THE FIRST JUDICIAL DISTRICT OF PENNSYLVANIA, PHILADELPHIA COUNTY
IN THE COURT OF COMMON PLEAS

OCEAN SPRAY CRANBERRIES, INC.	**: CIVIL TRIAL DIVISION**
	:
VS.	**: JULY TERM, 2001**
	: NO. 0162
REFRIGERATED FOOD DISTRIBUTORS INC., et al	**: Superior Ct. 3498EDA2005**

O P I N I O N

I. PROCEDURAL HISTORY

Defendant Refrigeration Design and Service, Inc. (known as "RD&S", hereinafter Appellant) appealed from the Orders dated June 21, 2005, wherein this Court granted York Refrigeration Group, York International Corporation, Frigid Coil Company, and Frick, Inc. (collectively known as "York" and hereinafter Appellees) Motion for Partial Summary Judgment and found that RD&S should indemnify and reimburse York $7,634,102.06 for settlement amounts paid and defense costs, including attorney fees, expert witness fees, and costs incurred during litigation of this matter.

II. FACTUAL BACKGROUND

This matter arises out of an October 8, 2000 ammonia leak at a warehouse, owned and operated by Refrigerated Food Distributors, Inc. ("RFDI"), that was the subject of various lawsuits consolidated by this Court under July Term 2001, No. 0162.

RFDI owned and operated cold storage warehouse facilities for customer storage.

RFDI entered into a contract with Ocean Spray for freezing and storage of its cranberries. (RFDI's Settlement Conf. Memorandum, pg. 3). This agreement necessitated the construction of a new facility, for RFDI to continue its distribution and transportation business with its current customers. Id.

On April 25, 2000, Thermal entered into a Construction Agreement between Penn Maid and 2701 Red Lion Associates as "Owner," Thermal as "Contractor," and

Webber/Smith as "Engineer" for the project known as RFDI Freezer Addition ("Project" or "Facility") to be completed on the 2701 Red Lion Road premises. (Exhibits In Support Of Defendant York's, Motion For Partial Summary Judgment For Indemnity And Defense Against Defendant, RD&S, Exhibit C).

Thermal was to achieve substantial completion for Cranberry Storage with a truck dock and equipment room by September 1, 2000 and the Quick Term Freezer and Rail Dock to be under roof by September 30, 2000. Id.

By lease dated May 1, 2000, RFDI leased the premises known as 2701 Red Lion Road, Philadelphia Pennsylvania from 2701 Red Lion Associates, L.P. to provide refrigeration storage to its customers. (RFDI Amended Complaint, October Term 2001, No. 0915, Exhibit B).

On May 26, 2000, Thermal, as "Contractor" subcontracted with RD&S, for the project known as "Refrigeration Work, Refrigerated Food Distributors, Inc., Freezer Addition (106,000 SF)." The engineer under this subcontract was also Webber/Smith. (Exhibits In Support Of Defendant York's, Motion For Partial Summary Judgment For Indemnity And Defense Against Defendant, RD&S, Exhibit D).

The work to be accomplished through the subcontract was the furnishing and installing of freezer equipment for the Cranberry Freezer and Cold Storage Warehouse associated with the Project. Id.

In accordance with the Subcontract , RD&S provided a design for a custom industrial ammonia refrigeration system for the facility to conform with the proposed building design and stringent construction schedule for the project. Id.

Included in the work to be performed under the subcontract, RD&S was to install a computerized control system, York ammonia screw compressors, penthouse evaporators, evaporative condensers, leak detection system, emergency ventilation system for the mechanical room and a glycol under-floor warning system, installed with all current safety standards as recommended by the International Institute for Ammonia Refrigeration. (RD&S Proposal #00-0313, dated 4/3/2000).

RD&S was also to include all motor starters, evaporator fan motor disconnects and refrigeration system electrical control wiring to assure a timely installation and to minimize delays in the startup of the facility. Id.

As part of a prior agreement (hereinafter "The Frick-Factor Contract") executed between York's "Frick Division" and RD&S (referred to in the contract as "Factor"), RD&S was to promote the sale of York refrigeration equipment and obtain offers to purchase such equipment from third parties. (Exhibits In Support Of Defendant York's, Motion For Partial Summary Judgment For Indemnity And Defense Against Defendant, RD&S, Exhibit E. Frick-Factor Contract, dated 2/18/94, pg.1). When RD&S obtains an offer to purchase from a third party, RD&S would in turn place an offer to purchase such the equipment with York. Id.

Thus, pursuant to the Frick-Factor Contract, York was responsible for, among other products, the manufacture of the refrigeration equipment used in the RFDI Freezer Addition Project. The First Part of the Frick-Factor Contract specifically defined the relationship between York and RD&S as:

> The relationship between Frick and Factor shall be that of seller and buyer respectively. All purchases and resales of equipment shall be for Factor's account as a principal. Factor is in all respects is an independent contractor and is not an agent of Frick. Neither this Agreement nor any course of dealing between Frick and Factor is intended as granting Factor any power or authority to bind or obligate Frick with respect to the third parties.
>
> It is intended that Factor will promote the sale of Frick equipment and will obtain offers to purchase such equipment from third parties. When Factor obtains an offer to purchase from a third party, Factor will in turn place an offer to purchase with Frick. If Frick accepts Factor's offer, it is expected that Factor will accept the third party offer. Id.

This equipment included Frigid Coil Model SCA 864 TL Aluminum Coil Evaporator Units ("Air Units") and other associated equipment utilized in the refrigeration process. This equipment utilized ammonia as a cooling agent. (Id., ¶26).

Specifically, the air units utilized electronic motor driven fans to draw air through and around ammonia filled aluminum evaporation tubes and electric motors and fans, which were attached to the air units by means of circular wire rod motor mounts. (RFDI Amended Complaint, October Term 2001, No. 0915,¶29). These air units were used to cool the facility where food and other frozen products were stored. Id.

In the section titled "Eighth: Limitations," subsection D the contract specifically states:

> Factor assumes and agrees to indemnify, defend and hold Frick harmless from and against any and all liability and obligation (including reasonable attorney's fees and other cost and expense of litigation) with respect to claim for bodily injury, or death, or property loss or damage by whomsoever such claims may be asserted, which are based in whole or in part upon any act or omission on the part of the Factor, or any of its agents, servants, or employees in connection with the performance of any obligation of the Factor under this agreement. Frick-Factor Contract, pg. 5.

Webber/Smith oversaw all aspects of the project including the suppliers of materials and equipment; along with the design, construction and implementation of all components listed in the Construction Contract and Subcontract. (RFDI Amended Complaint, ¶44).

For a variety of reasons the contractor and subcontractors were unable to complete the facility by September 1, 2000 and an alternative plan was developed. Instead of turning the facility over to RFDI the contractors agreed to bring one of the four refrigeration rooms (Refrigeration Box 104) on line so that RFDI could fulfill its contractual obligation to Ocean Spray and take delivery of the cranberry harvest. (RFDI Settlement Conf. Memorandum, pg.4).

Box 104 was completed in late August of 2000, and the process for starting-up the Box 104 system to cool the room temperature commenced in early September. (RFDI Settlement Conf. Memorandum, pg.4).

As a consequence of this new plan RFDI did not take delivery of the contracted facility prior to October 8, 2000. Rather this facility remained in the control of RD&S and Thermal. Id.

RD&S's obligation to design, test and inspect the York equipment RD&S installed in Box 104 was stated in their contract with Thermal C/M. (Thermal C/M – RD&S Contract dated May 26, 2000, Exhibit A). In this agreement, RD&S, as subcontractor, agreed to furnish and install an ammonia refrigeration system to meet the criteria set forth in its proposal letter to Thermal dated April 3, 2000 and attached to the

Thermal C/M – RD&S Contract.

The incident, which is the subject of this litigation, occurred on the night of October 8, 2000, into the early morning hours of October 9, 2000 in Box 104. An ammonia leak began in the newly-installed freezer equipment, when a fan in an overhead air handling unit was caused to break free of its restraints, fell forward into the unit, and severed an ammonia pipeline. (RFDI Settlement Conf. Memorandum, p.3). Approximately 10,000 pounds of ammonia liquid and gas discharged from an evaporative cooler unit mounted from the ceiling in the newly constructed addition (Box 104, also referred to as Box K) where Ocean Spray had stored 9 million pounds of cranberries.

Additionally, ammonia migrated from Box 104 into the pre-existing section of the warehouse, damaging food products owned by other RFDI customers as well as the building itself and its systems. Although no personal injury occurred in this incident, several RFDI customers suffered extensive damage to their property that was stored in and around Box 104.

On July 2, 2001, Ocean Spray Cranberries, Inc., brought an action against RFDI. (Complaint, July Term, 2001, No. 0162). Subsequently, on January 3, 2002 RFDI along with other plaintiffs, instituted an action against Thermal, RD&S, Webber-Smith, York, ADT Security Services and Robinson Alarm Company. (Amended Complaint, October Term, 2002, No. 0915). A third action also added Carr & Duff as an additional defendant. (Complaint, July Term, 2001, No. 0377). Ocean Spray Cranberries, Inc.; Dreyer's Grand Ice Cream and Edy's Ice Cream; 21st Century Foods, Inc.; and Quaker Valley Foods, Inc., did not bring direct actions against York or RD&S, rather they "pled over" against York and RD&S by virtue of the RFDI Third Party Complaint. (York Motion for Partial Summary Judgment, dated 2/18/05, pg. 10,12). In all, nine plaintiffs , including Ocean Spray and RFDI, brought suit against RD&S, York, Carr and Duff, Thermal, and Webber/Smith.

On December 21, 2001, York filed a New Matter Cross-claim asserting indemnity against RD&S. (York's Answer to Third Party Complaint). Thermal and Webber/Smith also asserted cross-claims for indemnity against RD&S and Carr & Duff.

Trial of this matter was tri-furcated into liability, warranty and damages phases, with a jury rendering a verdict in the liability phase on November 24, 2004.

Carr & Duff settled prior to the verdict in the liability phase of trial, while York settled with Ocean Spray during the warranty phase of trial.

Prior to trial, all plaintiffs except RFDI and Ocean Spray settled with all defendants. Additionally, RFDI and Ocean Spray settled with RD&S prior to trial. As a result, RFDI and Ocean Spray presented liability proofs only against York, Thermal and Carr & Duff at trial. (York's Motion for Partial Summary Judgment, pg. 13). Because RFDI and Ocean Spray did not press claims against RD&S at trial, the only basis for RD&S's liability presented to the jury came through proofs and cross-examination offered by the York and co-defendants Thermal and Webber-Smith. Id.

On November 24, 2004, the jury apportioned liability as follows: York, 75%; RD&S, 24.995% and Carr & Duff, .005%.

After the jury reached its verdict, York filed a Motion for Partial Summary Judgment for indemnity and defense against RD&S, while Thermal and Webber/Smith filed a similar motion for indemnity against RD&S and Carr & Duff. (York Motion for Partial Summary Judgment dated 2/18/05).

By Order entered June 21, 2005, the trial court granted York's Motion for Partial Summary Judgment and directed York to submit attorneys' affidavits of fees and costs for reimbursement by RD&S.

By separate Order also entered June 21, 2005, the court released funds back to Ocean Spray from a "Reserve Fund" that was created by agreement between RD&S and Ocean Spray for contribution to RD&S for its liability for contribution to York.

On October 12, 2005, the trial court entered two Orders, one granting Thermal's Motion for Summary Judgment against Carr & Duff for indemnification, and the other approving the certification of costs and fees submitted to York on the indemnity Order entered in its favor against RD&S and subsequently entering judgment in the amount of $7,634,102.06.

On November 2, 2005, the trial court entered judgment on the June 21, 2005 Reserve Fund Order in the amount of $97,782.00.

On November 22, 2005 Thermal and Carr & Duff reached a settlement on Thermal's indemnification claim, and a Praecipe to Settle, Discontinue and End Thermal's claims against Carr & Duff was filed.

On December 30, 2005, RD&S filed its Notice of Appeal from the trial court Orders of June 21, 20051 and issued their 1925(b) statement accordingly.

The sole issue for this court to address on appeal is whether the trial court erred in granting York's Motion for Partial Summary Judgment and found that RD&S should indemnify and reimburse York $7,634,102.06 for settlement amounts paid and defense costs, including attorney fees, expert witness fees, and costs incurred during litigation of this matter pursuant to the Frick-Factor Contract.

III. LEGAL ANALYSIS

In this matter, the Court is called upon to interpret the language in the above-referenced indemnity clause such that the indemnitee (York) is entitled to the benefit of their contract with the indemnitor (RD&S) in accordance with the Order of this Court now subject to this Appeal.

RD&S claims that it is entitled to the benefit of the "Perry-Ruzzi" Rule[2] which in its simplest form, holds "that a contract of indemnity against personal injuries should not be construed to indemnify against the negligence of the indemnitee, unless it is so expressed in unequivocal terms." ***Hershey Foods Corporation v. General Electric Service,*** 422 Pa. Super. 143, 619 A.2d 285 (1992), (citing and quoting ***Perry v. Payne,*** *infra).*

"No inference from words of general import can establish such indemnification" ***Hershey,*** *supra.* (citing and quoting ***Ruzzi v. Butler Petroleum Company,*** *infra).*

In order to understand the application of the Rule, a brief examination of the cases upon which the Rule is based may be appropriate.

In ***Perry v. Payne,*** Edward Perry, the plaintiff and owner of the property at Sixteenth and Chestnut Streets in Philadelphia, Pennsylvania, contracted with Payne and Company to construct and deliver a building to him on the Perry site. As part of the construction contract, Payne did deliver a bond to Perry promising to "protect and keep harmless said Edward Perry of and from all loss, costs and damages **. . .** arising from accidents to persons employed in the construction of, or passing near the said work **. . . .**" ***Perry***, 66 A at 553. In

1 Previous appeals from these Orders were quashed as interlocutory orders pursuant to Pa.R.A.P. 341(b)(1).
2 Perry v. Payne 217 Pa. 252; 66 A.553
Ruzzi v. Butler Petroleum Company 527 Pa.1; 588 A.2d 1

analyzing the issues, the Pennsylvania Supreme Court said:

> The principal and controlling question in the case depends upon the interpretation of the bond on which the action was brought. That part of the condition of the bond with which we are particularly concerned, provides that the contractors, "shall protect and keep harmless the said Edward Perry . . . from damages arising from accidents to persons employed in the construction of or passing near, the said work."

The injury in question was to a painter employed by Payne. He was killed when an elevator, operated by one of Perry's employees, came in contact with him while he was painting the elevator shaft. Perry was found to be fully liable for his employee's negligence by a jury, which also awarded damages for Plaintiff and against Perry.

Perry claimed that the bond given to him by Payne indemnified him for the personal injury caused by his negligence. The Supreme Court held that the language employed in the bond was not specific enough for it to conclude that the parties had originally contracted in the bond to shift the risk of liability for personal injuries caused by the indemnitee to the indemnitor. This holding appears to be concisely stated:

> We think it clear, on reason and authority, that a contract of indemnity against personal injuries (*emphasis supplied*) should not be construed to indemnify against the negligence of the indemnitee, unless it is so expressed in unequivocal terms.

Perry, 66 A. at 557.

On the face of its holding, ***Perry*** is distinguishable from the matter before the Court since the indemnification is not being sought for personal injuries caused solely by the negligence of the indemnitee. Therefore, at least one-half of the "Perry-Ruzzi" Rule appears not to be applicable because the loss for which indemnification is sought, is limited to property damage and is premised upon the joint negligence of indemnitor.

In ***Ruzzi v. Butler Petroleum Company,et al.,*** (*supra*), which is the other half of the "Perry-Ruzzi Rule," our Supreme Court had the opportunity to visit the application of the "Perry Rule."

The ***Ruzzi*** case had multiple parties and multiple consolidated cases and a complicated fact pattern which, if set forth, would be instructive. The Zinzers owned a gasoline station and contracted with Butler Petroleum to refurbish the station in return for the

Zinzers' purchase of Butler Petroleum products. As part of the refurbishing, Butler called AMG Sign Company to erect a new sign. Ruzzi worked for AMG and went to the gas station to put up a new sign. During this same time period, Butler had arranged with George Shockey to deliver gas storage tanks, which were to eventually be placed underground, but were above ground temporarily. Unbeknownst to Ruzzi and Zinzer, one of the tanks had gasoline in it and a hole through which gasoline fumes were escaping. While cutting away the old sign, the torch that Ruzzi was using ignited the gas fumes from the open tank and caused an explosion which injured him. Other parties filed additional claims and cross-claims. A jury found that Butler Petroleum and Shockey were 84% and 16% respectively negligent and awarded damages. All other claims were denied and judgments were entered in favor of Ruzzi and the Zinzers. The action against the Zinzers was by Butler Petroleum on the indemnification agreement under which Butler claimed that it was entitled to be indemnified for the damages it was obligated to pay to Ruzzi under the jury's verdict.

The Superior Court affirmed the trial court's decision that Butler Petroleum was not entitled to indemnification. The Pennsylvania Supreme Court reviewed the Superior Court decision and affirmed the decision but declined to discuss its reasoning.

> Butler Petroleum claims that the indemnity clause was enforceable as a matter of law. The trial court disagreed, relying on our decision in *Perry v. Payne, 217 Pennsylvania. 252, 66 A. 553 (1907).* Superior Court affirmed the trial court on the grounds that Butler Petroleum was found to be 84% negligent, and was, therefore, not entitled to indemnity, citing *DiPietro v. City of Philadelphia, 344 Pennsylvania. Superior Court. 191, 496 A.2d 407 (1985).* n2
>
> n2 In *DiPietro*, the Superior Court concluded: "Under Pennsylvania law, indemnity is disallowed if the indemnitee is actively negligent." *344 Pa.Super. at 195, 496 A.2d 407.* That court's ultimate authority for this proposition is *Pittsburgh Steel v. Patterson-Emerson-Comstock, 404 Pa. 53, 171 A.2d 185 (1961)* which in turn relied heavily on *Perry v. Payne, 217 Pa. 252, 66 A. 553 (1907).* Because the rule announced in *Perry* is dispositive of the issues raised by the parties, we feel no further need to discuss the Superior Court's reasoning on this issue.

It is clear now that the decision in ***Ruzzi*** rested upon the holding in ***Perry***. It is

further clear that the holdings of both ***Perry*** and ***Ruzzi*** applied to cases in which claims for indemnification were not allowed, where the indemnitee was negligent and such negligence resulted in personal injury.

Although the "Perry-Ruzzi" Rule is now cited by RD&S for the proposition that partial negligence of an indemnitee will abrogate an indemnification agreement where there is only property damage, such a broad reading of the "Perry-Ruzzi" Rule is not supported by the holdings of ***Perry*** or ***Ruzzi*** or the progeny spawned by them.

In ***Pittsburgh Steel Company v. Patterson-Emerson-Comstock,Inc.,*** Plaintiff was seeking indemnification from Patterson for personal injury to an employee of a subcontractor to Patterson for which Plaintiff Pittsburgh was liable. In holding against the Plaintiff indemnitee Pittsburgh, the Pennsylvania Supreme Court said:

> Factually, the leading case of *Perry v. Payne, supra,* is almost on all fours with the instant case. In that case the contract between the parties contained a clause indemnifying the property owner 'from *all* loss, cost or expense… *arising from accidents to* mechanics or *laborers employed in the construction of said work,* or to persons passing where the work is being constructed.' During the course of the construction one of the contractor's workmen was killed through the negligence of one of the property owner's employees. The property owner was compelled to respond in damages for the death. He then brought an action in assumpsit on the indemnity bond against the contractor. This Court affirmed the entry of a judgment of nonsuit.

In ***Urban Redevelopment Authority of Pittsburgh v. Noralco Corporation***, 281 Pa. Super. 466; 422 A.2d 563 (1980) the Perry rule was discussed by the Superior Court in a case involving a personal injury. This same factual circumstance (personal injury) was also present in the following cases where the "Perry Rule" or the "Perry-Ruzzi Rule" was invariably cited: ***Tidewater Field Warehouses, Inc v. Fred Whitaker Company, Inc***., 370 Pa. 538; 88 A.2d 796 (1952); ***Deskiewicz v. Zenith Radio Corporation***, 385 Pa. Super. 374; 566 A.2d 33 (1989); ***Hershey Food Corporation v. General Electric***, 422 Pa. Super. 143; 619 A.2d 285 (1992); ***Jason Greer v. City of Philadelphia, et al***.,568 Pa. 244; 795 A.2d 376 (2002); ***Bernotes v. Super Fresh v. Goldsmith***, 581 Pa. 12; 863 A.2d 478 (2004).

Considering the above cases, which are representative of, but certainly not an

exhaustive list of, the cases in which the "Perry-Ruzzi Rule" appears as part of the appellate court's consideration it is not unreasonable to conclude that the "Rule" was intended to be applied in cases where the indemnitee's negligence resulted in personal injury and, therefore, the authority of the Rule may be limited to such cases.

If the "Perry-Ruzzi Rule" is confined to indemnification actions where a payment of personal injury damages is that for which the indemnitee is seeking indemnification, then it would appear that another form of analysis is required in order to validate contract language which seeks to relieve a negligent party of liability in cases where there are exclusively property damages.

In ***Topp Copy Products, Inc. v. Singletary***, 533 Pa. 468; 626 A.2d 98 (1993) the Pennsylvania Supreme Court reviewed an exculpatory clause in a real estate lease. Singletary was the owner of a multi-story building. On the bottom floor, Topp Copy stored its office supply equipment, which it was in the business of leasing. A leak developed in the floor above where the equipment was stored, damaging Topp Copy's inventory. Topp Copy brought a damages action and Singletary motioned for Summary Judgment based upon the exculpatory clause in the contract (lease) which read in part:

> Said Lessee does hereby release and discharge said Lessor, his heirs or assigns, from any and all liability for damage that may result from the bursting, stoppage and leakage of any water pipe, gas pipe, sewer, basin, water-closet, steam pipe and drain, and from all liability for any and all damage caused by the water, gas, steam, waste and contents of said water pipes, gas pipes, steam pipes, sewers, basins, water-closets and drains.

The trial court granted Singletary's Motion for Summary Judgment, finding that the clause was applicable. Superior Court reversed, saying the clause was not specific enough to immunize Singletary. ***Topp Copy***, 404 Pa. Super.459, 591 A.2d 298 (1991). The Supreme Court reversed the Superior Court. The analysis employed by the Supreme Court is elucidating here because of what appears to be the operative principal in validating contract provisions which seek to relieve one who is negligent for damages caused by that negligence.

In conducting its analysis, the court looked at its prior decision in ***Cannon v. Bresch***, 307 Pa. 31, 160 A. 595 (1932). In ***Cannon,*** the court found as it had in ***Topp Copy***, that the

clause was sufficiently precise to allow for a shifting of liability for negligence which resulted in damage to property.

> Plaintiff alleges that the damage was caused by the negligence of the defendant, and that the agreement does not exempt him from liability for his acts of active negligence. The lease provides that the landlord shall be released 'from all liability for any and all damage caused by water.' The terms are emphatic -- the word 'all' needs no definition; it includes everything, and excludes nothing. There is no more comprehensive word in the language, and as used here it is obviously broad enough to cover liability for negligence. If it had been the intention of the parties to exclude negligent acts they would have so written the agreement. This paragraph of the lease is clear and unambiguous. No rules of construction are required to ascertain the intention of the parties. What was said by this court in *Atherton v. Clearview Coal Co., 267 Pa. 425, 432,* applies to this release: 'A writing in which only words of definite and precise meaning, as commonly understood, are used, free from ambiguity, is always its own best interpreter, since the language used best discloses and reveals the intention, object, and purpose of the parties to it . . . . We find nothing in the situation of the parties that would justify us in giving to the language used any other interpretation of the contract than that which the language clearly imports. . . . It would be difficult to employ language more general and embracing than that here employed; it excepts nothing expressly, nor does it by implication, unless it be wanton or willful damage, and that is not pretended here.' The Superior Court, in *Lerner v. Heicklen, 89 Pa. Superior Ct. 234,* held that a covenant in a lease relieving the landlord from all 'loss of property however occurring' is sufficient to release the lessor from all liability for loss caused by his negligence or that of his servants. The facts of that case were very similar to those of the case before us -- the plaintiffs having sued in trespass to recover damages for injury to their goods caused by the negligence of the defendants in permitting water to escape from the pipes and plumbing apparatus on a floor occupied by the lessor. The case is directly in point, and correctly states the law applicable to this situation. To the same effect see *Fera v. Child, 115 Mass. 132,* and *Tuttle v. Phipps, 219 Mass. 474."*
> ***Cannon,*** 160 A. at 596, 597.

The Court also analyzed the contract language in the context of its ruling in ***Perry v.***

Payne:

> The covenant in this lease against liability for acts of negligence does not contravene any policy of the law: *Perry v. Payne, 217 Pa. 252; Lerner v. Heicklen, supra; Hopkins v. Sobra, 152 Ill.A. 273; Woodbury v. Post, 158 Mass. 140.* It is a contract between persons conducting a strictly private business and relates entirely to their personal and private affairs, and so cannot be opposed to public policy. It would seem to be a matter of no interest to the public or the State. In *Woodbury v. Post, supra,* a contract between private individuals indemnifying against one's own negligence was sustained. *Perry v. Payne, supra,* is authority for the principle that, as between private individuals in their personal affairs, one may be indemnified against the results of his own or his servant's negligence, if the intention so to do is clearly expressed in the contract.

In the instant matter, York had manufactured equipment, which was to be resold by RD&S pursuant to its factor agreement with York as part of its overall design and installation of a refrigeration system for the building owner. As noted above, their contractual arrangement provided that RD&S would "indemnify, defend and hold (York) harmless from and against any and all liability and obligation (including reasonable attorneys' fees and other cost and expense of litigation) with respect to claim for **. . .** property loss or damage by whomsoever such claims may be asserted, which are based in whole or in part upon any act on the part of **. . .** (RD&S). Id. at 5.

In practical terms and application, this meant that RD&S was going to design a refrigeration system in which it would use York manufactured equipment (which it was allowed to resell) and also install this same equipment as one component of a large and complicated refrigeration design. The agreement provided that if RD&S were negligent in any aspect of its design or installation, York would be indemnified for its negligence.

Here, as in ***Cannon***, we have a situation where a party, who would normally be liable for its negligence, contracting to reallocate the liability for this negligence.

This principle was clearly enunciated in both ***Topp Copy*** and ***Cannon.***

> In addition to concluding that the clause was clear and unambiguous, we specifically indicated in ***Cannon*** that the clause under consideration was not against public policy, was in a contract between persons relating to their own private

> affairs and that each party was a free bargaining agent. Since the landlord would always be responsible if he damaged the goods of his tenant, we were able to conclude that the exculpatory clause's very purpose was to exonerate him.

Topp Copy, 533 Pa. at 472.

> It was to be free from this liability that defendant placed the covenant in the lease, and to say that it does not have that effect is to say that the covenant is meaningless, which would be incomprehensible under the circumstances. The parties meant something by what they said in their agreement, and where they used language so definite and precise there can be no doubt of their meaning, and it necessarily follows that their intention was to release the landlord 'from all liability for any and all damage caused by water' resulting from negligence unless wanton or willful . . . [a]ll that the law insists on in the case of a tenant's waiver of his landlord's responsibility for losses resulting from his negligence is that it shall be plainly expressed. With that requirement the covenant of this lease fully complies.

Cannon, 307 Pa. at 36.

To the extent that there is an issue that the instant matter should not be governed by the ***Topp Copy/Cannon*** line of cases, the Supreme Court addressed that issue by concluding that the two lines of cases are but different application of the same rule.

> Thus, ***Perry*** and ***Ruzzi*** are examples of how our general rules of contract interpretation for clauses which purport to relieve a party of responsibility for his own negligence are applied in the unique circumstance of an indemnity arrangement and should not be confused or misunderstood as stating a different rule as that which is expressed in ***Cannon***. ***Cannon*** also stands for the same proposition of contract interpretation, i.e., that the provisions and terms of a lease must clearly and unequivocally spell out the intent to grant immunity and relief from liability, and is illustrative of how the general rule is applied when the interpretation of a lease is before the court.

Topp Copy, 533 at 474.

Further, the Supreme Court has determined that the rules governing exculpatory clauses and indemnity clauses should be considered to be interchangeable.

In ***Dilks v. Flohn Chevrolet***, 411 Pa. 425; 192 A.2d 682 (1963), the court had before it a exculpatory clause in a lease. In evaluating the enforceability of the clause, the court looked at ***Perry v. Payne*** (*supra*), which they identified as '(an indemnity contract)' and in

footnote 11, said this:

> n11 While an exculpatory clause - which deprives one contracting party of a right to recover for damages suffered through the negligence of the other contracting party - differs somewhat from an indemnity clause - which effects a change in the person who ultimately has to pay the damages - yet there is such a substantial kinship between both types of contracts as to render decisions dealing with indemnity clauses applicable to decisions dealing with exculpatory clauses, and vice versa.

Dilks, 411 Pa. at 436.

Any discussion about the application of the "Perry-Ruzzi/ToppCopy-Cannon Rule" would not be complete without the inclusion of what appears to be a stark contradiction in the scope of the definition of the phrase "any and all liability." This contradiction was very aptly described by Justice Montemuro in his dissenting opinion in ***Topp Copy.***

> In ***Cannon***, this court held that the words 'any and all' were very specific and broad enough to cover liability for negligence. (*Cannon* was a property damage case. This Court's note).
> **. . .** [J]ust two years ago, this Court in ***Ruzzi v. Butler Petroleum Company*** . . . held that the words 'any and all liability' in an indemnity contract were words of general import and were not broad enough to cover liability for negligence. (*Ruzzi* was a personal injury case. This Court's note.)
> ***Topp Copy,*** 533 Pa. at 476-477.

Since Justice Papadakos was the author of the opinions in both ***Ruzzi*** and ***Topp Copy***, it is safe to assume that he had an intimate appreciation of the issue identified by Justice Montemuro. If we accept the principle, as stated above, that the distinction between the application of the "Perry-Ruzzi Rule" and the Topp Copy - Cannon Rule, cannot turn on the difference between an indemnity clause in a contract and an exculpatory clause in a lease, then, some other operative principle must be at work.

It is respectfully submitted that because the application of the Perry-Ruzzi Rule has been applied to deprive the indemnitee of indemnification in instances where the indemnitee's negligence resulted in personal injury, that the rule is inapplicable in the instant matter where only property damage was sustained. As Justice Papadakos noted in ***Topp Copy***:

> As we stated in Perry, (a personal injury case), the liability on such indemnity is so hazardous, and the character of the indemnity so unusual and extraordinary, that there can be no presumption that the indemnitor intended to assume the responsibility, unless the contract puts it beyond doubt by express stipulation.

Topp Copy at Pa. 473 (internal citation omitted).

It is further respectfully submitted, that in the instant matter, the subject indemnification clause supplies that "express stipulation."

If the Court finds that the application of the Perry-Ruzzi Rule requires a different analysis than the application of the Topp Copy - Cannon Rule and that the Perry-Ruzzi analysis is appropriate in this property damage case, then under ***Perry*** and its progeny defendant York is still entitled to its contracted for indemnification within the specific facts of this case.

In ***Perry***, the Supreme Court went beyond the language in the indemnity bond because it could not " assent to this construction of the bond." 217 Pa. at 257.

> In construing the instrument, it is our duty to ascertain the intention of the parties, and in doing so we are not confined to the language used, but may consider the circumstances surrounding the parties and their object in making the instrument. The nature of the duty of the obligor and the character of the obligee will be regarded as explanatory of the intent of the parties. (citation omitted).

The phrase in question provided that the contractors "shall protect and keep harmless the said Edward Perry **. . .** from damages arising from accidents to person employed in the construction of, or passing near the said work." 217 Pa. at 257.

Perry maintained that this phrase was intended to indemnify him for his own negligence. In determining what would be within the reasonable contemplation of the parties, the Court looked at the obligations of the parties in carrying out the contract.

> He was to be protected from loss and damages for nonfulfillment of the contract. Certainly that obligation rested upon Payne & Company. He was to be protected against any liens, claims or demands for material for labor furnished for the construction of the work. That protection, manifestly, was to be afforded by Payne & Company. He was to be indemnified against damage done to adjacent properties by

> reason of the construction of the work. As Payne & Company were to erect the building, we think there can be no doubt that the damage there contemplated was such as would be done by Payne & Company, or their employees, and not by Perry or his employees. He was also to be indemnified against depositing material in such a manner as to damage either the city or the individual. Again, recalling Payne & Company's relation to the building, that they were to furnish the material and erect the structure, this evidently only contemplated a liability if the material should be deposited by the contractors, and did not include material which might be deposited by Perry. In neither
> of the last two instances does the bond designate the party against whose negligent act Perry should be indemnified, but no reasonable interpretation of it would impose liability in either case for the acts of Perry or his employees; because manifestly the necessity for doing so could not have been anticipated by the parties, and hence it was not intended that the bond should cover such acts by Perry. He was also to be indemnified against 'damages arising from accidents to persons employed in the construction of, or passing near, the said work.' Against whose acts resulting in damages to such persons did the parties intend that Perry should be protected? Manifestly against the acts of the same parties against whom the bond protected Perry for damages arising from the deposit of materials, or the damages done to adjacent properties by reason of the construction of the work. In those cases, the negligent or unlawful acts against which Perry provided were evidently those of the contractors, although not so expressly stipulated, and we think it equally clear that it was the intention of both parties, when the bond in question was given, that the accidents against which the bond indemnified should be those that were caused by the negligence of the contractors or their employees who were engaged in the construction of the building, and not such as might arise from the unanticipated negligence of Perry or his employees.

In the instant matter, it was equally clear what the intentions of the parties were when they agreed to the indemnification clause if RD&S was in any way negligent. Here, RD&S was to obtain the product from York and design and construct a complex system using York's product as a component of the system. York was inherently relying upon RD&S to satisfy its obligations in a non-negligent manner and York was manifestly vulnerable to RD&S's negligence because of the symbiotic nature of its relationship to RD&S design,

construction and installation obligation. Because of this inherent vulnerability, York wanted to protect itself in the event RD&S was negligent. Hence, the provision in the contract providing for indemnification if RD&S was negligent "in whole or in part" and such negligence resulted in damages.

This analysis of the parties' intentions, as revealed by the surrounding circumstances and the object of entering into the contract, is consistent with how the courts have considered contract indemnity clauses.

> In applying this rule, however, the courts do not examine only the four corners of the contract to determine whether it specifies losses caused by the indemnitee's negligence. If the contractual language is not explicit, the court will consider the surrounding circumstances and the parties' object in entering into the contract. *See e.g., Brotherton Construction Co v. Patterson-Emerson-Comstock, Inc., 406 Pa.D. & C.2d 783 (Chester County 1961); Pittsburgh Steel Co. v. Patterson-Emerson-Comstock, Inc., supra; Tidewater Field Warehouses, Inc. v. Whitaker Co., 370 Pa. 538, 88 A.2d 796 (1952); Perry v. Payne, supra.*

Urban Redevelopment Authority of Pittsburgh v. Norelco Corporation, 281 Pa. Super. 474; 422 A.2d at 567.

In 2002 our Supreme Court decided the matter of ***Greer v. City of Philadelphia, et al.***, 56 Pa. 244; 795 A.2d 376 (2002). The facts and circumstances of ***Greer*** are important to the understanding of the matters decided by the Court.

> In 1993, the Pennsylvania Department of Transportation ("PennDOT") entered into a contract with J.H. Green Electric Company ("Green") to remove large overhead signs from Interstate 95 in Philadelphia. As part of the contract, Green assumed responsibility for traffic management. Green, in turn entered into a subcontract with CTS to undertake some of the work ("CTS Contract"), and by the terms of that subcontract, CTS assumed responsibility for traffic management. The CTS Contract also contained an indemnity clause in which CTS agreed to indemnify and hold harmless PennDOT and Green from and against claims, damages, losses and expenses, including but not limited to attorney's fees, arising out of or resulting from the performance of the Subcontractor's Work under this Subcontract **. . .** *but only to the extent caused in whole or in part by negligent acts or omissions of the Subcontractor,* the Subcontractor's Sub-Subcontractors, anyone directly or indirectly employed by them or anyone for

> whose acts they may be liable, *regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder.*

CTS Contract**,** at §4.6.1, R.R. at 29 A (emphasis added**)** ***Greer,*** 568 Pa. at 246.

Greer was injured in a traffic accident caused by the mismanagement of the traffic. Suit ensued and the jury entered a verdict for Greer and against PennDOT, Green Electric Company and CTS for $2.5 million dollars. For purposes of this discussion, separate joint liability of 22% was found against these same three entities.

In finding that CTS did not unambiguously agree to indemnify PennDOT and Green Electric for their own negligence, the court relied upon the phrase, "to the extent" which it called a "limitation," "which we easily read to only indemnify Green Electric and PennDOT for that portion of damages caused by the negligence of CTS." 568 Pa. at 25.

In Footnote 4 of ***Greer,*** the court discussed briefly, the case of ***Hershey Foods Corporation v. General Electric Services Co.***, 422 Pa. Super. 143, 619 A.2d 285 (1992) because (appellant here) Green, cited it in support of its argument. The unambiguous indemnity agreement in ***Hershey*** said, "in whole or in part." This was easily distinguished from the limiting phrase in ***Greer,*** and one could infer from the Supreme Court statement in **n4** that had the phrase been, "in whole or in part," the indemnification clause might have withstood scrutiny and been held to be an unambiguous agreement to indemnify PennDOT and Green for their own negligence.

> n4 In support of its argument, Green cites *Hershey Foods Corp. v. General Electric Service Co., 422 Pa. Super. 143, 619 A.2d 285 (Pa. Super. 1992),* which found a particular indemnity provision to unambiguously indemnify the indemnitee even when the indemnitee was partly negligent. Id. 15 288. Although Green characterizes the indemnification provision in that case as being 'essentially similar' to the language at issue here, Green Brf. at 10, the provision did not contain the 'to the extent' limitation present in the CTS Contract, but rather simply provided for indemnification for damages 'caused in whole or in part by' the indemnitor's negligence. Because we disagree that the 'to the extent' language can be, or should be, overlooked we decline to employ Hershey's analysis here.

Greer, 568 Pa. at 250.

The instant indemnification clause does not contain the limitation language found in

Greer. It is almost identical to the language found in ***Hershey.*** The Hershey case presented a situation where Hershey Foods Corporation (Hershey) was seeking indemnification from General Electric Service Company (GESCO) for damages it incurred when a GESCO employee was accidentally killed in a Hershey plant accident. As part of the contract that provided for GESCO to do electrical work in Hershey's plant, GESCO agreed that:

> 5.20.1 [GESCO] shall indemnify and hold harmless [Hershey] and their agents and employees from and against all claims, damages, losses and expenses including attorneys' fees arising out of or resulting from the performance of the Work provided that any such claim, damage, loss or expense (a) is attributable to bodily injury, sickness, disease or death or to injury to or destruction of tangible property (other than the Work itself) including the loss or [sic] use resulting therefrom, and (b) is caused in whole or in part by any negligent act or omission of [GESCO], . . . anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable, regardless of whether or not it is caused in part by a party indemnified hereunder.

The fatally injured worker (Roland), was injured during a lunch break while in the plant but not actually performing the "Work" which was defined under the contract as "electrical work throughout the plant as required by engineering departments." 619 A.2d at 287.

The Superior Court found "that GESCO did unambiguously contract to indemnify Hershey even where Hershey was partly negligent, ..." 619 A.2 at 288. The court went on to further find that the contract was ambiguous as to whether the accident arose out of the "Work" and therefore could not be construed to indemnify against the negligence of the indemnitee (Hershey).

For purposes of comparison, the language in the instant contract will be juxtaposed against the language in the contract in ***Deskiewicz v. Zenith Radio Corporation,*** 388 Pa. Super. 374; 561 A.2d 33 (1989).

Deskiewicz is a personal injury indemnification case in which our Supreme Court approved an indemnification clause essentially similar to the clause in this matter.

Factor assumes and agrees to indemnify, defend and hold Frick harmless from and against any and all liability and obligation (including reasonable attorney's fees and other cost and expense of litigation) with respect to claim for bodily injury, or death, or property loss or damage by whomsoever such claims may be asserted, which are based in whole or in part upon any act or omission on the part of the Factor, or any of its agents, servants, or employees in connection with the performance of any obligation of the Factor under this agreement. Id., pg. 5.	The contractor agrees to indemnify, hold harmless, and defend the owner, its subsidiaries affiliated companies, and agents and employees . . . from and against all claims or liabilities for damages (including costs of suit, attorney's fees of owner, and if awarded against owner by a court, attorney's fees of claimant) in any manner arising out of or resulting from: (a) Performance of the work, provided that any such claim or liability (1) is attributable to bodily injury . . . and (2) is caused *in whole or in part* by any negligent act or omission of the contractor, any subcontractor, anyone directly of indirectly employed by any of them . . . (emphasis supplied).

In reviewing the language in the ***Deskiewicz*** contract, the Court reviewed the applicable rules of construction for contracts of this type:

> A fundamental rule of construction in law of contracts states that words, phrases and clauses will be given their plain and ordinary expressed meaning. If this is so, then this particular area of law, indemnification for damages or injuries arising from negligent acts, could be thought of as an exception to the general rule. If literal effect was given to these clauses then indemnification would be enforced. Yet due to policy and practical considerations, decisions have been handed down indicating that such generally worded indemnification clauses *will not be construed* to mean that the indemnitor will indemnify the indemnitee for liability resulting from the indemnitee's own negligence. See *Perry v. Payne, infra.* Cases holding thusly are creating a rule of construction, not an absolute rule. Increasingly since the first pronouncement of this rule of construction the rule has been recognized to be only that, a rule of construction; and, cases have been reported finding an indemnification clause to cover injuries arising from the joint negligence of indemnitor and indemnitee. The rule has evolved up to and including the relatively recent case of *Urban Redevelopment Authority v. Noralco Corp., 281 Pa.Super. 466, 422 A.2d 563 (1980),* which further developed the rule to include concepts of active and passive

> negligence of the indemnitee. Of considerable importance also is the recognition in *Noralco*, that in addition to the four corners of the agreement, the surrounding circumstances must be considered in determining the scope of the clause. *385 Pa.Super. at 376*.

In applying these rules to the critical language in ***Deskiewicz***, the court said:

> Of particular importance, in our opinion, is the language "in whole or in part by any negligent act." This is explicit language which envisions the possibility that IPS will be obligated to indemnify Zenith even though someone other than IPS has contributed, through a negligent act or omission, to the liability imposed upon Zenith. Furthermore, to the extent the factor which triggers the indemnification obligation is the assumption of, or imposition upon, Zenith of a liability for personal injury, certainly a negligent act of Zenith must be considered one of the more likely and logical prefaces to imposition of such liability upon Zenith, and as such, arguably within contemplation of the subject indemnification clause.

As noted above, there could be no other reasonable reason for including the indemnification language in the instant case other than to recognize the critical role RD&S would play in designing the refrigeration system which would include the installation of York equipment, and that York could be subject to liabilities for damages. In the event that York was subject to liabilities for damages, it would be indemnified for same if RD&S was also liable "in whole or in part upon any act or omission." (Frick-Factor Contract dated 2/18/94 pg.5).

This analysis is analogous to that provided by our Supreme Court in ***Topp Copy***. In ***Topp Copy,*** a landlord included an exculpation clause for damages to any goods stored on his property resulting from his own acts of negligence. The Court reasoned that it could infer from the very existence of the clause, the parties intended to shift the liability for negligence to the indemnitor if it was negligent "in whole or in part."

> Since the landlord would always be responsible if he damages the goods of his tenant, we were able to conclude that the exculpatory clause's very purpose was to exonerate him. It was to be free from this liability that defendant placed the covenant in the lease, and to say that it does not have that effect is to say that the covenant is meaningless, which would be incomprehensible under the circumstances. The parties meant something by what they said in their agreement, and where they used language so definite and precise there can be no doubt of their meaning, and it necessarily follows

> that their intention was to release the landlord "from all liability for any and all damage caused by water" resulting from negligence **. . . .**

Topp Copy at 533 Pa. at 472; 676 A.2d at 100 (citing ***Cannon*** 307 Pa. at 36 160A at 597)

This same analysis is appropriate in the instant matter where we have a contractor, (RD&S) who will be designing a complex refrigeration system in which it will also be installing York's equipment. The interdependence upon the other parts of the system functioning properly is appropriately inferred from these circumstances.

Recently, In ***Bernotos v. Super Fresh, et al.,*** 581 Pa. 12; 963 A.2d 478 (2004) our Supreme Court had occasion to revisit the "Perry-Ruzzi Rule."

> It is well-settled in Pennsylvania that provisions to indemnify for another party's negligence are to be narrowly construed requiring a clear and unequivocal agreement before a party may transfer its liability to another party. *Ruzzi v Butler Petroleum Co., 527 Pa. 1,588 A.2d 1, 7(Pa.1991); Perry v. Payne, 217 Pa. 252, 66 A. 553 (Pa.1907).* Accordingly, indemnification provisions are given effect only when clearly and explicitly stated in the contract between two parties. *Greer v. City of Phila., et al., 568 Pa. 244, 795 A.2d 376, 380 (Pa. 2002)* ('unless the language is clear and unambiguous . . . we must opt for the interpretation that does not shoulder [subcontractor] with the fiscal responsibility for [contractor's] and [owner's] negligence.').

Bernotos, 581 Pa. at 20; 863 A.2d at 482-483.

In ***Bernotos***, there was a primary contract between the property owner, Super Fresh, the general contractor Acciavatti and an additional contract between Acciavatti and a subcontractor, Goldsmith.

Plaintiff Bernotos, was injured when she fell into a hole in the floor at a construction site in the store. Id. 14, 479. Plaintiff settled with Defendants for $200,000.00 with each Defendant contributing one-third of the settlement. Super Fresh sought indemnification under the primary contract with Acciavatti and Acciavatti sought indemnification from Goldsmith under the sub-contract.

The trial court, in a bench trial, found that Acciavatti was obligated to pay Super Fresh's share of the settlement in addition to its own and found that Goldsmith was only required to pay one-third and did not have to indemnify either Acciavatti or Super Fresh.

The Superior Court reversed the trial court in part and held that Goldsmith had to

indemnify Acciavatti, (who had to indemnify Super Fresh), thus making Goldsmith responsible for the total settlement or three-thirds.

The Superior Court held that the primary contract between Super Fresh and Acciavatti was valid and that the indemnification provision of Article XII was sufficiently specific to require Super Fresh to be indemnified by Acciavatti.

Bernotos, 816 A.2d at 227-228.

The relevant part of Article XII of the contract is set forth below:

> **The Contractor shall assume entire responsibility** and liability for any and all damage or injury of any kind or nature whatever (including death resulting therefrom) **to all persons**, whether employees of the Contractor or otherwise and to all property including but not limited to property of the company of loss of use thereof, **caused by,** resulting from, arising out of, or occurring in **connection with the execution of the work provided for in this contract and/or caused or contributed to by any negligent or willful act, error, or omission on the part of the Company, the contractor or his subcontractors, or the agents, servants or employees of the company, the Contractor** or his subcontractor.

On appeal to the Supreme Court, this provision was allowed to stand. (The parties agreed not to challenge the Superior Court's finding on this provision). The issue presented to the Supreme Court was whether the subcontract, which was called a "pass through contract," was sufficiently specific to support a finding of indemnification against the subcontractor, Goldsmith. The contract provision is here, set forth:

> [Goldsmith] hereby releases [Acciavatti] and [Super Fresh] from any and all claims . . . for personal injury. . . arising out of any matter occurring at location of the Work…and further, [Goldsmith] agrees to indemnify and to hold harmless Acciavatti] and [Super Fresh]…from and against any claim, loss, damage, liability or expense…occurring to any property or personal injury…as…may result from or arise from the performance, lack of performance or improper performance of the Work whether such matter may arise or occur on the location of the Work…
> 863 at 480.

In holding that the above provision was not sufficiently specific to subject the subcontractor to liability for indemnification for the contractor and owner's negligence,

the Supreme Court said this:

> The subcontract agreement between Acciavatti and Goldsmith does not clearly express the parties' intentions regarding the issue of indemnification. The language in the subcontract (Paragraph 13) could be interpreted to mean Goldsmith would indemnify Acciavatti only in the event of negligence resulting from the performance of Goldsmith's work. Goldsmith argues this provision specifically states it is not required to indemnify Acciavatti and/or Super Fresh for either's negligent acts not arising from the performance of Goldsmith's work. This interpretation is plausible when read in concert with the preceding language referring to a release of claims from any incidents occurring at the work site, which Goldsmith argues is distinct from its indemnification provision. Because the incident merely occurred at the work site, and was never found to have resulted solely from the performance of Goldsmith's work, the indemnification provision is not triggered. 863 at 483.

This is not the situation in the instant matter.

There can be no other reasonable understanding of the parties' obligations than that which is clearly and unambiguously set forth in their contract.

RD&S agreed to indemnify**. . .** against any and all liability**. . .** for property loss or damage based in whole or in part upon any act or omission. (emphasis supplied). (Frick-Factor Contract, pg. 5).

In ***Deskiewicz,*** PJE McEwen, wrote, in concurring, what should be the ultimate final analysis in the instant matter.

> I write only to assure that the insightful analysis of the indemnification issue provided in the majority opinion does not obscure the particular conclusion which I find controlling, namely, that the contract between the parties revealed their expectation that IPS would be bound to indemnify Zenith for liability imposed upon Zenith where IPS was at least partly responsible, and where Zenith was not wholly responsible, for the injuries suffered by a claimant.

RD&S also argues that it is not liable for counsel fees and costs, notwithstanding its agreement to do so pursuant to the indemnification agreement it entered into with York.(Frick-Factor Contract).

This issue was addressed in ***Deskiewicz*** where the Superior Court found that the

indemnitee was entitled to the benefit of its agreement with indemnitor.

Deskiewicz relied upon the Supreme Court's decision in ***Boiler Engineering and Supply Co. v. General Controls, Inc***., 443 Pa. 44, 277 A.2d 812 (1971).

In ***Boiler***, the Supreme Court reversed a prior Superior Court decision that had for twenty years been the law of the Commonwealth. See ***Rohm & Haas Co. v. Lessner,*** 168 Pa. Super. Ct 242, 77 A.2d 675 (1951).

The Supreme Court found that the majority of jurisdictions followed the rule allowing for indemnification where the factual circumstances are substantially similar to the instant matter.

> It is only with a great degree of hesitation and reservation that we overrule a long-standing appellee principle. However, our task is much less onerous when the particular, objectionable aspect of the opinion has never been employed in any subsequently reported decision. For these reasons, we overrule Rohm & Haas on this point and hold that an indemnitee may recover attorney's fees and costs from the indemnitor notwithstanding the fact that these expenses have already been paid by the indemnitee's insurance carrier.

This is controlling law in Pennsylvania and allows for York to recover these costs from RD&S.

IV. CONCLUSION

For the reasons cited above, this Court's decision to grant York's request for indemnification for damages and attorney's fees and costs should be affirmed.

BY THE COURT:

May 18, 2006

DATE **TERESHKO, J.**

cc:
All Counsel

cc:
All Counsel