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IN THE SUPERIOR COURT OF PENNSYLVANIA
WESTERN DISTRICT

No. 966 WDA 2022

AXIALL CORPORATION,

v.

ALLTRANSTEK LLC; RESCAR, INC. t/d/b/a RESCAR COMPANIES; and SUPERHEAT FGH SERVICES, INC.,

APPEAL OF: ALLTRANSTEK LLC and RESCAR, INC., t/d/b/a RESCAR COMPANIES

Appeal from the August 10, 2022 Judgment of the Court of Common Pleas of Allegheny County (Ward, J.), Docketed at GD-18-010944

BRIEF OF *AMICUS CURIAE* PENNSYLVANIA COALITION FOR CIVIL JUSTICE REFORM IN SUPPORT OF APPELLANTS

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STATEMENT OF INTEREST OF AMICUS CURIAE

The Pennsylvania Coalition for Civil Justice Reform ("PCCJR") is a statewide, nonpartisan alliance of organizations and individuals representing health care providers, professional and trade associations, businesses, nonprofit entities, taxpayers, and other perspectives. PCCJR is dedicated to bringing fairness to litigants by elevating awareness of civil justice issues and advocating for reform.

SUMMARY OF THE ARGUMENT

As Appellants ably explain, the lower court's award of attorneys' fees was predicated on Section 13.1 of Axiall's "Terms of Conditions," and was contrary to Pennsylvania's formulation of the American Rule that parties to litigation are not entitled to recover attorneys' fees because Section 13.1 does not clearly indicate whether it indemnifies Axiall for losses derived from first-party claims as compared to more traditional indemnification from third-party claims, and therefore does not clearly indicate whether it is dispensing with the American Rule, and therefore does not dispense with the American Rule.

PCCJR offers this brief to elaborate that Pennsylvania's formulation of the Rule is consistent with the law of other jurisdictions, which sometimes forbids, and, in any event, strictly polices agreements for fee-shifting in numerous ways. This formulation of the Rule is rooted in sound public policy, including disincentivizing litigation as a pure fee-generating mechanism, reflecting a normative judgment that although parties are free to contract to dispense with the American Rule, our courts will favor

constructions that do not. To that end, this Honorable Court should favor Appellants' construction, and the trial court's award should be vacated.

ARGUMENT

1. The lower court's award of attorneys' fees was predicated on Section 13.1 of Axiall's "Terms of Conditions," and was contrary to Pennsylvania's formulation of the American Rule that parties to litigation are not entitled to recover attorneys' fees because Section 13.1 does not clearly indicate whether it indemnifies Axiall for losses derived from first-party claims as compared to more traditional indemnification from third-party claims, and therefore does not clearly indicate whether it is dispensing with the American Rule, and therefore does not dispense with the American Rule.

As Appellants ably explain, the lower court's award of attorneys' fees was predicated on Section 13.1 of Axiall's "Terms of Conditions," which provides as follows:

> Seller assumes the risk of all damage, loss, costs and expense, and agrees to indemnify, defend and hold harmless Buyer, its officers, employees and representatives, from and against any and all damages, claims, demands, expenses (including reasonable attorneys' fees), losses or liabilities whatsoever, and whether involving injury or damage to any person (including employees of Seller and Buyer) or property, and any and all suits, causes of action and proceedings thereon arising or allegedly arising from or related to the subject matter of this Purchase Order, except where such injury or damage was caused by the sole negligence of Buyer. This indemnity shall survive the termination or

> cancellation of this Purchase Order, or any part hereof.

See Trial Ct. Op., at 16-17; Appellants' Brief at 73 n.9.

And as Appellants likewise ably explain, the lower court's award was contrary to Pennsylvania's formulation of the "American Rule" that a party is responsible for its own attorneys' fees because Section 13.1 does not clearly indicate whether it indemnifies Axiall for losses derived from first-party claims as compared to more traditional indemnification from third-party claims. *See* Appellant's Brief at 68-86.[1]

Pennsylvania's formulation of the Rule is that a party is responsible for its own attorneys' fees absent (1) an express statutory provision to the contrary; (2) salient here, a "clear" agreement – *i.e.*, an unambiguous agreement capable of no other reasonable construction – to the contrary; or (3) some other

[1] Appellants' arguments that there was no clear statement of the parties because the Terms and Conditions were remote and referenced in purchase orders that were never signed are likewise well-taken. *See* Appellant's Brief at 83-84. Indeed, inasmuch as, as explained *infra*, the purpose of the clear statement rule is to express a policy-based presumption that parties pay their own attorneys' fees except where the parties have clearly and unavoidably dispensed with it, it is a fair point that vendors throughout the Commonwealth should not be deemed to have done so based on vague, remote, and undisclosed incorporated terms and conditions.

established exception. *See generally Trizechahn Gateway LLC v. Titus*, 976 A.2d 474, 483 (Pa. 2009); *see also, e.g.*, *Clean Air Council v. Dept. of Enviro. Protection*, 289 A.3d 928 (Pa. 2023) (involving statutory fee-shifting in certain environmental-law private enforcement proceedings); *Trizechahn*, *supra* (involving clear contractual agreement to fee-shifting); *Enterprise Bank v. Frazier Fam. L.P.*, 168 A.3d 262, 265 (Pa. Super. 2017) (involving ambiguous contractual agreement to fee-shifting construed to avoid it); *Jones v. Muir*, 515 A.2d 855 (Pa. 1986) (involving common-law "common fund" exception allowing fee-shifting).

Section 13.1 is ambiguous as to whether it indemnifies Axiall for losses derived from first-party claims as compared to more traditional indemnification from third-party claims. Indeed, absent some clear reference to first-party claims, indemnification clauses containing traditional "indemnify, defend, and hold harmless" language are likely properly interpreted as, and at least reasonably interpretable as, requiring only traditional indemnification against third-party claims. *Compare*, *e.g.*, *McMullen v. Kutz*, 985 A.2d 769 (Pa. 2009) (involving agreement containing clear reference to first-

party claims and holding it was a clear agreement for fee-shifting); *with Jalapenos, LLC v. GRC General Contractor, Inc.*, 939 A.2d 925, 932 (Pa. Super. 2007) (involving agreement with no such reference and holding the opposite); *see also Cottman Ave. PRP Grp. V. AMEC Foster Wheeler Envt. Infrastructure Inc.*, 439 F. Supp. 3d 407, 438 (E.D. Pa. 2020) (collecting cases including *Horsehead Corp. v. Topcor Augusta, LLC*, 594 F.3d 238 (3d Cir. 2010) (holding that "the only sensible reading" of a clause similar to the one herein required only traditional indemnification from third-party claims)).

In short, because Section 13.1 contains no clear reference to first-party claims, it contains no clear agreement to dispense with the Rule as it pertains to them, and therefore does not dispense with the Rule as it pertains to them.

2. Pennsylvania's formulation of the Rule is rooted in sound public policy, including disincentivizing litigation as a pure fee-generating mechanism, and promotes the development of the law and the deliberative adjudicative process, among other salutary public policy ends, reflecting a normative judgment that although parties are free to contract to dispense with the American Rule, our courts will favor constructions that do not.

The vast majority of jurisdictions treat agreements for fee-shifting with some degree of circumspection. Some outright forbid agreements for fee-shifting entirely, or in certain contexts. *See*, *e.g.*, *Hand Cut Steaks Acquisitions, Inc. v. Lone Star Steakhouse & Saloon of Nebraska, Inc.*, 905 N.W.2d 644, 667 & n. 98 & 99 (Neb. 2018) (holding agreements for fee-shifting void as against public policy); Del. Code tit. 8, § 109 (prohibiting agreements for fee-shifting as pertains to internal corporate claims, including shareholder derivative litigation).

And those jurisdictions that permit agreements for fee-shifting generally require clear agreements for fee-shifting, albeit the particular verbiage sometimes differs. *See*, *e.g.*, *NevadaCare, Inc. v. Dept. of Hum. Servs.*, 783 N.W.2d 459, 470 (Iowa 2010) (noting requirement of a "clear and express provision"); *Wagner v. Nolan*, 545 S.W.3d 373, 376 (Mo. Ct. App. 2018) (noting requirement that provision for fee-shifting be "explicit" rather than a "[g]eneral reference[s]," which are strictly construed against fee-shifting).

Moreover, virtually every jurisdiction that allows agreements for fee-shifting strictly polices them in their substance in myriad ways. By way of illustration, in some jurisdictions, agreements for fee-shifting must be mutual – *i.e.*, each signatory must have the same opportunity to litigate, prevail, and recover fees. *See*, *e.g.*, Cal. Civ. Code § 1717; *Burkhalter Kessler Clement & George LLP v. Hamilton*, 19 Cal. App. 5th 38, 43, 228 Cal. Rptr. 3d 154, 158-60 (2018) (discussing and applying statute); Fl. Stat. Ann. 57.105; *Azalea Trace, Inc. v. Matos*, 249 So. 3d 699, 701-03 (Fla. Dist. Ct. App. 2018) (discussing and applying statute); Utah Code Ann. § 78B-5-826; *Hardy v. Montgomery*, 428 P.3d 78, 88 (Utah Ct. App. 2018).

In others, agreements for fee-shifting are limited to the signatories themselves, third-party beneficiaries, and subrogees and not, as other contractual provisions are, assigns and successors. *See*, *e.g.*, *Cargill, Inc. v. Souza*, 201 Cal. App. 4th 962, 966, 134 Cal. Rptr. 3d 39, 42 (2011); *Azalea Trace, supra*; *PNC Bank, National Assoc. v. MDTR, LLC*, 243 So.3d 456, 458 (Fla. Dist. Ct. App. 2018).

And in virtually every jurisdiction that allows agreements for fee-shifting, including Pennsylvania, they are subject to trial-court review for reasonableness. *See*, *e.g.*, *Nova Rsch., Inc. v. Penske Truck Leasing Co.*, 952 A.2d 275, 283 (Md. 2008) ("Contract clauses that provide for the award of attorney's fees are valid and enforceable . . . subject to a trial court's examination of the prevailing party's fee request for reasonableness."); *Kamco Supply Corp. v. Annex Contracting, Inc.*, 689 N.Y.S.2d 189, 190 (N.Y. A.D. 1999) ("An award of attorneys' fees pursuant to . . . a contractual provision may only be enforced to the extent that the amount is reasonable and warranted for the services actually rendered."); *Graystone Bank v. Grove Estates, L.P.*, 58 A.3d 1277, 1283 (Pa. Super. 2012), *affd. sub. nom.*, 81 A.3d 880 (Pa. 2013) (citing *McMullen v. Kutz*, 985 A.2d 769 (Pa. 2009)) ("Our jurisprudence is clear that even where a contract authorizes fee-shifting in a particular amount, that amount must be reasonable under the circumstances.").

All of which is to say that Pennsylvania's rule that agreements for fee-shifting are subject to a clear statement rule is well within

the mainstream: most jurisdictions view them with a jaundiced eye.

But why?

3. Pennsylvania's formulation of the Rule is rooted in sound public policy, including disincentivizing litigation as a pure fee-generating mechanism, reflecting a normative judgment that although parties are free to contract to dispense with the American Rule, our courts will favor constructions that do not.

The reason is that fee-shifting undermines fundamental norms of public policy. Primarily, the American Rule *disincentivizes* litigation as a pure fee-generation mechanism, reflecting the fundamental norm that litigation should not proceed for its own, or attorneys', sakes.[2] Indeed, our Supreme Court put it well nearly 200 years ago where, in a debt-collection case, it reasoned that "it would be going further than good policy requires . . . to say that . . . counsel fees should be recovered, as that would put it in the power of the surety, to indulge an appetite for litigation at the expense of his principal[.]" *Wynn v. Brooke*, 5 Rawle 106, 110, 1835 WL 2719 (Pa. 1835). Similarly, in the 1840s, the Court

[2] Notably, Axiall was awarded a total of $12.8 million in substantive damages, unreduced by its own 40% fault, and sought $11.5 million in attorney's fees.

recognized that claims for nominal damages, absent application of the American Rule, would represent a "standing dish," *i.e.*, an article of food left on the table, for litigants and counsel seeking awards of fees. *Good v. Mylin*, 8 Pa. 51, 52 (Pa. 1848); *see also* "Standing dish," Brewer's Dictionary of Phrase and Fable (1894), *available at* https://words.fromoldbooks.org/Brewer-DictionaryOfPhraseAndFable/s/standing-dish.html (last visited Apr. 11, 2023). And in the 1920s, the Court put a less gustatory, yet finer, point on it, musing that "[i]f clients could pay attorney's fees out of the pockets of their opponents, they would pay most liberally." *Hempstead v. Meadville Theologial Sch.*, 134 A. 103, 103 (Pa. 1926). The American Rule serves to ensure that a party and his counsel have a good reason beyond spite or counsel's profit motive for compelling his opponent to participate in, and for invoking, the adjudicatory system and all of its time and attention.

Finally, the Rule's effect in this regard serves other, broader public policy goals as well. It promotes settlement in cases in which litigants' chances of success are reasonable, but not clear, by removing any incentive for litigants (and their attorneys) to

press forward, stakes ever-increasing, to "make back" attorneys' fees until trial is, economically speaking, the only option. In cases that do proceed, it promotes the continuous advancement, reevaluation, and reform of the law, and, particularly, constitutional and common law, which depend almost exclusively on litigation to provide the basis for evolving rules. And it allows for a robust, deliberative adjudicative process whereby judges and juries bring democratic values to bear in achieving justice on the merits, providing litigants with an honest win or an honest loss, rather than a stress-test for risk.

All of which is to say that formulation of the American Rule as requiring a clear agreement to dispense with it serves as a balancing of these weighty public policies and the parties' right to contract. In other words, if parties want to dispense with the Rule and its service of these public policy ends, they may do so, but between competing constructions, our courts will favor the one consistent with the Rule. *Cf. Wolf v. Scarnati*, 233 A.3d 679, 696 (Pa. 2020) (employing constitutional avoidance canon of statutory interpretation).

Concomitantly, this Honorable Court, faced with Appellants' construction of Section 13.1, which adheres to the American Rule and its service of fundamental public policy goals, and the trial court's which does not, should favor Appellants' construction, and the trial court's award should be vacated.

CONCLUSION

Accordingly, in light of all the foregoing, PCCJR respectfully requests that this Honorable Court enter an order vacating the August 10, 2022 judgment and remanding to the trial court with instructions to re-enter judgment in the proper amount, or such other relief as this Honorable Court deems just and proper.

Respectfully submitted,

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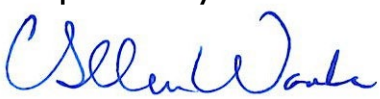
CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the word-count limits of Pa.R.A.P. 531, as it contains 2,168 words, which is fewer than 7,000 words, exclusive of excluded materials, and complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania – Case Records of the Appellate and Trial Courts* requiring the filing of confidential information and documents differently than non-confidential information and documents.

Respectfully submitted,



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