

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

No. 2009-0533

One Beacon Insurance, LLC

v.

M&M Pizza, Inc.

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**BRIEF OF APPELLEE ONE BEACON INSURANCE, LLC**

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**TABLE OF CONTENTS**

	<u>Page</u>
TABLE OF AUTHORITIES .....	iii
STATEMENT OF THE FACTS AND THE CASE.....	1
SUMMARY OF THE ARGUMENT .....	5
ARGUMENT .....	6
I.    Standard of Review.....	6
II.   The Plain Language of the Lease Supports the Trial Court’s Ruling That M&M is Required to Indemnify One Beacon. ....	7
A.    The injury and claim grew out of M&M’s use of the premises, requiring M&M to indemnify One Beacon under the unambiguous language of the Indemnification Clause. ....	7
B.    The words “of the leased premises” do not circumscribe the broad, general and comprehensive scope of the Indemnification Clause. ....	9
C.    M&M offers no legal support for its assertion that the words “of the leased premises” limit the scope of the Indemnification Clause. ....	15
III.  The Liability Clause Sets No Limit on the Scope of the Indemnification Clause, and Separately and Independently Exculpates the Lessor for Harms Occurring “On or About” the Leased Premises.....	16
A.    The Liability Clause and the Indemnification Clause are separate, independently valid provisions to which the court must give effect.....	16
B.    Because the injury occurred “on or about” the leased premises, the Liability Clause exculpates the Lessor. ....	19
IV.  The Other Terms of the Lease Do Not Limit the Plain, Clear Language of the Indemnification Clause. ....	22

	<u>Page</u>
V. The Intent of the Parties Was to Prevent the Lessor from Incurring Any Costs Whatsoever from Injuries Related In Any Way to M&M's Business Operations.....	28
VI. M&M Is Required to Indemnify One Beacon Because It Had Adequate Notice of and Opportunity to Participate in the Settlement Conference in the Underlying Suit, but Declined to Do So. ....	29
A. Morrissette involved a common law indemnification claim and its principles have not been applied in a case like this where the indemnification obligation is contractual in nature.....	29
B. The letter from Centercorp's counsel to M&M requesting M&M's attendance at the settlement conference more Than fulfills the requirements of due process.....	31
CONCLUSION AND REQUEST FOR RELIEF.....	33

## TABLE OF AUTHORITIES

	<u>Page</u>
<b><u>New Hampshire State Cases</u></b>	
<i>Bellak v. Franconia College</i> , 118 N.H. 313 (1978).....	18
<i>Carter v. Bergeron</i> , 102 N.H. 464 (1960).....	11, 16, 27
<i>Commercial Union Assurance Co. v. Brown Co.</i> , 120 N.H. 620 (1980).....	23
<i>Dunn v. CLD Paving, Inc.</i> , 140 N.H. 120 (1995) .....	17, 30
<i>Foundation for Seacoast Health v. HCA Health Services of New Hampshire, Inc.</i> , 157 N.H. 487 (2008) .....	23
<i>Glick v. Chocorua Forestlands Ltd. Partnership</i> , 157 N.H. 240 (2008) .....	23
<i>Lacasse v. Spaulding Youth Ctr.</i> , 154 N.H. 246 (2006).....	6
<i>Merrimack School Dist. v. Nat'l School Bus Service</i> , 140 N.H. 9 (1995) .....	15, 16, 26, 30
<i>Morrisette v. Sears, Roebuck &amp; Co.</i> , 114 N.H. 384 (1974) .....	29, 30, 31, 32
<i>Morse v. Pike</i> , 15 N.H. 529 (1844) .....	20
<i>N.A.P.P. Realty Trust v. CC Enterprises</i> , 147 N.H. 137 (2001).....	7
<i>Pope v. Lee</i> , 152 N.H. 296 (2005) .....	22
<i>Pro Con Construction, Inc. v. Acadia Ins. Co.</i> , 147 N.H. 470 (2002).....	9, 10, 11, 12, 16, 21
<i>Smith v. Furbish</i> , 68 N.H. 123 (1894).....	27
<i>Tanguay v. Marston</i> , 127 N.H. 572 (1986).....	17, 18, 26, 30
<i>Thompson v. Banks</i> , 43 N.H. 540 (1862).....	19
<i>Town of Peterborough v. MacDowell Colony, Inc.</i> , 157 N.H. 1 (2008).....	6, 7
<i>West v. Turchioe</i> , 144 N.H. 509 (1999) .....	28

**Federal Cases**

*Continental Cas. Co. v. City of Richmond*, 763 F.2d 1076 (9th Cir. 1985).....11

*Crawford v. Pope & Talbot, Inc.*, 206 F.2d 784 (3rd Cir. 1953).....32

*F.D.I.C. v. Singh*, 977 F.2d 18 (1st Cir. 1992).....23

**Cases From Other Jurisdictions**

*Campell v. Shrewsbury Surgicenter*, 2009 WL 383364 (N.J. Super.A.D. 2009) .....12, 13

*Community Trust Bancorp, Inc. v. Mussetter*, 242 S.W.3d 690 (Ky. 2007).....12, 13, 14

*Franklin Mut. Ins. Co. v. Security Indem. Ins. Co.*, 646 A.2d 443 (N.J. Super. A.D. 1994) .....12, 13

*Hall Road Shopping Plaza, Inc. v. U and M, Inc.*, 2000 WL 33415000 (Mich. App. 2000) .....21

*Harrah's Atlantic City, Inc. v. Harleysville Ins. Co.*, 671 A.2d 1122 (N.J. Super. A.D. 1996) .....13

*Interface Group-Nevada, Inc. v. Freeman Decorating Co.*, 473 S.E.2d 573 (Ga. Ct. App. 1996).....11

*Liberty Village Associates v. West American Ins. Co.*, 706 A.2d 206 (N.J. Super. A.D. 1998) .....13

*Lumpkins v. CSL Locksmith, LLC*, 911 A.2d 418 (D.C. 2006).....7

*National Grange Mut. Ins. Co. v. Santaniello*, 961 A.2d 387 (Conn. 2009).....8

*Rathburn v. W. Mass. Elec. Co.*, 479 N.E.2d 1382 (Mass. 1985).....30

*Raymond v. Bowers*, 2002 WL 1308782 (Mich.App. 2002) .....21

*Servants of the Paraclete, Inc. v. Great Am. Ins. Co.*, 857 F.Supp. 822 (D.N.M. 1994) .....12

*Tatro v. Manor Care, Inc.*, 625 N.E.2d 549 (Mass. 1994) .....11

*Wagner v. Regency Inn Corp.*, 463 N.W.2d 450 (Mich.App. 1990) .....20

**Secondary Authorities**

41 Am. Jur. 2d, Indemnity, §29 .....30

Am. Jur. Products Liability §1741 (2d Ed. 2009).....30

Black’s Law Dictionary (4th Ed. 1968).....19

4 Williston on Contracts §601 (4th Ed.) .....18

11 Williston on Contracts §30:4 (4th Ed) .....7, 23, 25

**Statutes and Rules**

N.H. Rev. St. Ann. 491:8-a .....6

## STATEMENT OF THE FACTS AND THE CASE

Appellant M&M Pizza, Inc. ("M&M") entered into a lease agreement (the "Lease") with 61 Crystal Avenue, LLC d/b/a Centercorp Retail Properties, Inc. ("Centercorp"), on August 22, 1997, to lease a space in a mall located at 61 Crystal Ave, Derry. Appendix to Appellant's Brief 21 ("App. \_\_\_\_"). The Lease was renewed July 2, 2002, for a second five year term. App. 9. Among other things, the Lease required M&M to acquire liability insurance, naming Centercorp as a co-insured, Lease §18, App. 29; and to indemnify Centercorp for certain claims. §17 ("Liability"), App. 29. Section 17 is comprised of two sentences. They are:

Except for injury or damage caused by the willful act of the Lessor, its servants or agents, the Lessor shall not be liable for any injury or damage to any person happening on or about the leased premises or for any injury or damage to the leased premises or to any property of the Lessee or to any property of any third person, firm, association or corporation on or about the leased premises.

§17, first sentence (the "Liability Clause"), App. 29; and

The Lessee shall, except for injury or damage caused as aforesaid, indemnify and save the Lessor harmless from and against any and all liability and damages, costs and expenses, including reasonable counsel fees, and from and against any and all suits, claims and demands of any kind or nature, by or on behalf of any person, firm association or corporation and from and against any matter or thing growing out of the condition, maintenance, repair, alteration, use, occupation or operation of the leased premises or the Facilities thereon or the installation of any property therein or the removal of any property therefrom.

§17, second sentence (the "Indemnification Clause"), App. 29.

M&M leased the premises in order to operate a "Domino's" pizza franchise. App. 19. M&M serves its patrons in either of two ways: by taking orders from consumers who pick up their pizza on the premises; or through a pizza delivery operation. App. 88. Regarding the delivery of pizzas, M&M receives an order from a

patron by telephone, cooks the pizza, and sends an employee by car to deliver the pizza at the patron's address. App. 88-89. On the night of November 27, 2002, Nathaniel Box, an M&M employee who was tasked that evening with delivery duties, was returning from a delivery to pick up the next round of pizzas when he slipped and fell on ice outside the back door of M&M's pizza shop. App. 74-75, 89.

Prior to its evening dinner rush, M&M lets its delivery employees use the front entrance. App. 89. During the evening dinner rush, however, M&M typically requires its delivery employees to park behind the retail mall and use the rear door to the shop so that patrons will not be disturbed by delivery employees entering and exiting, and the maximum number of parking spaces in front will be reserved for patrons. *Id.* Thus, after Box had completed three to four delivery runs through the front entrance of the pizza shop, M&M's manager, Mark Morris, instructed Box to park behind the mall, between one and ten feet from the rear door to the pizza shop. App. 76-77. This was the first time that day that Morris had instructed Box to use the rear entrance. App. 66, 74. Box had no trouble with his footing when walking into and out of the pizza shop through the front door. App. 71.

After parking behind the rear entrance to M&M's shop, Box had gathered his pizza carriers, stepped out of the car, and shut the driver's side door. App. 74-75. The footing behind the shop was more slippery than the footing in front of the shop. App. 66, 80. Box walked around the left front fender of his car and his feet came out from under him. App. 74-75. He landed hard on his tail bone. App. 84. Box used the bumper and hood of his car to help himself stand, and went through the back door into the pizza shop. *Id.* Another employee notified Morris that Box had fallen. App. 89. Morris asked Box if

he was injured, and, when Box replied that he believed he was injured, suggested that Box consider taking the rest of the night off, and seek medical attention. *Id.*

After Box's fall, Morris instructed his staff to spread rock salt in the area where Box fell. *Id.* Morris kept a bag of rock salt in the back of his shop for spreading in the area behind the store where he asked his delivery employees to park during the evening dinner rush. App. 89-90. His primary purpose in spreading the salt in that area was to assure the safety of his employees as they came and went. App. 90. Typically, he spread, or instructed his employees to spread rock salt in an area up to five yards outside the shop's rear entrance. App. 92. When asked why he did so, Morris replied, "I don't want worker's comp. claims. That's the reason." App. 90.

Box sued Centercorp, as well as other parties, after he was injured; as the employer, M&M was immune from suit by Box under state Worker's Compensation statutes. The parties agreed to hold a settlement conference on August 8, 2007. Counsel for Centercorp sent a letter to M&M by certified mail on July 19, 2007, asserting that M&M was obligated, by statutory contribution requirements and the Indemnification Clause of the Lease, either to contribute to or indemnify Centercorp for costs associated with any settlement. App. 91, 121. That letter, sent by certified mail, reads, in its entirety:

Dear Mr. Morris,

This office represents [Centercorp] in the above-entitled litigation. The case is scheduled for mediation on August 8, 2007 at Mulvey Professional Association, 378 Islington St., Portsmouth, New Hampshire. I am writing to request that you, or your legal representative, attend with authority to contribute money toward the settlement of the case.

Mr. Box claims to have sustained severe and permanent injuries when he slipped and fell in the parking area behind Domino's Pizza on the night of

November 27, 2002. At his deposition, he testified that you were his supervisor and had told him to park his car out back.

I believe your attendance at the mediation would be constructive because M&M Pizza is liable to Centercorp for any damages it must pay Mr. Box. First, under ¶7 of the Lease, M&M Pizza was responsible for keeping all “loading, unloading and parking areas which are part of or which serve the leased premises” free from obstructions and encumbrances. Mr. Box testified that there was a shovel and bucket of sand in the back of the store and that he saw employees sanding the area after he fell.

Second, under ¶17 of the Lease, M&M agreed to indemnify Centercorp for injuries and damages to any person “*happening on or about the leased premises...growing out of the condition, maintenance...use, occupation or operation of the leased premises or the facilities thereon...*”. Thus, M&M is contractually required to indemnify Centercorp for its legal costs and damages incurred in defending this case.

Although it appears that M&M Pizza would have no direct liability to the plaintiff as an employer who provided worker’s compensation benefits, M&M Pizza is liable to Centercorp under both contribution and indemnification theories. Centercorp intends to bring a third party action against M&M Pizza to seek recovery of any amounts it is required to pay Mr. Box, either by settlement or by verdict. Your attendance at the mediation would give you the opportunity to participate in the settlement process and to address the legal issues between Centercorp and M&M Pizza.

I look forward to your response.

Very truly yours...

App. 121 (italics in original, reformatted from original).

Mr. Morris responded to this letter by calling Centercorp and informing Centercorp that he viewed it, as Lessor, to be fully responsible for maintaining the driveway where Mr. Box fell; and that M&M, refusing to contribute or indemnify, would not attend the settlement conference. App. 91. M&M did not attend the settlement conference. *Id.* The lawsuit filed by Mr. Box was settled after the aforementioned

conference, with One Beacon Insurance, Centercorp's insurer, paying Mr. Box \$185,000 for a release of claims against Centercorp. App. 3.

Appellee One Beacon is the subrogee of Centercorp's rights under the Lease between Centercorp and M&M. App. 1. As Centercorp stated it would do in the July 19, 2007 letter, One Beacon filed suit against M&M to enforce the Indemnification Clause of the Lease. App. 1, 4.<sup>1</sup> After discovery, M&M filed a motion for summary judgment; One Beacon objected to M&M's motion for summary judgment and counter-moved for summary judgment. App. 6, 38. On June 25, 2009, the Superior Court (McHugh, J.) issued a comprehensive order denying M&M's motion, and granting summary judgment to One Beacon (the "Order"). App. 95.

The Superior Court denied M&M's motion for reconsideration for the reasons stated in One Beacon's objection. App. 123. This appeal followed.

### **SUMMARY OF THE ARGUMENT**

M&M's argument that it is not required to indemnify One Beacon is not supported by either the language of the Indemnification Clause of the Lease, or by existing case law. The clear command of the Indemnification Clause's requirement that M&M indemnify its Lessor for any injury "growing out of...the use, occupation or operation of the premises" is unambiguous. This broad, general and comprehensive language is not limited by the phrase "of the leased premises." It is not limited by the Liability Clause, nor by the other sections and provisions of the Lease. Existing New Hampshire law, supported by decisions from other jurisdictions, confirms that this clause was broadly intended to insulate the Lessor from liability for any accident occurring because M&M operated a business at its mall. The superior court correctly found that the

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<sup>1</sup> One Beacon's initial writ and declaration included a statutory contribution claim, which it later withdrew.

accident that gave rise to the underlying case “[grew] out of...the use, occupation or operation of the leased premises.” Therefore, the superior court’s ruling that M&M was required to indemnify One Beacon in this case should be affirmed.

In addition, the injury in the underlying litigation occurred “on or about” the leased premises, and under the terms of the Lease, the Lessor’s liability is contractually attenuated.

Finally, M&M’s argument that it was never offered an opportunity to defend the underlying action, and had insufficient notice of the settlement to approve or reject it, fails because the Lessor put M&M on notice, in the clearest possible terms, of the lawsuit, the opportunity to settle, and its intention to seek indemnification from M&M. Even if M&M was entitled to such notice under New Hampshire law, the Lessor fully met its obligations, and, as a consequence, One Beacon is entitled to indemnification under the plain terms of the Lease.

## ARGUMENT

### I. Standard of Review

When reviewing a trial court's grant of summary judgment, the Court considers the affidavits and other evidence, and all inferences properly drawn from them, in the light most favorable to the non-moving party. *Town of Peterborough v. MacDowell Colony, Inc.*, 157 N.H. 1, 5 (2008) (citing *Lacasse v. Spaulding Youth Ctr.*, 154 N.H. 246, 248 (2006)); see RSA 491:8-a. If its review of the evidence does not reveal a genuine issue of material fact, and if the moving party is entitled to judgment as a matter of law, the Court will affirm the trial court's decision. *McDowell*, 154 N.H. at 5; RSA 491:8-a.

The Court reviews the trial court's application of the law to the facts *de novo*. *McDowell*, 154 N.H. at 5.

In this case, the Court should affirm the trial court's grant of summary judgment in favor of One Beacon because it was required by the plain language of the Lease, and supported by the relevant case law. Therefore, the trial court correctly ruled that One Beacon was entitled to judgment as a matter of law.

**II. The Plain Language of the Lease Supports the Trial Court's Ruling That M&M is Required to Indemnify One Beacon.**

- A. The injury and claim grew out of M&M's use of the premises, requiring M&M to indemnify One Beacon under the unambiguous language of the Indemnification Clause.

The plain language of the indemnification clause speaks for itself:

*The Lessee shall, except for injury or damage caused as aforesaid, indemnify and save the Lessor harmless from and against any and all liability and damages, costs and expenses, including reasonable counsel fees, and from and against any and all suits, claims and demands of any kind or nature, by or on behalf of any person, firm association or corporation and from and against any matter or thing growing out of the condition, maintenance, repair, alteration, use, occupation or operation of the leased premises or the Facilities thereon or the installation of any property therein or the removal of any property therefrom.*

§17, App. 29 (emphasis added). The meaning of these words is unambiguous because M&M cannot reasonably disagree about what the language itself says or means. *See N.A.P.P. Realty Trust v. CC Enterprises*, 147 N.H. 137, 139 (2001) (“The language of the contract is ambiguous if the parties to the contract could *reasonably* disagree as to the meaning of that language.”). M&M claims to disagree as to what this language was *intended* to mean, but its subjective interpretation is not controlling. *E.g.*, 11 Williston on Contracts §34:4; *Lumpkins v. CSL Locksmith, LLC*, 911 A.2d 418, 422 (D.C. 2006) (“A contract is not ambiguous merely because the parties disagree over its meaning.”);

*National Grange Mut. Ins. Co. v. Santaniello*, 961 A.2d 387, 393 (Conn. 2009)

(“[A]mbiguity in a contract must emanate from the language used in the contract rather than from one party's subjective perception of the terms[.]”). In fact, there is no uncertainty as to what the words actually say: if the injury or claim “[grows] out of” the “use, occupation or operation of the leased premises,” then M&M is required to indemnify the Lessor “from and against any and all liability and damages, costs and expenses.” App. 29.

The trial court found that Box’s injury “[grew] out of the ... use, occupation or operation of the leased premises,” App. 99-101, a finding that was fully supported by the factual record. Specifically, Morris admitted that Box was employed by M&M at the time of his injury; that Box was acting within the course and scope of his employment when he fell; and that it was upon his instruction that Box was coming and going through the rear entrance to the pizza shop at the time of Box’s fall and injury. App. 89. Morris admitted that the delivery service that Box was engaged in at the time he fell was an integral part of M&M’s business operations, *id.*, and that M&M leased the premises in order to operate a pizza restaurant. App. 88. Given that there is no genuine dispute as to these material facts, M&M cannot—indeed, does not contest that Box’s injury “[grew] out of [its] use, occupation or operation of the leased premises.” §17, App. 29. It follows, as a matter of law, that under the plain terms of §17, M&M is required to indemnify its Lessor. The superior court’s order was therefore correct and should be affirmed.

B. The words “of the leased premises” do not circumscribe the broad, general and comprehensive scope of the Indemnification Clause.

M&M argues that the words “of the leased premises” in the phrase “growing out of the...use, occupation or operation of the leased premises” limit the scope of the Indemnification Clause to injuries suffered on or inside the strict square footage of the leased premises. Appellant’s Brief 8-9 (“App. Brief \_\_\_”). But if the parties had intended the indemnification obligation only to arise when an injury or claim occurred on or in the leased premises, they could have said so. That is, the Indemnification Clause *does not read*: “*occurring on the leased premises and growing out of the...use, occupation or operation of the leased premises[.]*” The intention of the parties, as articulated unambiguously by this sentence, was to indemnify the Lessor for any costs arising from liability that “[grew] out of” the use of the premises by M&M—a much broader protection for the Lessor. Under M&M’s analysis, no injury that occurred outside the premises would trigger indemnification by M&M, except perhaps fires or explosions originating in the restaurant. *Id.* at 9. M&M offers no support for this legal assertion, and there is none: M&M’s analysis is contradicted by existing New Hampshire law, as well as extensive case law from other jurisdictions.

In *Pro Con Construction, Inc. v. Acadia Ins. Co.*, 147 N.H. 470 (2002), the Court interpreted the synonymous term<sup>2</sup> “arising out of” in the context of an insurance coverage obligation in a construction contract. In *Pro Con*, the computer giant Oracle hired Pro Con, the plaintiff construction company, to build a new office complex. *Id.* at 471. Pro Con subcontracted interior painting duties to a small business, Decorative Concepts. *Id.*

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<sup>2</sup> *Pro Con*, 147 N.H. at 472 (“The phrase ‘arising out of’ has been interpreted as meaning ‘originating from or growing out of, or flowing from.’”) (quoting *Allstate Ins. Co. v. Crouch*, 140 N.H. 329, 332 (1995)).

Defendant Acadia insured Decorative Concepts. *Id.* Decorative Concepts' insurance agreement included an additional-insured endorsement that stated:

WHO IS AN INSURED is amended to include as an insured any person or organization for which you are performing operations if you and such person or organization have agreed in a contract or agreement that such person or organization be added as an additional insured on your policy. Such person or organization is an additional insured only with respect to liability *arising out of your ongoing operations* performed for that insured.

*Id.* (emphasis added).

During the interior painting work, Decoration Concepts' employee was injured when he slipped on ice while visiting a coffee truck parked outside during break. *Id.* The employee sued Pro Con for negligence in maintaining the parking area. *Id.* Pro Con requested indemnification from Acadia pursuant to the additional-insured provision in Decorative Concepts' policy, which Acadia denied. *Id.* The issue in the case was whether the injury "arose from" the contract, and therefore, triggered the insurance requirement of the defendant's policy. The Court's analysis focused on whether there was a link between the injury and the performance of Decorative Concepts' duties under the service contract with Pro Con. *See id.* at 472.

The Court enunciated a test that, when applied in this case, demonstrates a causal connection between M&M's pizza operations and the injury and claim by Box. *Id.* A causal connection between an injury and a party's operations exists if the injury occurs (1) while the employee was engaged in any task related to the insured's business operations, or (2) near the insured's business operations. *Id.* at 472-73. In *Pro Con*, the Court held that the link between the job and the injury suffered by the employee was insufficient to show a causal connection—the employee was taking a coffee break, and thus was not engaged in work for his employer; and the coffee truck was parked outside,

well away from the interior job site. *Id.* at 472-73 (“[T]he causal connection between the two must be more than tenuous...”). But both conditions are present in this case. Here, Box parked his car in the back of the store at the instruction of his employer while in the course of making pizza deliveries for M&M. App. 76-77. He was less than ten feet from the back door to the pizza shop and moving towards the door when he fell. App. 74-75. Box’s fall happened within feet of the place of M&M’s business operations, while he was acting in the course of his employment, performing a work-related task at the instruction of M&M. App. 100-101. Under *Pro Con*, this establishes a causal connection between M&M’s “use, occupation or operation of the leased premises” and the injury suffered by Box. *See* 147 N.H. at 472-73.

Although the Court, in *Pro Con*, found that there was no causal connection between the work of Decorative Concepts and the injury in question, the analysis in *Pro Con* affirms that phrases like “grow[ing] out of” are “broad, general and comprehensive,” and, most importantly, should *not* be equated with proximate cause. *Carter v. Bergeron*, 102 N.H. 464, 470-71 (1960); *Underwriters at Lloyd’s of London v. Cordova Airlines, Inc.*, 283 F.2d 659, 664-65 (9th Cir. 1960); *Continental Cas. Co. v. City of Richmond*, 763 F.2d 1076, 1080 (9th Cir. 1985) (“This court [has] concluded that ‘arising from’ implies something broader than causation.”); *Tatro v. Manor Care, Inc.*, 625 N.E.2d 549, 552-54 (Mass. 1994) (“Massachusetts construes the meaning of ‘arising from’ liberally, preferring a ‘but for’ or ‘train of events’ test to the more restrictive proximate cause test[.]”); *Interface Group-Nevada, Inc. v. Freeman Decorating Co.*, 473 S.E.2d 573, 575 (Ga.Ct. App. 1996) (“‘Arising from’ does not mean the same thing as proximately caused by.”).

Instead, an injury “grows out of” the use of a given property when there is a nexus between the occurrence and the use of the property in question. *E.g.*, *Pro Con*, 147 N.H. at 427; *Servants of the Paraclete, Inc. v. Great Am. Ins. Co.*, 857 F.Supp. 822, 836-37 (D.N.M. 1994) (holding that the injury “arose out of the use of the premises” if there was some causal connection or a sufficient nexus between the ownership, maintenance, or use of the premises and the injuries sustained); *Franklin Mut. Ins. Co. v. Security Indem. Ins. Co.*, 646 A.2d 443, 446 (N.J. Super. A.D. 1994). Two recent cases illustrate the principle on facts that are the same or similar to the facts of the present case. In *Campell v. Shrewsbury Surgicenter*, 2009 WL 383364 (N.J. Super.A.D. 2009) (unreported), Appellee’s Appendix at 101 (“Appellee’s App. \_\_\_”) and *Community Trust Bancorp, Inc. v. Mussetter*, 242 S.W.3d 690, 694 (Ky. 2007), Appellee’s App. 111, the tenants each argued, as M&M does here, that the occurrence of an injury on the common area of the property where they had leased premises meant that they were not required to indemnify their Lessor despite being bound by similar “growing out of” language in the indemnification provisions of their leases.

The New Jersey Appeals Division in *Shrewsbury Surgicenter*, 2009 WL 383364 at \*2, *see* Appellee’s Appendix 101-10, rejected the argument outright. *Id.* at \*7. *Shrewsbury Surgicenter* was a walk-in surgical clinic and tenant in a commercial mall owned by *Shrewsbury Partners, Inc.* *Id.* *Campbell*,<sup>3</sup> an employee of the clinic, fell on ice while walking across the parking lot. *Cambell* sued the lessor, *Shrewsbury Partners*, and the lessor sought indemnification and insurance coverage from *Shrewsbury Surgicenter*. *Id.* The appellate court analyzed a series of analogous cases and concluded that

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<sup>3</sup> *Campbell v. Shrewsbury Partners* was a consolidated appeal involving claims for injuries by two plaintiffs. For simplicity, only the titular plaintiff is referred to here.

Shrewsbury Partners should be indemnified through Shrewsbury Surgicenter's liability insurance policy even though Shrewsbury Partners, and not the tenant, had responsibility under the lease for maintaining the parking lot. *Id.* at \*7.

Like the policies in [cases cited], [the tenant's] insurance policy provides coverage to Shrewsbury Partners for liability "arising out of the ownership, maintenance or use of that part of the premises leased to [the Surgery Center]." An insurer must anticipate providing coverage to a lessor under this type of provision, where there exists a "substantial nexus between the occurrence and the use of the leased premises." The slip and fall accident that occurred here is strikingly similar to those in [cases cited]. In each of these cases there existed "substantial nexuses" [requiring insurance coverage under the tenant's policy for the lessor's liability]. Like the plaintiffs in those cases, [Campbell] fell outside the business location, but within the parking lot; [his] presence in the parking lot was directly related to the tenant's use of the leased premises. Campbell was in the parking lot because of his employment at the Surgery Center... Shrewsbury Partners' obligation to maintain and remove snow from the premises is not determinative. We made this point clear in [cases cited] where the lessor was responsible for maintaining the exterior stairs. Simply stated, coverage is not contingent on whether the tenant had any liability for the accident.

*Campbell v. Shrewsbury Surgicenter*, 2009 WL 383364 at \*7 (citing *Liberty Village Associates v. West American Ins. Co.*, 706 A.2d 206 (App.Div.), *certif. denied*, 713 A.2d 500 (1998); *Harrah's Atlantic City, Inc. v. Harleysville Ins. Co.*, 671 A.2d 1122 (App. Div. 1996); and *Franklin Mut. Ins. Co.*, 646 A.2d at 443 (quotations and internal citations omitted).

In *Bancorp*, 242 S.W.3d at 694,<sup>4</sup> the Kentucky Court of Appeals denied the lessor's claim for indemnification by the tenant under similar circumstances to this case. However, it did so for reasons that would *require* indemnification here. The lessor, Bancorp, leased space in an office building to the tenant, Mussetter, a financial services firm. *Id.* at 691. A Mussetter employee was injured when she slipped on a common area

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<sup>4</sup> Appellee's App. 111-15.

stairway that had become wet due to a leaky pipe in the stairwell. *Id.* For the purposes of the action, Bancorp conceded that the injury and claim were due to its own negligence, but argued, as One Beacon does here, that the lease provision requiring indemnification for any injury “growing out of” the occupancy of the premises required Mussetter to indemnify it. *Id.* at 693. The Kentucky appeals court rejected this argument as follows:

[T]he actual language of the lease states, “The Lessee shall save the Lessor harmless ... from any liability ... on account of injury to employees, or to customers or to the general public *and/or* growing out of the occupancy of the said Premises by the Lessee....” “And/or” is defined as “a function word to indicate that two words or expressions are to be taken together or individually.” [This court has] stated that “[a]nd/or” means “either *and* or *or*.” Thus, the indemnification clause, read literally, appears to require Mussetter [the tenant] to indemnify Community Trust [the lessor] “from any liability ... on account of injury to employees, or to customers or to the general public,” from any cause, in any location, and regardless of whether or not the damages arise from Mussetter's occupancy of his leased office suite. Such an indemnification clause is simply too broad and would be against public policy, as found by the circuit court.

*Id.* at 694 (some citations omitted, emphasis in original). However, significantly for this case, the Kentucky court noted that:

Community Trust argues that the clause should be interpreted to require that Mussetter indemnify Community Trust if an injury occurs on the “premises,” that is, the leased office suite; or if it occurs in the public areas, but in that case only if the injury “grow[s] out of the occupancy of the ... premises.” *We agree that if this was the language used, such a provision would not be against public policy.*

*Id.* at 693-94 (emphasis added). That is precisely the language used in §17 of the Lease.

In other words, the language of the Indemnification Clause is exactly the language that the Kentucky Appeals Court said would have required indemnification in that case.

C. M&M offers no legal support for its assertion that the words “of the leased premises” limit the scope of the Indemnification Clause.

M&M characterizes *Merrimack School Dist. v. Nat'l School Bus Service*, 140 N.H. 9, 12 (1995), as supportive of its argument that the requirement to indemnify the Lessor for any injury or claim “growing out of” M&M’s use of the premises is limited by the words “of the leased premises” in the Indemnification Clause. It is not.

In *Merrimack School District*, the plaintiff school district sued the National Bus Service, the owner of the buses in the district, for indemnification related to damages resulting from an accident in which a bus driver struck a child in the course of duty. *Id.* at 10-11. The defendant bus company denied responsibility for indemnification because it believed that the transportation agreement between the bus service and the school district did not provide for indemnification in the instance of the school district’s negligence (the plaintiff in the underlying suit had independent negligence claims against the school for negligent supervision of the child in the school pick up zone). *Id.* at 11. But the transportation agreement provided that the bus company would indemnify the plaintiff for any injury “arising from or out of the operations [of the bus service],” and the Court held that the “arising from” language was broad, general and comprehensive, and required indemnification of the school district even for its own negligence. *Id.* at 13.

Contrary to M&M’s argument, the Court in *Merrimack School District* did not require that the indemnitor have caused the injury in question in order for its indemnification obligations to be valid. Rather, the Court pointed to the fact that the student was struck by the defendant bus company’s bus as support for its legal conclusion that the injury “arose out of” the indemnitor’s operations. *Id.* This finding was not intended to limit the scope of such clauses to situations where the indemnitor was itself

negligent. Rather, the Court's holding in *Merrimack School District* affirms the general principle that words like "arising out of" or, as in this case, "growing out of" should be read broadly to require indemnification even for those indemnitees who are concededly negligent. *Id.*

In short, M&M offers no support for its assertion that the language "of the leased premises" has any limiting effect on the Lease's "broad, general and comprehensive" requirement that M&M indemnify the Lessor for any and all injuries "growing out of" the "use, occupation or operation of the leased premises." *See Carter*, 102 N.H. at 470-71; *Cordova*, 283 F.3d at 664-65; §17, App. 29. In fact, the plain language of the Lease, the controlling case of *Pro Con*, 147 N.H. at 472-73, and a substantial body of case law from New Hampshire and other jurisdictions all compel the conclusion that the trial court correctly applied the law to the facts of this case.

**III. The Liability Clause Sets No Limit on the Scope of the Indemnification Clause, and Separately and Independently Exculpates the Lessor for Harms Occurring "On or About" the Leased Premises.**

**A. The Liability Clause and the Indemnification Clause are separate, independently valid provisions to which the court must give effect.**

In addition to indemnification under the Indemnification Clause of §17, the Lease further clarifies that the Lessor is insulated from liability for all acts and omissions except for its own willful acts. The Liability Clause of §17 reads:

Except for injury or damage caused by the willful act of the Lessor, its servants or agents, the Lessor shall not be liable for any injury or damage to any person happening on or about the leased premises or for any injury or damage to the leased premises or to any property of the Lessee or to any property of any third person, firm, association or corporation on or about the leased premises.

§17, App. 29. Exculpatory clauses like the Liability Clause are not against public policy, even when their effect is to insulate one of the parties—the Lessor in this case—from liability for its own negligent acts. *Tanguay v. Marston*, 127 N.H. 572, 578 (1986) (“Where the parties to a contract are free to make their own bargain, and no special relationship...exists between them, a clause fully exculpating one party for ... damage due to its negligence in the performance of a contract is valid and will be enforced.”); *Dunn v. CLD Paving, Inc.*, 140 N.H. 120, 122 (1995) (such clauses are valid “as long as the language of the release clearly and specifically indicates the intent to release the [party] from liability for personal injury caused by [its own] negligence.”). Thus, even assuming that the Lessor was negligent in this case, the Liability Clause relieves the Lessor of any liability, provided that the injury occurred “on or about the leased premises.” §17, App. 29.

M&M argued in a motion to dismiss early in the proceedings that the Box injury did not occur “on or about” the leased premises. Appellee’s App. 5-9. The superior court rejected this argument in denying its motion to dismiss, Appellee’s App. 100, and M&M did not expressly raise this argument again in its motion for summary judgment.<sup>5</sup> However, in its motion for summary judgment, M&M argued, as it does here, that the Indemnification Clause only requires indemnification when an injury occurs *on the premises*. In effect, M&M argued that the Liability Clause, with its “on or about” provision, defined the scope of the Indemnification Clause. The trial court implicitly rejected this argument when it resolved the case in favor of One Beacon based upon the language of the Indemnification Clause alone. App. 99.

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<sup>5</sup> The superior court’s order, Appellee’s App. 100, grants One Beacon’s Motion to Amend its writ and declaration, filed in conjunction with its Objection to M&M’s Motion to Dismiss. By implication, therefore, the superior court denied M&M’s Motion to Dismiss.

This was the correct ruling because, under M&M's interpretation of §17, the Liability Clause draws a strict boundary—injuries occurring inside the boundary of the premises are the responsibility of M&M, regardless of their origin, and injuries occurring outside that boundary are the Lessor's responsibility, regardless of their origin. Such a strict geographical delineation of liability would render the subsequent Indemnification Clause unnecessary. For if the injury does not occur "on or about" the leased premises, then it simply would not matter whether the injury "[grew] out of the...use, occupation or operation of the premises," because, according to M&M, it is not required to indemnify the Lessor for such injuries. Even M&M does not dispute that an injury could occur outside the leased premises and yet still "[grow] out of" its operations. App. Brief 9. In effect, then, M&M is arguing that the Indemnification Clause is mere surplusage.

Under New Hampshire law, however, it is well established that language in a contract is presumed to have meaning, and provisions should be construed so as to give them effect. *Bellak v. Franconia College*, 118 N.H. 313, 316 (1978) (*citing* 4 Williston on Contracts §601). For this reason, the Indemnification Clause only makes sense if it is considered as a separate and independent requirement on the part of M&M. In effect, the Lease insulates the Lessor from liability for any injury occurring on or about the premises *as well as* any injury "growing out of the...use, occupation or operation of the leased premises." Although this provision certainly favors the Lessor, it is recognized that parties in commercial lease arrangements like this one may assign risks and obligations between themselves as they see fit. *Tanguay*, 127 N.H. at 578. The trial court correctly interpreted §17 of the Lease to give effect to both of its two substantive provisions by recognizing the independent obligation created by the Indemnification Clause.

B. Because the injury occurred “on or about” the leased premises, the Liability Clause exculpates the Lessor.

Even if the Court accepts, for the sake of argument, that the Liability Clause was intended to limit the Indemnification Clause, One Beacon is still entitled to judgment as a matter of law, because the accident occurred “on or about” the premises, and the Lessor bears no liability for such an accident under the Liability Clause. In advancing its argument that the Indemnification Clause only requires indemnification if the injury in question occurs “on the premises,” M&M ignores the phrase “on or about.” The words “or about” are not mere legal surplusage; they imply something more than “on”. Black’s Law Dictionary (4th Ed. 1968) (defining the phrase “on or about” as “near”).

“On or about” is intended to expand upon the precise definition of an area, and encompass not just the defined area, but the space in close proximity to it. This Court has never interpreted the words “on or about” in a modern context, let alone on facts similar to those in this case. The two cases in which the Court has interpreted similar language are comparatively antiquated, but a close reading of the two cases in context supports the conclusion that “on or about” encompasses more than merely the interior space of the leased premises.

In *Thompson v. Banks*, 43 N.H. 540, 540-41 (1862), the Court interpreted “on or about” in the context of a saw mill privilege, or a lease to operate a saw mill and its surrounding woodlands. The question was whether a provision in the privilege that permitted the holder to use logs “on or about” the property included the right to cut and use logs felled on a separate, adjacent piece of land. *Id.* at 540. The Court interpreted “on or about” in this context not to encompass land beyond the boundary of the land included in the franchise. *Id.* at 541. However, the Court, in analyzing the “on or about”

language, referred to the case of *Morse v. Pike*, 15 N.H. 529 (1844), in which it implied that “or about” would encompass an area outside a building when the leased premises was not a privilege, as in *Thompson*, but rather was a building or other improvement. *Morse*, 15 N.H. at 532; see *Thompson*, 43 N.H. at 541. Evaluating whether a mortgage on a sawmill permitted the holder to take certain lumber from the site, the Court wrote, “The mortgage included ‘all the...manufactured lumber in and about said mill.’” *Morse*, 15 N.H. at 532. After noting that “‘about,’ according to lexicographers, means ‘relating to,’ ‘concerning,’” the Court concluded, “There is no doubt that the mortgage covers all the lumber in the yard, and also all the lumber in the mill.” *Id.*

Thus the “on or about” language is dependent on context, and in the context of a leased improvement, such as we have in this case, “on or about” clearly means some area in close proximity to the leased premises themselves.

Although antiquated, these cases are supported by more recent interpretations from other jurisdictions. In *Wagner v. Regency Inn Corp.*, 463 N.W.2d 450, 456 (Mich.App. 1990),<sup>6</sup> a tenant agreed to indemnify the lessor for any liability for damages to any person “in, on or around” the premises. *Id.* at 450-52. A plaintiff was injured in the parking lot owned by the lessor after having visited the tenant’s business for commercial purposes. *Id.* The court held that the tenant was required to indemnify the lessor, stating that the indemnification language “is so broad it can only be construed as applicable to plaintiff’s claim. While plaintiff’s injury, which occurred in the parking lot, may not have occurred on the actual premises leased and controlled by [the tenant], it occurred in proximity to, *in other words*, ‘on or about’ the leased premises.” *Id.* at 456 (citations omitted, emphasis added).

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<sup>6</sup> Appellee’s App. 116-24.

Similarly, in *Hall Road Shopping Plaza, Inc. v. U and M, Inc.*, 2000 WL 33415000 at \*2-3 (Mich.App. 2000),<sup>7</sup> a plaintiff slipped and fell on the sidewalk outside a store operated by the tenant in the lessor's mall. *Id.* at \*1. When the defendant tenant submitted evidence showing that the parties intended to have separate spheres of responsibility for care and maintenance in and outside the leased premises, the court held that the broad, "in, on or about" language of the indemnification clause did not make any such distinction. *Id.* at \*2. "Although [the tenant] may have intended that [the lessor] would be solely responsible for sidewalks and common areas, the lease's indemnification provision does not distinguish between [the tenant's] store and the area outside the store." *Id.* Thus, the tenant was required to indemnify the landlord for a slip and fall that occurred on the sidewalk outside the tenant's store. *Id.*; see also *Raymond v. Bowers*, 2002 WL 1308782 (Mich.App. 2002) (holding that tenant injured while knocking ice off an awning that spanned the sidewalk in front of her leased premises was required to indemnify the lessor for any claim arising from the injury).

Modern New Hampshire case law supports this interpretation of "on or about." *Cf. Pro Con*, 147 N.H. at 472-73 (a causal connection exists between an injury and a business' operations if the injury occurs *near* the site of the business operation). In this case, Box's injury occurred just a few feet from the back door of M&M's pizza shop; and it occurred after Box was instructed by M&M to park outside the back door and to enter and exit the shop using the back door. App. 76-77, 89. After the fall, M&M ordered its employees to spread salt or sand on the area, as it regularly did to improve walking surfaces in the area immediately outside its back door for employees entering and exiting the business. App. 89-90. If this area was close enough for M&M to consider it

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<sup>7</sup> Appellee's App. 125-27.

necessary to regularly treat the surfaces, and it was less than ten feet, perhaps even just a few feet, from the back door of the shop, then there can be no dispute that Box's injury occurred "near," "in proximity to" or "on or about" the leased premises. For this reason, even if the exculpatory Liability Clause is interpreted as limiting, defining, or circumscribing the scope of the Indemnification Clause, M&M is still required to indemnify One Beacon on the facts of this case.

**IV. The Other Terms of the Lease Do Not Limit the Plain, Clear Language of the Indemnification Clause.**

The other terms and sections of the Lease do not create any ambiguity about the meaning of the Liability Clause and the Indemnification Clause. Since there is no ambiguity about the meaning of these provisions, the Court should enforce their plain meaning as the truest expression of the intent of the parties. *Pope v. Lee*, 152 N.H. 296, 301 (2005).

As noted previously, there is no ambiguity in the language of §17 itself. The Liability Clause limits the Lessor's liability as described; and the Indemnification Clause requires indemnification under certain conditions. These are independent obligations that do not conflict, and are not expressly interrelated. The Liability Clause may be given effect without compromising the effect of the Indemnification Clause, and visa versa. Furthermore, there is no language in the Indemnification Clause that supports an assumption that the Indemnification Clause grew out of the liability boundaries described by the Liability Clause. Had the two clauses not been intended to be mutually exclusive, the parties could have said so very simply by adding, to preface the Indemnification Clause, "To give effect to the foregoing allocation of liability..." or "In light of the foregoing allocation of liability...", etc. Without plain conflict between the clauses, or

conflict arising from uncertainty as to what the two clauses mean when read together, neither of which is present here, there is no ambiguity. See 11 Williston on Contracts §30:4 (4th Ed) (“Ambiguity may exist where two contractual provisions are *in conflict* with each other[.]”) (emphasis added). Absent ambiguity in the language of §17, there is no cause to turn to other provisions of the Lease to ascertain the intent of the parties.

*Foundation for Seacoast Health v. HCA Health Services of New Hampshire, Inc.*, 157 N.H. 487, 501 (2008) (only if there is ambiguity will the Court apply an objective standard to determine what the parties mutually understood the language to mean).

Instead of responding to the plain language of the Indemnification Clause, M&M attempts to divert the Court’s attention away by focusing on other sections of the Lease, including §§6, 14, and 18. In effect, M&M would like the Court to infer from these sections, none of which expressly limits §17, that there is an implied limitation on M&M’s obligation to indemnify. But it is a standard rule of contract construction that, when seeking to ascertain the intent of the parties, the express language of one clause, if unambiguous, cannot be defeated by a purported implication from another clause. See *Glick v. Chocorua Forestlands Ltd. Partnership*, 157 N.H. 240, 249 (2008) (rejecting a proposed inference when the clear and unambiguous express terms of the contract stated otherwise); *F.D.I.C. v. Singh*, 977 F.2d 18, 22 (1st Cir. 1992) (holding that a court cannot construe a clause in a way that would render another express clause nugatory). When the language of the Indemnification Clause is as “plain as a pikestaff,” *id.*, as it is here, limiting its scope by a dubious inference from other clauses would strip it of its meaning and make its language mere surplusage. See *Commercial Union Assurance Co. v. Brown*

Co., 120 N.H. 620, 623 (1980) (noting that it is impermissible to interpret a contract in a manner that would render an express indemnification clause to be surplusage).

M&M argues that §18 of the Lease “only requires M&M to obtain liability insurance ‘on the leased premises[,]’” implying that the scope of the insurance requirement under the Lease sets limits on the scope of the Indemnification Clause. App. Brief 10. But no express language in §18 even refers to §17 or its contents:

The Lessee shall, throughout the term hereof, procure and carry, at its expense, comprehensive liability on the leased premises and the Facilities thereon with a responsible insurance company authorized to do business in New Hampshire. Such insurance shall be carried in the name of and for the benefit of the Lessee and the Lessor with the Lessor named as an additional insured; shall be written on an “occurrence” basis; and shall provide coverage of at least One Million Dollars in the case of death of or injury to one person; at least Two Million Dollars in case of death of or injury to more than one person in the same occurrence; and at least Five Hundred Thousand Dollars in case of loss, destruction or damage to property. A single limit policy or policies in the total amount of Two Million Dollars shall be deemed in compliance with the preceding sentence. The Lessee shall furnish to the Lessor a certificate of such insurance, which shall provide that the insurance indicated therein shall not be canceled without at least ten days prior written notice to the Lessor.

Lease §18, App. 29 (numbered dollar amounts omitted).

Therefore, the superior court correctly observed that the insurance requirement and the Indemnification Clause are two separate and independent obligations, and that §18 required M&M to carry a base level of insurance. App. 101-02 (“[T]he Lease requires that M&M carry liability insurance for a class of incidents that may or may not include all of the potential harms for which M&M is obligated to indemnify Centercorp.”). The Lease’s indemnification obligations may have been broader than the insurance requirement’s mandated scope, but this does not render them meaningless. *See id.* There is no incorporation by reference, nor, in fact, any express reference at all to the

Indemnification Clause in the language of §18. Without an express intention by the parties to link these two clauses together and limit the indemnification clause by the terms of §18, the Court should not imply such an intention merely because M&M claims that such a limitation was intended. 11 Williston on Contracts §30:4 (“[C]ourts will not stretch...words in a contract to create ambiguity when their ordinary meaning leaves no room for such doubt.”). There must be some basis for such an inference, and the language of §18 provides no support, express or implied, for such an inference.

The case of *Brown Co.*, 120 N.H. at 624, is instructive. In that case, the Court pointed to the scope of the insurance clause of a service contract as evidence of the intended scope of the indemnification obligations of the subcontractor under the contract. *Id.* at 622-24. The Court noted that the insurance clause “required the [subcontractor] to obtain specific insurance to protect against *all liabilities assumed under the contract*. Such a contractual stipulation supports a finding that the parties intended the indemnity agreement to cover negligence on the part of the owner.” *Id.* at 624. There was no way to fulfill the terms of the insurance clause of the contract in *Brown Co.* without reference to the other clauses of the contract to know what the subcontractor needed to insure against. Accordingly, the insurance clause in *Brown Co.* was inextricable from the other clauses of the contract. By contrast, the insurance clause in §18 of the Lease is fully self-contained, and can be completely and clearly understood without reference to any other portion of the Lease. §18, App. 29. Indeed, the sentence, “A single limit policy or policies in the total amount of Two Million Dollars shall be deemed in compliance with the preceding sentence[,]” demonstrates that when the parties wanted to make sentences, clauses or sections of this Lease co-referential, they knew how to do so. *Id.*; *see*

*Merrimack School Dist.*, 140 N.H. at 12 (indemnification clause referred to insurance clause of contract between school and bus company to define scope of indemnification obligation).

M&M would also like the Court to conclude that M&M's indemnification obligation stops at the edge of the leased premises because §6(a) requires the Lessor to repair the exterior of the building; §7 requires M&M to repair the interior of the leased premises; §11 requires M&M to pay utilities for the leased premises; and §14 requires the Lessor to maintain the common areas of the mall outside the leased premises. But these provisions only allocate the division of maintenance responsibilities. It is well established under New Hampshire law that maintenance provisions like this do not circumscribe the scope of otherwise clearly expressed legal responsibilities under the Lease. *Tanguay*, 127 N.H. at 578 (“[A] lessor and lessee in a lease of commercial real estate may agree on which party will maintain the leased premises and which party will be liable for injuries caused by improper failure to maintain.”). The superior court correctly ruled, therefore, that, “the party with maintenance responsibilities is not determinative of the indemnification responsibilities of the parties. The two responsibilities are independent, and both parties must be free to allocate each responsibility among themselves.” App. 104.

Interestingly, M&M does not challenge the superior court's analysis of §24 of the Lease, part of which reads: “During the six months next preceding the expiration of this Lease, the Lessor may keep affixed to any suitable part of the outside of the building or the leased premises a notice that the leased premises are for sale or rent.” *Id.*, App. 33. The court wrote:

[Section 24] likewise does not support M&M's contention of a barrier of indemnification liability at the threshold of the leased premises. To the contrary, the fact that the parties felt the [the Lessor] had to contract with M&M for the time-sensitive right to 'keep affixed to any suitable part of the outside of the building or the leased premises a notice that the leased premises are for sale or rent' indicates that the lease to M&M included some dominion over the exterior of the building as well as the interior 1,088 square foot leased premises. The implied extension of M&M's dominion and control from the leased premises outwards undermines M&M's argument that the Lease intended to limit M&M's indemnification liability to incidents occurring within the leased premises exclusively.

App. 102. Here, the superior court's inference is clearly warranted by the quoted language of §24. If the Indemnification Clause did not require indemnification for injuries that occurred outside the leased premises, then the area of M&M's control, as shown by this sentence of §24 as well as M&M's regular habit of treating the area behind its back door for with salt to prevent slipping, App. 89-90, would extend beyond its obligation to indemnify. Such an interpretation would be inconsistent with the "broad, general and comprehensive" language of the Indemnification Clause, and would appear to completely reverse the overall intent of the Lease to insulate the Lessor from any claims arising from the presence of M&M as a tenant. *See Carter*, 102 N.H. at 471.

M&M argues that "[t]he purpose of referencing the insurance provision, and the other provisions of the [L]ease, is due to the court's obligation to examine the entirety of the contract as well as the situation of the parties" and to examine "how those provisions affected the 'intent' of the parties." App. Brief 11. But requiring the court to consider the "whole context" of a contract "even although the immediate object of inquiry be the meaning of an isolated clause" does not mean that the court must draw inferences or imply limitations that are not sustained by the plain language of the various terms of the contract. *Smith v. Furbish*, 68 N.H. 123, 129 (1894). The sections of the Lease referred

to by M&M in no way alter the clearly articulated, unambiguous obligation of the Indemnification Clause. Accepting M&M's argument would require the Court to render meaningless the Indemnification Clause's mandate that M&M indemnify the Lessor for any injury "growing out of the...use, occupation or operation of the leased premises." M&M does not dispute that an injury can "[grow] out of the use" of the premises and yet not be within the strict confines of the premises. Permitting unrelated sections of the Lease to limit this obligation only to injuries that occur *on the leased premises* would contradict the Court's obligation to give effect to all the terms of a contract, and would be unlawful. *West v. Turchioe*, 144 N.H. 509, 516 (1999).

V. **The Intent of the Parties Was to Prevent the Lessor from Incurring Any Costs Whatsoever from Injuries Related In Any Way to M&M's Business Operations.**

M&M's catalog of provisions in the Lease that purportedly evince an intention of the parties to restrict the scope of M&M's liability to injuries occurring on the leased premises ignores the best evidence of the parties' intentions with respect to risk allocation: the Liability and Indemnification Clauses of §17. The clear intention of the language of the Indemnification Clause to require M&M to indemnify the Lessor for any injury or claim "growing out of" its "use, occupation or operation of the leased premises" demonstrates an intention to protect the Lessor from all possible liability-related costs it could incur because M&M was operating a business on its property. Not only does the Liability Clause contractually attenuate the Lessor's liability for injuries occurring on the premises; the Indemnification Clause assures that the Lessor will still be protected from an injury that might not fall within scope of the protection of the Liability Clause—*i.e.*, an injury where the Lessor could have legal liability under the Lease—but that should

still be M&M's responsibility because the injury would not have occurred if M&M were not operating a pizza restaurant on the leased premises.

**VI. M&M Is Required to Indemnify One Beacon Because It Had Adequate Notice of and Opportunity to Participate in the Settlement Conference in the Underlying Suit, but Declined to Do So.**

M&M relies upon *Morrisette v. Sears, Roebuck & Co.*, 114 N.H. 384, 388 (1974) to argue that M&M did not have proper notice of the settlement conference, or receive an opportunity to approve the settlement or defend the case, and hence, that One Beacon must show it had actual liability to pay for Box's injuries in order to be entitled to indemnification by M&M. App. Brief 11-13. In other words, M&M would like the Court to require that One Beacon "prove the case against [it]self" before giving effect to the Indemnification Clause. *Morrisette*, 114 N.H. at 388. Such a result is not supported by *Morrisette*, and the Court should reject this argument.

A. *Morrisette* involved a common law indemnification claim and its principles have not been applied in a case like this where the indemnification obligation is contractual in nature.

*Morrisette* describes the procedural obligations of an indemnitee seeking indemnification in a *common law* or *implied* indemnification action. 114 N.H. at 387-88. In *Morrisette*, a tenant was injured while using a lawn mower owned by her landlord and manufactured by Sears. *Id.* at 385. The tenant sued the landlord for negligence; and the landlord, in turn, sued Sears for negligence, breach of warranty, and strict product liability. *Id.* During the trial, the action between the tenant and landlord was settled. *Id.* at 386. However, the third-party defendant maintained an action for indemnification against Sears. Sears argued that it had not been given an opportunity to defend against liability or approve the settlement proposals. *Id.* at 387. In determining the burden of

proof in a third-party plaintiff indemnification suit where the original action has been settled, the Court highlighted the following standard:

The indemnitee's unilateral acts, albeit reasonable and undertaken in good faith, cannot bind the indemnitor; notice and an opportunity to defend are the indispensable due process satisfying elements ... If the indemnitor approves the settlement or defends unsuccessfully against the original claim, he cannot later question the indemnitee's liability to the original claimant. If the indemnitor declines to take either course, then the indemnitee will only be required to show potential liability to the original plaintiff in order to support his claim over against the indemnitor. In the event that no offer is made to the indemnitor to either approve or defend, then the indemnitee should have the burden of showing actual liability to the original plaintiff.

*Id.* at 389 (quotations and citations omitted).

But in *Morrisette*, Sears' obligation to indemnify flowed from its own negligence and/or strict liability in manufacturing its lawnmower. *Id.* at 385; see *Dunn v. CLD Paving, Inc.*, 140 N.H. 120, 123 (1995) (distinguishing between contractual and implied indemnity); *Rathburn v. W. Mass. Elec. Co.*, 479 N.E.2d 1382 (Mass. 1985) (same). In an implied indemnification situation like *Morrisette*, the party seeking indemnification is saddled with responsibility to the injured party without having been actively negligent—the property owner in *Morrisette* had no way of knowing that the lawnmower it purchased contained a dangerous defect. 114 N.H. at 385. Therefore, the indemnification is based upon principles of equity. See Am. Jur. Products Liability §1741 (2d Ed. 2009) (citing 41 Am. Jur. 2d, Indemnity, §29). By contrast, contractual indemnity is not contingent on the negligence of the indemnitor or the indemnitee, but is predicated on the mutual promises made in an agreement. *Rathburn*, 479 N.E.2d at 1385. Indeed, it has been firmly established that contractual indemnification is permissible even in cases of the indemnitee's own negligence. *Tanguay*, 127 N.H. at 577; *Merrimack Sch.*

*Dist.*, 140 N.H. at 13. Because *Morrisette* involved a common law or implied indemnification, the notice standards it enunciates have never been applied in a contractual indemnification scenario like the one in this case. For this reason, *Morrisette* is inapplicable.<sup>8</sup>

- B. The letter from Centercorp's counsel to M&M requesting M&M's attendance at the settlement conference more than fulfills the requirements of due process.

More importantly, however, even if *Morrisette* does apply, One Beacon has fulfilled its notice requirements in both letter and spirit. Under *Morrisette*, the indemnitee is required to provide the indemnitor with notice and an opportunity to defend the case. *Id.* at 389. M&M argued that it was sent a letter inviting it to attend the mediation by the Lessor's attorneys, and that this letter was insufficient to provide it with adequate notice of its obligations under *Morrisette*. App. Brief at 12. This argument ignores the specific language of the letter, which informed M&M of the existence of the lawsuit, M&M's obligation to indemnify the Lessor under the Lease, and the Lessor's intent to seek indemnification through a third-party action if M&M declined to attend the settlement conference and work out any dispute it may have with the Lessor about its legal obligations. App. 91. Specifically, after requesting M&M to attend the mediation *with authority to contribute money to the resolution of the case*, the Letter states:

[U]nder ¶17 of the Lease, M&M agreed to indemnify [the Lessor] for injuries and damages to any person "*happening on or about the leased premises...growing out of the condition, maintenance...use, occupation or operation of the leased premises or the facilities thereon...*". Thus, M&M

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<sup>8</sup> Although M&M argues that the inapplicability of the notice requirements of *Morrisette* would make "[i]ndemnitees...free to settle cases for any amount they wished and then...simply collect the judgment pursuant to the contract," such a scenario is highly unlikely. The uncertainties of litigation, and of whether the conditions for indemnification under any given agreement are met, place a pressure on indemnitees to approach any settlement agreement conservatively in the event that the indemnification they are expecting is not realized.

is contractually required to indemnify [the Lessor] for its legal costs and damages incurred in defending this case.

Although it appears that M&M Pizza would have no direct liability to the plaintiff as an employer who provided worker's compensation benefits, M&M Pizza is liable to [the Lessor] under both contribution and indemnification theories. [The Lessor] intends to bring a third party action against M&M Pizza to seek recovery of any amounts it is required to pay Mr. Box, either by settlement or by verdict. Your attendance at the mediation would give you the opportunity to participate in the settlement process and to address the legal issues between [the Lessor] and M&M Pizza.

App. 121-22. Upon receipt of this letter, M&M called the Lessor and reiterated its position that it had no liability for Box's injury under the Lease, and would not attend the settlement. App. 91. M&M effectively "left the matter" to the Lessor, and should be bound by the Lessor's subsequent settlement decisions. *See Morrisette*, 114 N.H. at 389 (citing *Crawford v. Pope & Talbot, Inc.*, 206 F.2d 784 (3rd Cir. 1953)).

M&M complains that "it is undisputed that M&M was not provided the opportunity to take over the defense of the case. Moreover, it is undisputed that M&M was not provided the opportunity to approve the settlement agreement." App. Brief 12. This is absurd. While this letter may not have used the specific words, "This is a formal tender of defense," there is no question that M&M, upon receiving this letter, was on notice of the claim, the settlement conference at which it would have an opportunity to approve the settlement or, if it chose, defend the case, and the Lessor's intent to compel it to pay pursuant to the Indemnification Clause if it chose not to participate and resolve any disputed issues about payment with the Lessor. Surely this fulfills the requirements of *Morrisette* and the "basic tenets of due process" referred to by M&M in its brief. To require more would be a triumph of form over substance.

## CONCLUSION AND REQUEST FOR RELIEF

The plain language of the Indemnification Clause of the Lease requires M&M to indemnify One Beacon for damages and costs incurred as a result of the injury to Nathaniel Box. There is no question that Box's injury "[grew] out of" M&M's "use, occupation or operation of the leased premises," and the broad, general and comprehensive scope of this language is not limited by the words "on the leased premises," nor by the Liability Clause, nor by the other provisions of the Lease. The injury to Box also occurred "on or about" the leased premises, contractually attenuating the Lessor's liability under the Liability Clause. Therefore, the superior court's Order correctly required M&M to indemnify One Beacon.

In addition, M&M had full and fair notice of its opportunity to attend the settlement conference in the underlying litigation and thereby to approve the settlement or reject the settlement and choose to defend the case. It did so knowing that the Lessor intended to seek indemnification pursuant to the Lease, and that attending the settlement conference would give it the opportunity to deal with any dispute it may have with the Lessor over the scope of its indemnification obligations. By leaving the settlement of the underlying matter to the Lessor and One Beacon, M&M has waived its right to contest the terms of the settlement, or the Lessor's liability to the underlying plaintiff.

For these reasons, the Court should affirm the superior court's Order.

WHEREFORE, One Beacon Insurance requests that the Court:

- A. Affirm the superior court's denial of M&M's motion for summary judgment; and

- B. Affirm the superior court's grant of One Beacon's counter motion for summary judgment; and
- C. Grant such other and further relief as it deems to be just and necessary.

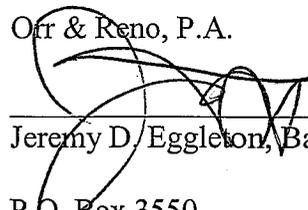
Respectfully submitted,

ONE BEACON INSURANCE

By and through its attorneys,

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