IN THE SUPREME COURT OF OHIO

WILDCAT DRILLING, LLC	)	CASE NO. 2019-0222
	)	
Appellee,	)	On Appeal from the Seventh District Court of
	)	Appeals and Court of Common Pleas of
	)	Mahoning County
v.	)	
DISCOVERY OIL AND GAS, LLC	)	
	)	
Appellant.	)	

MERIT BRIEF OF APPELLEE,

WILDCAT DRILLING, LLC

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INTRODUCTION

This appeal involves a claim of contractual indemnity. Though the contractual language used for the parties' indemnity clause is common, the facts of this case are not at all common.

Here, a contractor (Appellee, Wildcat Drilling, LLC, herein, "Wildcat") was hired to drill an oil and gas well pursuant to a drilling contract. A well was drilled to completion and a $190,000 invoice was submitted for payment to the well owner (Appellant, Discovery Oil and Gas, LLC, herein, "Discovery"). Around the time the invoice was received, Discovery received notice from the Ohio Department of Natural Resources (herein, "ODNR") that it believed a violation of law had occurred during the drilling process (introduction of brine into the well that might affect local drinking water) and that a fine might be imposed. Pursuant to the Ohio Revised Code, the maximum total fine for the violations alleged was $10,000.

Section five of the Drilling Contract provided that, in such circumstances, Wildcat would "*assume full responsibility for and defend, indemnify, and hold [Discovery] harmless*…," however Wildcat was robbed of any opportunity to do so as Wildcat was unaware of the ODNR's concerns. In fact, rather than requesting, or even allowing Wildcat to undertake a defense of the ODNR's claims, Discovery took it upon itself to negotiate a settlement with the ODNR concerning the alleged violation, using its own attorney. It did this without any notice to Wildcat. Indeed, Wildcat was never made aware of the alleged violation until *after a deal had already been struck between the Discovery and the ODNR.*

To say that Discovery's approach to the ODNR's allegations was lackluster is an understatement. Knowing that it was simply going to deduct the amount of the fine from Wildcat's pending bill, Discovery did not argue with the ODNR, did not ask for additional information, nor present any meaningful defense. Instead Discovery agreed to a $50,000 fine that was suggested by the ODNR, which was five times greater than the maximum permitted by

statute. Discovery never reached out to Wildcat during this process to see whether there might be a defense to the ODNR's alleged violation of law (and there was such a defense); it simply, "rolled over."

Following the settlement with ODNR, Discovery refused to pay any portion of Wildcat's pending bill for $190,000. Finding itself without alternative, Wildcat sued Discovery to collect on its invoice. Wildcat argued at the trial and appellate levels that it was not fair, equitable, or in accordance with the contract for Discovery to deduct the fine as well as Discovery's attorney's fees from a bill which was otherwise not in dispute. In support of this argument, Wildcat relied primarily upon *Globe Indemn. Co. v. Schmitt*, 142 Ohio St. 595, 595, 53 N.E.2d 790 (1944).

Under *Globe*, Discovery's claim for indemnity fails for two reasons. First, Discovery needed to provide Wildcat notice of the ODNR's alleged violation so that it could defend the same. Second, Discovery's settlement with the ODNR needed to be a reasonable one.

The proposition of law accepted for review by this Court is whether *Globe* applies to "contractually-negotiated indemnification agreements." That question should be answered in the affirmative. However, it is readily conceded that parties could draft a contract in such a manner that varied from the common law requirements of *Globe*. In this case, the parties' contract was not drafted in such a manner.

STATEMENT OF FACTS

A. The Drilling Contract and Associated Invoice

On December 19, 2014, Wildcat and Discovery entered into a drilling contract (Exhibit A to Plaintiff's Complaint, herein, the "Drilling Contract") under which Wildcat would drill the J Klick #2 well for Discovery, who would go on to own and operate the well. Wildcat drilled the

well and submitted an invoice for its work in drilling the J. Klick #2 well. The invoice totaled $190,350.37, was dated 2/13/2015, and was attached to the Complaint as Exhibit B. It was received by Discovery within a few days of that date according to E. Michael Ellenis, a geologist and vice president of Discovery whose deposition was attached to Plaintiff's Motion for Summary Judgment as Exhibit B. (Ellinis Depo. 50-51)

The Drilling Contract provided that payment of the bill was due within ten days of submission of the bill. (Drilling Contract at 5.1) That same contract provision indicated that if any portion of a bill was disputed, written notice of the dispute must be given to Wildcat, and any portion of the bill that was not in dispute must be paid within the ten day window. The evidence before the trial court made clear that no payment was made within the required time frame, nor was timely, written notice of any dispute given.

Discovery readily admitted that it failed to pay Wildcat's invoice because it received notice from the ODNR that rules had allegedly been broken during the drilling process and that fines might be imposed. More specifically, an ODNR inspector sampled water from the plastic lined drilling pit located near the well and found high salinity, causing him to believe that brine had been introduced into the well during the drilling process. Mr. Ellinis conceded that, other than the ODNR brine issue, he had no reason to dispute the invoice or claim that it was unreasonable. (Ellinis Depo. p. 50-51)

B. Discovery's Intentional Refusal to Notify Wildcat of the Alleged ODNR Violation

As the owner of the well, Discovery received notice of the alleged violation from the ODNR. Mr. Ellenis and his counsel met with the ODNR in Columbus on March 3, 2015, about settling the claimed violation (Ellinis Depo. 16-18, 57). Discovery did not involve Wildcat in the meeting with the ODNR, did not dispute the ODNR's claimed version of events, and offered no

evidence to counter the same. (Ellinis Depo. p. 41-42). Indeed, Discovery intentionally refrained from notifying Wildcat about the proceedings with the ODNR, as it felt having Wildcat involved "*would only escalate tensions with [the ODNR] and it would be counter-productive to negotiating a favorable settlement*." (Affidavit of E. Ellenis at paragraph 6) Mr. Ellinis further testified that, at the March 3, 2015 meeting, Discovery agreed to pay a $50,000.00 fine that had been suggested by the ODNR. He did not suggest a lower number. (Ellenis Depo. p. 43)

Attached to Wildcat's Motion for Summary Judgment as Exhibit C was an affidavit of Rick Liddle, an employee of Wildcat. Therein, Mr. Liddle indicates that Wildcat's first knowledge of any Notice of Violation by the ODNR concerning the brine issue did not occur until March 23, 2015, being weeks after Defendant had met with the ODNR in Columbus and agreed to the $50,000.00 fine.

Additionally, Mr. Liddle confirms in his affidavit that Defendant has never made payment on its invoice, and that no objection to the invoice was received until well outside the time prescribed by the Drilling Contract (affidavit of Richard Liddle). The first notice Wildcat received was via a letter from defense counsel on April 23, 2015 (attached as an exhibit to Mr. Liddle's affidavit). The letter indicated that its purpose was "*to put you on notice of the breach of the above described contract*…." The letter also indicated that Defendant "*has been charged by the State of Ohio with a failure of compliance fee of $50,000*…." Additionally, the letter indicated that Defendant was demanding "*indemnification and protection as a result of*" Wildcat's alleged breach of the contract.

C. Wildcat's Potential Defenses to the Alleged ODNR Violation

As to whether or not Wildcat violated rules and regulations concerning the use of brine at the drill site, evidence was submitted to the trial court in the form of two deposition transcripts:

the first from Wildcat's drilling supervisor, John Howell, and the second, Wildcat's geologist, Richard Liddle.

1. The Improper Test Location Defense

John Howell, a long time drilling supervisor for Plaintiff, explained that he was required to have brine on site for the drilling of the well: that because of the cold temperature he circulated brine through the mud pump to keep it from freezing; that it was legal to use brine in that manner, so long as the pump was circulating through the secondary "rat hole" that has been lined with an impervious coating; that there was a ditch that ran from the well to the rat hole to the pit; and it was legal to place brine in the pit, since it is lined with plastic. Understanding that these are rather technical issues, the foregoing is to say that the mere presence of brine on site is not only legal but required by law. Further, Wildcat should have been given the opportunity to cross examine the ODNR inspector as to the location of his sampling. (Howell depo at p.42).

2. The Impossible Timeline Defense

John Howell also pointed out that drilling (the sole activity for which Wildcat was responsible, and merely one step in the process of completing an oil and gas well) had stopped at 5:45 in the morning, at which time Wildcat moved off of the well and a separate contractor moved on. The inspector was not even called to come to the site until 7:00 a.m., lived approximately one hour away, and was driving in the middle of a blizzard. To put it simply, he could not have taken his sample when Wildcat was drilling (and in control of the well and associated fluids). With these facts, John Howell felt that the inspector could have been mistaken when he concluded that brine was used in the drilling process. (Howell depo at p. 42-43)

Richard Liddle bolstered Mr. Howell's testimony in his own deposition. He explained, at page 63 of his deposition, that he had reviewed various records kept contemporaneously with various aspects of work on the well, which effectively create a time log of all operations on the drill site. Based upon the times noted in such records, when the inspector took his sample, another company hired by Discovery (and not associated with Wildcat) was in control of the well using the drilling rig and attached equipment to pump cement into the well. Importantly, Wildcat is not responsible for the operations of a third-party company hired by Discovery. Such company could have introduced brine into the well bore. (Liddle depo, page 56 - 57).

D. The Lack of Physical Damage

Notably absent from the record is any evidence as to contamination or other damages stemming from the alleged brine infraction. In the four- and one-half years since the alleged incident, no issue has been raised by the landowner, local government, Environmental Protection Agency, or other government agencies. Additionally, the ODNR did not require any sort of remediation in its settlement with Discovery.

E. Statutory Framework of the Alleged ODNR Violations

1. Per the Ohio Revised Code, the Maximum Allowable Penalty in this Matter was $10,000.00.

O.R.C. 1509.33 sets forth the "Civil Penalties" that may be assessed for violations of the statutes and rules in play here. Part (A) says: "Whoever violates sections 1509.01 to 1509.31 of the Revised Code, or any rules adopted or orders or terms or conditions of a permit or registration certificate issued pursuant to these sections for which no specific penalty is provided

in this section, shall pay a civil penalty of not more than ten thousand dollars for each offense (emphasis added)."

Wildcat stands accused of the single act of using brine to drill the surface hole of the J. Klick well. The Defendant laid out in its Counterclaim, at Paragraphs 34-42, the various statutes and administrative rules that it believes Wildcat violated by allegedly drilling with brine. The statutes mentioned therein all fall between R.C. 1509.01 and 1509.31 referenced above. The administrative rules cited are enacted by the Chief of the ODNR per authority granted in Chapter 1509. All relate to usage of brine during drilling. Under R.C. 1509.22(A) the fine should have been no more than $10,000.

The civil penalty section quoted above does contain language indicating that it applies only to violations "for which no specific penalty is provided in this section." The only statute or rule that Wildcat is charged with breaching that has a "specific penalty" is R.C. 1509.22(A) – placing brine into the ground water. The specific penalty for that offence is no less than $2,500, but no more than $10,000. See 1509.33(D). The effect of 1509.33(D) is that a minimum of $2,500 must be assessed, whereas under 1509.33(A) no minimum fine is required. Under both statutes, *the maximum is $10,000*. The fine Discovery agreed to in this matter was not only unreasonable, it was *five times greater than allowable by law*. Had Wildcat been afforded the opportunity to defend itself, it certainly would have researched the above and would have been able to mitigate the $50,000.00 fine.

2. Testimony as to Prior ODNR Violations

Drilling oil and natural gas wells is a highly technical operation in a highly sophisticated industry. Like the construction industry, despite the best efforts of industry professionals, accidents do happen. Mr. Liddle discussed during his deposition (pages 56-57) two prior

situations he was familiar with which involved brine contamination. Mr. Liddle was directly involved in one such incident while working for an entirely different company. Regrettably, despite best efforts and compliant industry practices, a drilling pit liner was *accidentally* torn, and drilling fluids migrated into a nearby spring from which the landowner took water for his home. After this incident occurred, Mr. Liddle self-reported to the ODNR and followed their instructions to the letter. The ODNR required Mr. Liddle (and his company) to temporarily supply the homeowner with water until the spring recharged itself, and no fine of any sort was assessed.[1] Discovery's insistence that Wildcat is a repeat offender of this statute is categorically false and a misrepresentation of the facts in evidence. Wildcat has never been cited with an infraction of this nature and vehemently maintains its innocence in this case. The second violation of which Mr. Liddle was familiar was particularly egregious. A third-party company (not associated with either Wildcat or Discovery) *intentionally piped brine into a nearby creek.* Despite this open, intentional and nearly unthinkable act, a fine of only $10,000 was assessed by the ODNR with $7,500 being suspended. The fine Discovery agreed to in this matter was absolutely unreasonable given the ODNR's prior dealings, particularly in light of the lack of physical damage. Importantly, had Wildcat been afforded the opportunity to defend itself, it would have brought this knowledge to the negotiations with ODNR.

F. The Indemnification Language

Below is summary of the critical events for the Court's convenience:

[1] This is the incident that Discovery describes in its brief as proving that Wildcat's "illegal actions" show it to be a "repeat offender."

January 7, 2015	Alleged improper use of brine discovered by ODNR inspector[2]
Pre March 3, 2015	Discovery received notice of ODNR's investigation[3]
March 3, 2015	Discovery met with ODNR and agreed to $50,000 fine[4]
March 23, 2015	Wildcat heard through third party about ODNR brine investigation[5]
April 9, 2015	Discovery wrote check to ODNR[6]
April 15, 2015	Discovery signed Compliance Notice (a settlement agreement)[7]
April 23, 2015	Discovery sent letter to Wildcat demanding indemnification[8]

The parties' Drilling Contract, provides at Item 17.9.1 (emphasis added):

> [Wildcat] shall assume full responsibility for and shall defend, indemnify, and hold [Discovery] and its joint owners harmless from and against any loss, damage, expense, claim, fine and penalty, demand, or liability for pollution or contamination, including control and removal thereof, that originates on or above the surface of the land or water from spills, leaks, or discharges of motor fuels, lubricants, and oils; pipe dope; paints and solvents; ballast, bilge, sludge, and garbage; and other liquids or solids in possession and control of [Wildcat]. These obligations are assumed without regard to the negligence of any party or parties.

Pursuant to the above timeline, Wildcat did not become aware of the ODNR's citation against Discovery until weeks after the March 3 meeting between Discovery and the ODNR. It was at that meeting that Discovery admits a $50,000 fine was suggested by the ODNR and agreed to by Discovery. In fact, Discovery admitted that it *intentionally* did not notify Wildcat about the meeting in Columbus, believing it would be counterproductive. (Affidavit of E. Ellenis at paragraph 6)

[2] Compliance Agreement paragraph 4; to Defendant's Motion for Partial Summary Judgment, Exhibit B-4.
[3] Deposition of E. Michael Ellenis pages 16-18; Plaintiff's Motion for Partial Summary Judgment, Exhibit B
[4] Deposition of E. Michael Ellenis page 50; Plaintiff's Motion for Partial Summary Judgment, Exhibit B
[5] Deposition of Rick Liddle, page 27-29; Plaintiff's Motion for Partial Summary Judgment, Exhibit C
[6] Compliance Agreement and executed check; Defendant's Partial Motion for Summary Judgment Exhibit B-4.
[7] Compliance Agreement and executed check; Defendant's Partial Motion for Summary Judgment Exhibit B-4.
[8] Affidavit of Rick Liddle, Plaintiff's Motion for Partial Summary Judgment, Exhibit C.

These facts make clear that Discovery intentionally prevented Wildcat from assuming "full responsibility for" and from "defending" the claims of the ODNR. Instead, and contrary to the language of the contract, Discovery assumed responsibility for and defended the ODNR's claims itself. In doing so, it violated the terms of the parties' agreement and violated the equitable rules for indemnity claims founded upon settlements established by this Court in *Globe Indemn. Co. v. Schmitt*, 142 Ohio St. 595, 53 N.E.2d 790 (1944).

ARGUMENT AGAINST PROPOSITION OF LAW

Proposition of Law:
Contractually-negotiated indemnification clauses are not subject to the common law *Globe* indemnification requirements.

Stated simply, Wildcat's position in this case is that, with limited exceptions, persons in Ohio are free to craft the contract they desire. Where contracts are unambiguous, their language should be enforced by a reviewing Court. When they are ambiguous, common law principles should be used to determine the contract's terms. Importantly, there is no requirement that a contracting party opt-in to common law principles; instead, a firm opt-out is required.

In this matter, the parties agree that the applicable language in the Drilling Contract appears at Item 17.9.2: *"[Wildcat] shall assume full responsibility for and shall defend, indemnify, and hold [Discovery] … harmless from and against any loss, damage, expense, claim, fine and penalty … for pollution or contamination …*."

Importantly, this language totally fails to reference what terms apply as far as giving notice of any claim or as to how settlements might be reached with a party making a claim. The language does not say, for example: "*An indemnitee may, without notice to indemnitor, settle*

any claim lodged against it under any terms it, in its sole discretion, deems appropriate and may recover such settlement payment in full, plus attorney's fees." Neither does it say, "*The parties agree that the notice requirement of Globe do not apply*," which would equate to the above-referenced waiver of implied covenants. Here, no opt-out was indicated nor intended.

Instead, the Drilling Contract indicates that Wildcat "*shall … defend… and hold Discovery harmless*" from claims. One must ask -- how was Wildcat supposed to fulfill its contractual duty to "defend" Discovery, when it was never made aware of the ODNR's claim until after a $50,000 deal had been struck? How was it proper for Discovery to select its own counsel to defend it in such situation and later make a claim for said counsel's fees? How was it fair for Discovery to agree to a $50,000 fine (which it then attempted to deduct from its pending bill) when the wrongful act alleged (using brine during the drilling process) carried a maximum fine of $10,000? How was it right that Wildcat's legitimate defenses to the ODNR's claims were never able to be presented? Importantly, the word "defend" firmly opts the parties into the *Globe* requirements.

The facts of this case demonstrate why indemnity claims founded upon a settlement (as opposed to an actual judgment) require additional scrutiny before they can be validated. Settlements that fail to involve the party who ultimately must pay for them can lead to unjust results. For this reason, this Court held, in a case following *Globe* (emphasis added):

> Where the operator of an automobile is covered with respect to negligent operation thereof by two insurance policies issued by different companies one of which policies provides primary coverage and the other secondary coverage and the company which carries the primary coverage wrongfully disclaims coverage and refuses to defend or participate [***9] in settlement of an action which is brought against the insured, such disclaimer is made at its peril and the company which carries the secondary insurance may, *after reasonable notice to the other company*, effect reasonable settlement of the action and, upon general equitable principles, may recover from the carrier of the primary coverage the amount so expended within the limits of that policy.

> *Aetna Cas. & Sur. Co. v. Buckeye Union Cas. Co.*, 157 Ohio St. 385, 385, 105 N.E.2d 568 (1952) Syllabus 1

In *Aetna*, the defendant's secondary insurer brought an indemnity action against the defendant's primary insurer seeking to recover funds the secondary insurer paid to settle an action brought against the parties' insured. The primary insurer refused to defend the suit brought against the insured and the secondary insurer stepped in to defend. It later settled with the plaintiff, after giving notice of the pending settlement to the primary insurer. This Court determined that the indemnity claim was valid and owed by the primary insurer because it had been given advance notice of the settlement and the settlement amount was reasonable.

Globe also involved an indemnity claim founded upon a settlement with an injured party. This Court established a common law rule that applied to parties who had settled a claim and who later sought indemnity from the wrong actor. In sum, Globe required that such party: (1) was itself legally liable for the injury and not a volunteer; (2) had offered the indemnitor a chance to be involved in the settlement process by giving notice; and (3) reached a reasonable settlement with the injured party. These factors are limited to indemnity claims founded upon settlements with the party asserting a claim.

Although *Globe* did not involve a contractual indemnity claim, for decades, numerous Ohio appellate courts have followed the commonsense rule set out in *Globe* when reviewing contractual indemnity claims. Such cases would include: *Total Quality Logistics, LLC v. JK & R Express, LLC*, Clermont No. CA2018-05-034, 2019-Ohio-20 (12th Dist.); *Brown v. Gallagher*, 2013-Ohio-2323, 993 N.E.2d 415 (4th Dist.); and *Portsmouth Ins. Agency v. Med. Mut. of Ohio*, 188 Ohio App.3d 111, 2009-Ohio-941, 934 N.E.2d 940, (4th Dist.); *Ozko, Inc. v. Isaacson Constr.*, Summit No. 17078, 1995 Ohio App. LEXIS 5085, (Nov. 15, 1995) (9th Dist.); *Jones v.*

Bank One, Hamilton APPEAL No. C-980097, 1998 Ohio App. LEXIS 6232, (Dec. 24, 1998) (1st Dist) ; *Lubrizol Corp. v. Michael Lichtenberg & Sons Constr., Inc.*, Lake No. 2004-L-179, 2005-Ohio-7050 (11th Dist.); and *Lopresti v. Transohio Savs. Bank*, Cuyahoga NO. 60667, 1992 Ohio App. LEXIS 2911, (June 4, 1992) (8th Dist.). The Seventh District, via its ruling in the instant matter, is also in accord.

It should be noted that, in support of the 3-part test set out in *Globe*, this Court cited to a single case -- *Tugboat Indian Co. v. A/S Ivarans Rederi*, 334 Pa. 15, 16, 5 A.2d 153 (1939). That holding continues to be the law in Pennsylvania, see, e.g. *Ferraro v. Turner Constr. Co.*, 30 Pa.D.&C.5th 423, 430 (C.P.2013) and *In re Suh*, Bankr.D.N.J. No. 17-17221-ABA, 2018 Bankr. LEXIS 3011, (Sep. 28, 2018) – where a New Jersey Bankruptcy judge interpreted Pennsylvania law.

Tugboat Indian's rule has been cited positively in other states as well. In *Casey v. Ryder Truck Rental, Inc.*, E.D.N.Y. No. 00 CV 2856 (CLP), 2005 U.S. Dist. LEXIS 45601, (May 16, 2005), the court explained that New York law followed the rules in *Tugboat* that the indemnitor must be notified of the claim and that the settlement amount must be reasonable. The court also indicated that the rules applied "***whether the issue of indemnification arises in the context of a contractual provision or in the context of a claim based on common law equitable principles***." Washington also has cited and adopted one of the rules set out in *Tugboat Indian*, i.e., that the settling indemnitee must be legally liable for the claim and not a volunteer. See, *Nelson v. Sponberg*, 51 Wash.2d 371, 376, 318 P.2d 951 (1957).

Discovery suggests that this Court has issued rulings since *Globe* indicating that *Globe* only applies to common law, rather than contractual, indemnification. Discovery's argument in that respect falls flat.

The three-part rule of *Globe* applies only to indemnification that is founded upon a payment made via settlement. No case from this Court cited by Discovery for its above-stated proposition involved a settlement. See, *Glaspell v. Ohio Edison Co*., 29 Ohio St.3d 44, 505 N.E.2d 264 (1987); *Worth v. Aetna Cas. & Sur. Co*., 32 Ohio St.3d 238, 513 N.E.2d 253 (1987); and *Allen v. Standard Oil Co*., 2 Ohio St.3d 122, 443 N.E.2d 497 (1982). Since the parties claiming indemnity in these cases were not basing their claims upon a settlement made with the injured party, it only makes sense that the rules set out in *Globe* would not be followed or even discussed within the opinions of this Court. The rulings in the cases referenced above cannot reasonably be read as excluding the *Globe* rule in cases involving contractual indemnity based upon a settlement.

This Court routinely and repeatedly applies common law rules when analyzing contractual agreements; the rule set out in *Globe* should be no different. For example, in *Paul Cheatham I.R.A. v. Huntington Natl. Bank,* 2019-Ohio-3342, the common law rule against automatic assignment of claims was applied to a written agreement. In *Quarto Mining Co. v. Litman*, 42 Ohio St.2d 73, 85, 326 N.E.2d 676 (1975), this Court analyzed whether the common law rule against perpetuities had application to a written agreement. In *Lucarell v. Nationwide Mut. Ins. Co.*, 152 Ohio St.3d 453, 2018-Ohio-15, 97 N.E.3d 458, this Court indicated that the common law prohibited punitive damages due to a contractual breach. *Williams v. Spitzer Autoworld Canton, L.L.C.*, 122 Ohio St.3d 546, 2009-Ohio-3554, 913 N.E.2d 410 held that the common law parol evidence rule barred introduction of evidence concerning the parties' intent under their written contract.

In the oil and gas context, this Court has also applied common law principles to written oil and gas leases. In particular, the oil and gas industry is well-acquainted with the waiver of the

implied covenant to reasonably develop. *Hupp v. Beck Energy Corp.*, 2014-Ohio-4255, 20 N.E.3d 732, 2014 Ohio App. LEXIS 4174, recently upheld by *Bentley v. Beck Energy Corp*., 2015-Ohio-1375, 2015 Ohio App. LEXIS 1395. The waiver of implied covenants can be reasonably equated to an "opt-out" of common law by sophisticated parties in their contractual drafting.

While the common law clearly applies to contracts, Wildcat readily concedes that parties could draft their contract in such a way to avoid a common law rule. When this is attempted, however, this Court has recently declared that the written agreement must be very clear on that point: "Parties to a contract may include terms in derogation of common law… but the intent to do so must be clearly indicated," *Paul Cheatham I.R.A. v. Huntington Natl. Bank*, 2019-Ohio-3342, ¶ 30. The *Cheatham* case reaffirmed what parties in the oil and gas industry have long known, that a firm opt-out of common law is required.

In the instant matter, there is no hint of any language that the parties intended to avoid the mandates of *Globe* or the many cases that have followed it. To the contrary, by requiring Wildcat to "defend" Discovery, the language would logically require Discovery to notify Wildcat of any claims made so that Wildcat could proceed with a defense.

CONCLUSION

Knowing that it would deduct its payment to the ODNR from Wildcat's pending bill, Discovery agreed to an excessive settlement amount, admittedly to enhance its own relationship with ODNR, all the while keeping the deal a secret from Wildcat. It later refused to pay even the undisputed part of Wildcat's bill despite the clear contractual requirement. When Discovery was sued, it claimed that long settled common law did not apply to its contract.

As this Court made clear only two months ago in *Paul Cheatam, supra,* parties may opt-out of certain common law holdings by drafting their contract in a manner that varies from the common law, but any attempt to do so must be clearly stated. Here the contract was not drafted in such a manner. *Globe* therefore applies. Its requirements that the settlement with the ODNR was reasonable and that Wildcat was given timely notice of the ODNR's claims were unquestionably violated. Discovery's appeal should be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of this Merit Brief was sent by ordinary U.S. mail and email to counsel of record for appellant, David A. Detec and Thomas F. Hull, II, 201 E. Commerce St., Level 2, Youngstown, OH 44503 on November 13, 2019.

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