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I.

ASSIGNMENTS OF ERROR

The trial court below erred as a matter of law in dismissing appellant's, BENEVOLENT & PROTECTIVE ORDER OF ELKS OF THE UNITED STATES, INC., contractual indemnity claim against respondents, LARRY and JANE DOE ZIEGLER, because the trial court erroneously concluded the relevant indemnity provisions in a commercial lease: (1) only applied to third party claims; (2) were inconsistent with the parties' insurance obligations under the commercial lease at issue; and (3) were ambiguous as a matter of law and must therefore be strictly construed against appellant.

The issues presented for review by this appeal are:

1. Under what theories may a commercial tenant be liable to a landlord for damage caused by as fire under a commercial lease?
2. What are the correct rules of construction applicable to an indemnity provision contained in a commercial lease?

3. Can a properly worded indemnity provision in a commercial lease be applied to indemnify a landlord for property damages caused by a tenant, even if the tenant's conduct does not rise to that of negligence?

4. Are the indemnity provisions contained in the commercial lease at issue applicable only to third party claims?

5. Are these indemnity provisions inconsistent with the parties' insurance obligations contained in this same lease?

6. Are these indemnity provisions ambiguous as a matter of law and therefore to be strictly construed against appellant?

II. STATEMENT OF THE CASE

A. Factual Background.

The parties below did not dispute the following material facts:

1. This case arises out of a fire that occurred on December 9, 2003 (hereinafter referred to as the "fire") at the five-story building owned by appellant, BENEVOLENT & PROTECTIVE ORDER OF ELKS OF THE UNITED STATES,

INC. (hereinafter referred to as the “landlord”), located at the intersection of First and Lincoln Streets in downtown Port Angeles. [CP 23] The street level of the building was leased to various small businesses, including "The Camera Comer" owned by respondents, LARRY and JANE DOE ZIEGLER, (hereinafter referred to as the “tenant”). [CP 23]

2. The fire originated in the ground floor retail space leased by tenant [CP 60] from the landlord under a commercial lease entered into between the parties in March, 1996 [CP 169, 138-143]

3. The fire damaged the entire five floors of the building, including the ground floor space leased by the tenant. [CP 179; 199]

4. The fire originated in the office area of the space leased by tenant. [CP 108, 112] The source of ignition for the fire was identified as one of several electrical components (computer, fax/scanner, outlet plug strip, and power cord underneath a refrigerator) found in the area of origin. [CP 60, 112]

5. Paragraph 6A of the lease agreement entered into between the parties, entitled *Damages and Insurance*, stated:

Tenant will indemnify Landlord and save him harmless from and against any and all claims, actions, damages, liability and expenses arising from or out of [1] any occurrence, in upon or at the leased premises, or [2] the occupancy or use by Tenant of the leased premises or part thereof, or [3] occasioned wholly or in part by an act if omission of the Tenant, its agents, contractors, employees, servants, Lessees or concessionaires. In case Landlord shall, without fault on his part, be made a party to any litigation commenced by or against Tenant, then Tenant shall proceed and hold Landlord harmless and shall pay all costs, expenses and reasonable attorney's fees that may be incurred or paid by the Landlord in enforcing the covenants and agreements of this lease. (Numerical sub-dividers added) [CP 138]

Paragraph 6B of the Lease Agreement stated:

Tenant agrees to provide, pay for and maintain a policy or policies of public liability insurance with respect to the leased premises in standard form issued by a company or companies acceptable to Landlord insuring Landlord and Tenant with minimum limits of liability of \$150,000.00 and \$300,000.00 in respect to bodily injury or death, and \$50,000.00 in respect to property damage. [CP 138]

B. Procedural Background.

The landlord originally brought suit against the tenant for damages to the building proximately caused by the fire. The landlord brought two causes of action against tenant: (1) the first claimed the tenant's negligence proximately caused the fire; and (2) the second claimed the tenant breached its indemnity obligations to the landlord under the lease. [CP 196-199]

The tenant eventually brought a motion for summary judgment that was originally scheduled for hearing on February 9, 2008. [CP 178-191] This motion sought to dismiss the landlord's complaint in this lawsuit for three reasons. First, the tenant claimed the landlord's claims should be dismissed because there was no evidence that the negligence of the tenant caused the fire. By the time of oral argument on the tenant's motion, the landlord conceded that given the destruction of physical evidence by the fire, its fire expert was unable to demonstrate on a more probable than not basis that the tenant's negligence caused the fire. [CP 59-60] The landlord consequently conceded at time of oral argument it could not preclude, as a matter of law, the

dismissal of its negligence claim against the tenant.

Second, the tenant claimed the landlord's contractual indemnity claim should be dismissed because the indemnity provisions at issue only applied to third party claims claiming negligence on the part of tenant.

Finally, the tenant claimed the landlord waived all of its damages claims against the tenant under the language employed in the lease.

On January 30, 2008, the tenant voluntarily continued the hearing on its motion until February 29, 2008 in order to afford the landlord's fire expert another opportunity to examine the physical evidence removed by the tenant's fire experts from the fire scene.

On January 30, 2008, the Honorable Ken Williams recused himself *sua sponte* from any consideration in this matter.

[CP 63]

The tenant's motion was thereupon re-assigned to the Honorable S. Brooke Taylor and re-scheduled for hearing on March 14, 2008. On March 14, 2008, the trial court heard oral

argument from the parties on the tenant's motion. [CP 34] On June 30, 2008 the trial court apprised the parties of his intention to grant the tenant's motion. [CP 32] On July 15, 2008, the trial court filed a memorandum decision granting the tenant's motion for summary judgment dismissing all of the landlord's claims against the tenant in this lawsuit. [CP 23-31]

III. LEGAL ARGUMENT

A. Standard of Review.

An appellate court reviews a trial court's ruling on summary judgment *de novo*, performing the same inquiry as the trial court. *Herron v. Tribune Publishing Co., Inc.*, 108 Wn.2d 162, 169, 736 P.2d 249 (1987).

B. The Trial Court Below Erred as a Matter of Law In Its Interpretation of the Relevant Provisions Contained in the Commercial Lease Entered Into Between the Parties.

1. Tenant's Liability Under a Commercial Lease.

The trial court below refused to acknowledge the general rules applicable to when a tenant will be liable to a landlord for damage caused by fire under a commercial lease.

A commercial tenant may be liable to a landlord under

three separate theories for damage caused by a fire:

1. A tenant may be liable in tort if negligence causes the damage;

2. A tenant may be liable for fire damage on the grounds of breach of contract to surrender the possession of the premises in good condition on expiration of the lease.

3. A tenant may be responsible to a landlord on the basis of contractual indemnity. If the indemnity clause in the lease is broad enough to include damage or destruction by fire or other cause, the tenant is liable for such damage regardless of fault, as if the tenant had insured the landlord against these matters. *Friedman on Leases*, Vol. 1, §9:10, pp. 9-61 - 9-63 (5th Ed. 2007).

A contract of indemnity should be construed so as to cover all losses, damages or liabilities to which it reasonably appears the parties intended it should apply to. *Nunez v. American Building Maintenance Co.*, 144 Wn. App. 345, 190 P.2d 56, 58 (2008); 42 C.J.S. *Indemnity*, §15, p. 117 (2007). The theory triggering liability should not affect the applicability or

interpretation of the indemnification clause if its language is broad enough to encompass all theories of liability, particularly where such broad language does not stand alone, but exists in company with an insurance clause requiring insurance against the particular harm complained of. 42 C.J.S. *Indemnity*, §16, p. 121 (2007).

Indemnity agreements are interpreted like any other contracts, *Jones v. Strom Constr. Co.*, 84 Wn.2d 518, 520, 527 P.2d 1115 (1974), and the touchstone of the interpretation of contracts is the intent of the parties. *Berg v. Hudesman*, 115 Wn.2d 657, 663, 801 P.2d 222 (1990). Therefore, the intention of the parties must be the starting point for the interpretation of the indemnity agreement. *See Scruggs v. Jefferson Cy.*, 18 Wn. App. 240, 243, 567 P.2d 257 (1977) (indemnity provision construed to effectuate intent of the parties); *McDowell v. Austin Co.*, 105 Wn.2d 48, 53, 710 P.2d 192 (1985) (indemnity agreements enforced according to intent of parties).

Under Washington law, an indemnity agreement will be enforced to require the indemnitor to indemnify the indemnitee

for property damages caused by indemnitor. In *Northern Pacific Railway Co. v. Sunnyside Valley Irrigation District*, 85 Wn.2d 920, 540 P.2d 1387 (1975), defendant's (indemnitor) irrigation canal broke, sending large quantities of water rushing through a drainage culvert under plaintiff's (indemnitee) railroad tracks. The culvert was inadequate to handle the water, and plaintiff's railroad tracks were washed away. Plaintiff sought to recover on a theory of indemnification based on an indemnity provision contained in a permit issued by defendant's predecessor in interest (Yakima County) for the construction of the culvert. The Washington Supreme Court recognized that plaintiff could recover against defendant for breach of this indemnity provision, but held that the specific wording in the indemnity provision involved was not broad enough to include the damages sought by plaintiff. *Id.*, 85 Wn.2d at 923.

In *Continental Cas. Co. v. Seattle*, 66 Wn.2d 831, 405 P.2d 581 (1965), the Washington Supreme Court reviewed an agreement whereby the obligation to indemnify arose whenever "any act, action, neglect, omission or default" of one party caused

a certain loss to the other. The Washington Supreme Court held that it was not necessary that the indemnitor's conduct be negligent or tortious in order to implement the indemnity provision in the contract, since, under a literal reading of the provision, the words "act" and "action" were not qualified by the word "neglect. *Id.*, 66 Wn.2d at 831.

Admittedly, the terms of the indemnity provision are broad, but the duties and obligations of the parties must be determined and measured by the language of the agreement. We deem the language clear and unambiguous: General Construction covenanted to indemnify Metro for any loss Metro might suffer by reason of "any act, action, neglect, omission or default" on the part of General Construction. Giving ordinary meaning to the words of the provision, they place responsibility upon General Construction for (1) any default or negligence in the performance of its contractual obligations and (2) any act or action which directly or indirectly results in loss to Metro. Literally, the words "act" or "action" are not qualified by the word "neglect."

Metro's legal liability for damages caused by an act of General Construction is, of course, an element necessary to implement the indemnity provision of the contract. *Oregon-Washington R.R. & Nav. Co. v. Washington Tire & Rubber Co.*, 126 Wash.

565, 219 Pac. 9 (1923); *State ex rel. Macri v. Bremerton*, 2 Wn.2d 243, 97 P.2d 1066 (1940).

"Causation, not negligence, is the touchstone."

Id., 66 Wn.2d at 835-836. *Accord MacLean Townhouses, LLC v. America 1st Roofing & Builders*, 133 Wn. App. 828, 138 P.3d 155 (2006). *See also McDowell v. Austin Co.*, 105 Wn.2d 48, 51, 710 P.2d 192 (1985)(" Parties are free to establish liability instead of negligence as the triggering mechanism of an indemnity contract. Causation, not negligence, is the touchstone"); *Karnatz v. Murphy Pacific Corp.*, 8 Wn. App. 76, 81, 503 P.2d 1145 (1972)("As we view this indemnity clause, it would be most difficult to assemble words which describe a more comprehensive and all-inclusive intent by the indemnitor to indemnify the indemnitee for all losses suffered by the indemnitee, "of whatsoever kind or nature," so long as they had some connection with the indemnitor's performance of the subcontract.")

2. Paragraph 6A.

The plain and unambiguous language employed by the

indemnity provision in paragraph 6A of the lease stated the tenant's duty to indemnify the landlord from and against any and all damages would arise in three distinct situations:

1. Arising out of any occurrence in, upon or at the leased premises;
2. The occupancy or use by tenant of the leased premises or part thereof; or
3. Occasioned wholly or in part by an act or omission of the tenant, its agents, contractors, employees, servants, lessees or concessionaires. [CP 138]

The trial court stated, in conclusory fashion, that:

The wording of Section 6-A suggests that it is intended to cover third-party claims only, as opposed to claims between landlord and tenant. It would be a very strained interpretation of this language to find that it would apply to a claim between the landlord and the tenant. Even if the language were found to be ambiguous, in the absence of clear evidence this strained interpretation, that ambiguity be construed against the landlord as the drafter of the document under standard rules of construction. [CP 27-28]

There is nothing "strained" about the landlord's

interpretation of paragraph 6A. An objective interpretation of the actual words employed in paragraph 6A highlights the broad indemnity obligation undertaken by the tenant. Three contingencies potentially trigger the tenant's obligation to indemnify the landlord under paragraph 6A. The first contingency ("arising out of any occurrence in, upon or at the leased premises") is not dependent upon the damages complained of having been caused by a third, but whether the cause of the damage originated in, upon or at the leased premises. The phrase "any occurrence", if read objectively and impartially, would include a claim between a landlord and tenant.

The phrase "arising out of" is unambiguous and has broader meaning than "caused by" or "resulted from." *State Farm Mut. Auto Ins. Co. v. Centennial Ins. Co.*, 14 Wn. App. 541, 543, 543 P.2d 645 (1975), review denied, 87 Wn.2d 1003 (1976). It is ordinarily understood to mean "originating from", "having its origin in", "growing out of", or "flowing from". *Avenco Ins. Co. v. Mock*, 44 Wn. App. 327, 329, 721 P.2d 34 (1986). The trial court's conclusion that the phrase "arising out

of any occurrence in, upon or at the leased premises” might somehow be interpreted as ambiguous was therefore in error.

In this instance, it is undisputed the fire that caused the damages complained of originated in the office area for the space inside the building leased by the tenant. [CP 60, 112] The fire started in an area that was under the complete control of the tenant, not the landlord. The fire was started by one of several office appliances that were owned and being operated by the tenant in the tenant’s space at the time of the fire. [CP 119] Under this first contingency triggering the tenant’s indemnity liability, the tenant’s obligation to indemnify the landlord for damages due to the fire is plainly and unambiguously triggered by where the fire started, not who in particular was responsible for starting the fire. There is nothing in the language employed in this first contingency to indicate it is limited to an occurrence caused solely by a third party. Such an interpretation requires the reader to completely ignore the use of the adjective “any” placed in front of the term “occurrence.” It was therefore reversible error by the trial court below to restrict the tenant’s indemnity

obligation to only claims by third parties, and failing to recognize the tenant's indemnity obligation was triggered by where the damage occurred, not who caused the damage.

The tenant argued below that a contractual indemnity clause will not create a right to a cause of action against the indemnitor without some "overt act or omission" on the part of the indemnitor citing *Gall Landau Young Construction Co. v. Hurlen Construction Co.*, 39 Wn. App. 420, 693 P.2d 207 (1985); *Brame v. St. Regis Paper Co.*, 97 Wn.2d 748, 649 P.2d 836 (1982); *Jones v. Strom Construction Co.*, 84 Wn.2d 518, 527 Wn.2d 1115 (1974). [CP 183] However, the Washington Supreme Court expressly chose not to adopt this precise conclusion in *Scott Galvanizing v. N.W. Enviroservices*, 120 Wn.2d 573, 581-582, 844 P.2d 428 (1993), and Division One of the Washington Court of Appeals recently expressly rejected this proposition in *MacLean Townhouses, LLC v. America 1st Roofing & Builders*, 133 Wn. App. 828, 832-834, 138 P.3d 155 (2006).

The trial court below, without explanation, claimed the landlord's recitation of the court's holding in the *Scott*

Galvanizing decision was in error. [CP 28] The trial court below completely ignored Division One's holding in the *MacLean Townhouses* decision.

In *Parks v. Western Washington Fair Association*, 15 Wn. App. 852, 857, 553 P.2d 459 (1976), it was held by this Court that where the negligence of the indemnitor was not established, there must be some evidence of control by the indemnitor over the instrumentality or conditions causing the accident in order to impose liability to indemnify. Unlike the *Parks* decision, where there was no evidence to indicate that the plaintiff had slipped on ice from a snow cone sold by defendant concessionaire, in this instance the tenant had control over all of the instrumentalities identified as the possible source of ignition for the fire and their respective conditions at the time of the fire. All were in the immediate area of where the fire originated, all had been placed in that location by tenant in tenant's leased space and all were being operated by the tenant at the time of the fire. The tenant therefore had the requisite control over these instrumentalities and their condition at the time of the fire, and a sufficient factual

nexus exists between the operation of these instrumentalities and the damages caused by the fire, to impose a duty on the tenant to indemnify the landlord under paragraph 6A of the lease for the damages due to the fire.

3. Paragraph 6B.

Paragraph 6B of the lease, entitled *Damages and Insurance*, imposed an obligation on the tenant to carry liability insurance:

Tenant agrees to provide, pay for and maintain a policy or policies of public liability insurance with respect to the leased premises in standard form issued by a company or companies acceptable to Landlord insuring Landlord and Tenant with minimum limits of liability of \$150,000.00 and \$300,000.00 in respect to bodily injury or death, and \$50,000.00 in respect to property damage. [CP 138]

The lease made no mention nor imposed any obligation on either landlord or tenant to maintain property insurance for either the building or for the ground floor portion of the building leased by the tenant. [CP 138] The lease did impose an obligation upon tenant to maintain liability insurance covering property damage. [CP 138] The liability insurance maintained by the tenant at the

time of the fire included coverage for the indemnity obligation contained in paragraph 6A. [CP 82; 97-104]

The broad wording of an indemnity clause coupled with the existence of increased insurance is conclusive evidence of an obligation to indemnify. *Midland Ins. Co. v. Delta Lines, Inc.*, 530 F.Supp. 190, 194 (D.S.C. 1982). *See also MacGlashing v. Dunlop Equipment Co.*, 89 F.3d 932, 941 (CA1 1996); *Rodriguez v. Olin Corp.*, 780 F.2d 491, 499 (CA5 1986); *Hastreiter and Husband v. Karau Buildings*, 57 Wis.2d 746, 205 N.W.2d 162 (1973).

The tenant's indemnity obligation contained in paragraph 6A of the lease is supplemented by the contractual duty in paragraph 6B to carry liability insurance naming the landlord as an additional insured.

The trial court refused to acknowledge this undisputed fact when it concluded:

In addition, the relatively low limits required by the lease certainly suggest that the parties did not contemplate the tenant would be responsible for the damage which occurred in this case, which greatly exceeded the amount of coverage required.

The only reasonable interpretation of this provision is that it was intended to provide a source of funds for the indemnification against third-party claims called for in Section 6-A, as well as claims against the Camera Comer itself from operation of its business. [CP 28-29]

In reaching this conclusion, the trial court below chose to completely ignore the undisputed evidence before it that the tenant had actually secured \$1 million in liability insurance including coverage for property damage, not the \$50,000.00 limit of liability called for by the lease. [CP 82; 97-104] In addition, the trial court below failed to explain why a “reasonable factfinder” would conclude that a fire caused by a third party would somehow manage to only lead to damages not exceeding \$50,000.00. Once again, an objective interpretation of the conduct on the part of the tenant in choosing to actually carry \$1 million in liability coverage for property damage, not \$50,000.00, would lead a reasonable factfinder to conclude the tenant recognized the broad scope of its indemnity liability obligation under paragraphs 6A and consequently purchased \$1 million in liability insurance coverage under paragraph 6B of the

lease to pay for damages caused by a fire originating in the tenant's leased premises.

4. Paragraph 6C.

The lease contained a waiver of subrogation provision found at paragraph 6C. Paragraph 6C of the lease is limited to damage caused by the fire to the ground floor portion of the building occupied by the tenant at the time of the fire, not the damage to rest of the five floors of the building. *Millican v. Wienker Carpet Service*, 44 Wn.App. 409, 722 P.2d 861 (1986).

Paragraph 6C of the Lease Agreement states:

For and in consideration of the execution of this lease by each of the parties hereto, Landlord and Tenant hereby release and relieve the other and waive their entire claim of recovery for loss or damage to the property arising out of or incident to fire, lightning, and the perils included in the extended coverage endorsement in, on or about the demised premises, whether due to the negligence of any said parties, their agents or employees or otherwise. Any increased premium charge caused by the provision shall be paid by Tenant. (Emphasis added) [CP 138]

The trial court below concluded this paragraph was ambiguous and therefore any ambiguity associated with this

provision must be interpreted against the landlord.

First, the trial court concluded:

This provision of the lease is clearly ambiguous. It could be interpreted to refer only to "damage to the property. . . in, on, or about the demised premises," or it could be construed to refer to property damage "arising out of the (sic) incident to fire, lightning and the perils included in the extended coverage endorsement in, on, or about the demised premises", with the later phrase defining where the perils originate, rather than where the covered property is located. [CP 29]

No principled application of the rules of English grammar could lead a reasonable person to reach such a conclusion. The trial court gives no explanation for why it would be reasonable for anyone reading this provision with an eye towards ascertaining its meaning in a reasoned, impartial manner to completely ignore the phrase "arising out of or incident to fire, lightning, and the perils included in extended coverage" placed in between "damage to property" and "in, on or about the demised premises". The alleged "ambiguity" contained in this provision is manufactured by selectively choosing, without any explanation based on the wording or punctuation actually used in the lease, to

ignore a modifying phrase actually employed in the lease provision. The trial court's interpretation of paragraph 6C is analogous to concluding the phrase "United States of America" is ambiguous by holding it would be reasonable to ignore the presence of the noun "States" after the adjective "United" and before the prepositional phrase "of America".

There is no ambiguity in how this provision is worded. In this instance, the waiver applies to: (1) any loss or damage to *the property* (2) arising out of the incidence of *fire* (3) in, on or about *the demised premises*. The plain intent of this lease language is that the waiver was to apply to any property that was damaged "in, on or about" the demised premises.

The trial court went on to conclude:

This provision of the lease is a standard provision which by its terms is specifically limited to "damage to the property. . . in, on, or about the demised premises." The term "property" is not defined anywhere in the lease, whereas the leased portion of the building is consistently referred to as "the leased premises", "the demised premises" or just "the premises." The only reasonable interpretation is that this waiver provision clearly works to foreclose a claim for damages by the landlord against the tenant

for damage to the remainder of the building, in the absence of a clear definition of the term "property". [CP 29-30]

As was pointed out for the trial court in both the landlord's briefing submitted to the trial court and at oral argument, the term "property" is specifically defined at paragraph 1 of the Lease Agreement, entitled *Premises*, on the first page of the lease, as "the following described property: 135 E. First Street, Port Angeles, Washington being a portion of the street floor of [the] building situate on the south 90 feet of lots 18 and 18, Block 16, Norman R. Smith's Subdivision of the Townsite of Port Angeles." [CP 169] This is the space inside the Port Angeles Elks leased by tenant. The tenant claimed the word "property" used in paragraph 6C is "reasonably construed to mean the rest of the building owned by plaintiff, and not just the demised premises." However, the terms "premises" and "property" are both specifically defined in paragraph 1 to refer to 135 E. First Street, the portion of the Port Angeles Elks leased by the tenant. An objective, impartial reading of the lease would indicate the terms "premises" and "property" utilized in the lease

refer to the portion of the Elks Building leased by the tenant, not the entire building.

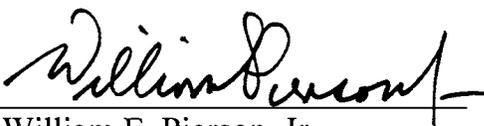
Consequently, it is not a reasonable construction of paragraph 6C to read “property” as referring to the entire Port Elks building when it was originally defined at the beginning of the lease to specifically refer to the tenant’s leased space.

IV. CONCLUSION

This Court should reverse the trial court’s decision below granting the tenant’s motion for summary judgment and remand this case to the trial court below in order to allow the landlord to proceed to prosecute its contractual indemnity claim against the tenant for damages sustained to the building as a result of the fire.

RESPECTFULLY SUBMITTED this 29th day of April, 2009.

LAW OFFICE OF
WILLIAM E. PIERSON, JR. | PC

By 
William E. Pierson, Jr.
WSBA No. 13619

Attorneys for Appellant

FILED
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STATE OF WASHINGTON

CERTIFICATE OF SERVICE

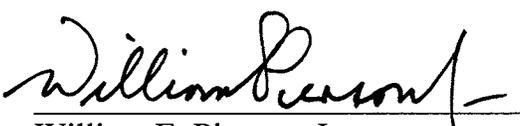
The undersigned certifies that on this day he caused to be

served in the manner noted below, a copy of the document to
which this certificate is attached, on the following counsel of
record:

Attorneys for Respondents
LARRY and JANE DOE
ZIEGLER

Gary A. Trabolsi	<input type="checkbox"/>	via U.S. Mail
GARDNER BOND TRABOLSI	<input checked="" type="checkbox"/>	via hand delivery
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DATED this 29th day of April, 2009.


William E. Pierson, Jr.