Nos. 2—10—0385, 2—10—0386, 2—10—0387 cons.
Order filed May 25, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

GENERAL CASUALTY COMPANY OF ILLINOIS, Plaintiff and Third-Party Defendant-Appellee, v. PROFESSIONAL MANUFACTURERS REPRESENTATIVES, INC., and HOME DEPOT U.S.A., INC., Defendants-Appellants. (Terence Jerman and Theresa Harskey, Defendants; Virginia Surety Company, Indiv. and as Subrogee of Professional Manufacturers Representatives, Inc., Intervening Plaintiff-Appellant).	)	Appeal from the Circuit Court of Du Page County. No. 08—MR—1571 Honorable Bonnie M. Wheaton, Judge, Presiding.

JUSTICE BOWMAN delivered the judgment of the court.
Justices McLaren and Burke concurred in the judgment.

RULE 23 ORDER

Held: The trial court did not err in granting summary judgment for General Casualty, because the indemnity provision at issue was not an "insured contract," meaning that coverage exclusions in General Casualty's commercial general liability applied. Therefore, General Casualty was not obligated to defend or indemnify Professional Manufacturers Representatives in the underlying suit against a third-party complaint by Home Depot.

This case involves an insurance coverage dispute. Defendant, Terence Jerman, was working for defendant, Professional Manufacturers Representatives, Inc. (PMR), which had an in-store merchandising agreement with defendant, Home Depot U.S.A., Inc. (Home Depot). Jerman allegedly sustained injuries when he was setting up shelves and displays at a Home Depot store, and he and his wife, defendant, Theresa Harskey, filed suit against Home Depot to recover damages. Home Depot filed a third-party complaint against PMR. PMR tendered its defense of the complaint to its commercial general liability insurance carrier, plaintiff, General Casualty Company of Illinois (General Casualty), and its workers compensation and employer's liability insurance carrier, intervening plaintiff, Virginia Surety Company (Virginia Surety). Virginia Surety agreed to defend PMR. However, General Casualty declined to defend or indemnify PMR on the basis that coverage was precluded by contract exclusions. General Casualty sought a declaratory judgment to this effect, bringing suit against PMR, Home Depot, Jerman, and Harskey. Virginia Surety filed an intervening complaint in the declaratory judgment action, seeking a declaration that General Casualty had a duty to defend PMR against Home Depot's third-party complaint. General Casualty and Virginia Surety filed cross-motions for summary judgment regarding General Casualty's coverage obligations to PMR. The trial court granted summary judgment in General Casualty's favor, and PMR, Home Depot, and Virginia Surety appeal. We affirm.

I. BACKGROUND

PMR and Home Depot entered into the in-store merchandising agreement on June 15, 2005. Pursuant to the agreement, PMR agreed to provide in-store merchandising services, including resetting product placement displays at Home Depot stores. The in-store merchandising agreement contains an indemnity provision, which states in relevant part:

"12. Indemnity.

(a) By [PMR]. [PMR] shall indemnify, defend and hold harmless Home Depot *** and their officers, employees and agents, against any and all loss, damage, claim, lawsuit, judgment, liability, cost or expense (including attorney's fees and settlement costs) to the extent arising out of: (a) [PMR's] provision of Services, (b) any actual or alleged injury or death to persons and/or loss of or damage to property caused directly or indirectly, wholly or in part, by [PMR], its employees, agents, or contractors, *** (c) any claims resulting, directly or indirectly, from the conduct or actions of [PMR], its employees, agents or contractors ***.

(b) By Home Depot. Home Depot shall indemnify, defend and hold harmless [PMR], and its officers, employees and agents, against any and all loss, damage, claim, lawsuit, judgment, liability, cost or expense (including attorney's fees and settlement costs) to the extent arising from the gross negligence or willful misconduct of Home Depot, its employees or agents." (Emphases added.)

The in-store merchandising agreement also contains a clause requiring PMR to obtain a commercial general liability policy that names Home Depot as an additional insured.

PMR purchased a workers compensation and employers liability policy from Virginia Surety for the period of January 3, 2005, to January 3, 2006. PMR obtained a comprehensive insurance policy from General Casualty, which included a commercial general liability form (CGL policy) and a commercial umbrella liability coverage form, which was effective for the same policy period. The provisions of the CGL policy relevant to this appeal are as follows:

"SECTION I - COVERAGES

COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY

1. Insuring Agreement

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies. ***

* * *

2. Exclusions

This insurance does not apply to:

* * *

b. Contractual Liability

* * *

e. Employer's Liability

'Bodily injury' to:

(1) An 'employee' of the insured arising out of and in the course of:

(a) Employment by the insured; or

(b) Performing duties related to the conduct of the insured's business; ***

* * *

This exclusion applies:

(1) Whether the insured may be liable as an employer or in any other capacity; and

(2) To any obligation to share damages with or repay someone else who must pay damages because of the injury.

This exclusion does not apply to liability assumed by the insured under an 'insured contract.' " (Emphases added.)

The CGL policy contains an endorsement modifying the terms of the contractual liability exclusion. It states:

"A. Paragraph 2.b. of Exclusions of Bodily Injury And Property Damage Liability (SECTION I - COVERAGES) is replaced by the following:

2. Exclusions

This insurance does not apply to:

b. Contractual Liability

'Bodily injury' or 'property damage' for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:

(1) That the insured would have had in the absence of the contract or agreement; or

(2) Assumed in a contract or agreement that is an 'insured contract,' provided that the 'bodily injury' or 'property damage' occurs subsequent to the execution of the contract or agreement." (Emphases added.)

The CGL policy's definition of "insured contract" includes:

"That part of any other contract or agreement pertaining to your business *** under which

you assume the tort liability of another party to pay for 'bodily injury' or 'property damage' to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement."

On October 11, 2005, Jerman was allegedly injured while working for PMR at a Home Depot store.

Jerman and Harskey filed suit against Home Depot in the Cook County circuit court. In November 2007, Home Depot removed the case to federal court. The following month, Jerman filed an amended complaint against Home Depot. He alleged that Home Depot carelessly and negligently failed to do the following, among other things: provide him with a safe place to work; supervise, control, and properly instruct employees and contractors working on the premises; maintain proper safety measures; and properly monitor, inspect, and review work being performed by employees of subcontractors. Jerman alleged that Home Depot's acts and omissions proximately caused his injuries.

In January 2008, Home Depot tendered its defense and indemnification of the Jerman action to PMR and General Casualty. In March 2008, General Casualty denied Home Depot's tender on the basis that Home Depot did not qualify as an insured under PMR's policy and was not specifically named as an additional insured on the policy. According to Home Depot, PMR also refused to defend and indemnify it in the Jerman action.

On July 3, 2008, Home Depot filed a third-party complaint against PMR within the Jerman lawsuit. Count I was based on contribution; count II was based on contractual indemnification; and count III was based on breach of contract for failure to procure insurance for Home Depot. PMR tendered its defense of Home Depot's third-party complaint to General Casualty and Virginia Surety. Virginia Surety agreed to defend PMR pursuant to a reservation of rights. General Casualty denied PMR's tender.

On October 3, 2008, General Casualty filed a declaratory judgment action against PMR, Home Depot, Jerman, and Harskey, which is the subject of this appeal. General Casualty alleged that under the contractual liability and employer's liability exclusions in the CGL policy, it had no duty to defend or indemnify PMR against Home Depot's third-party complaint. General Casualty sought a declaration to this effect, as well as a declaration that it had no duty to defend or indemnify Home Depot in the Jerman lawsuit.

On May 11, 2009, Virginia Surety, individually and as subrogee of PMR, filed an intervening complaint in General Casualty's action. Virginia Surety alleged that General Casualty had a duty to defend PMR in connection with Home Depot's third-party complaint because the "insured contract" exception to the contractual liability and employer's liability exclusions in the CGL policy applied. Count I of Virginia Surety's intervening complaint, based on contribution, sought a declaration that General Casualty had a duty to defend PMR against Home Depot's third-party complaint and share in PMR's defense costs of that suit. Count II, based on subrogation, similarly sought a declaration that General Casualty had a duty to defend PMR, as well as pay the entirety of PMR's defense costs in the Jerman suit.

On October 26, 2009, General Casualty filed a motion for summary judgment as to PMR and Virginia Surety. General Casualty relied on Virginia Surety Co. v. Northern Insurance Co. of New York, 224 Ill. 2d 550 (2007), to support its argument that the in-store merchandising agreement was not an insured contract, meaning that the insured contract exception to the employer's liability and contractual liability exclusions in the CGL policy did not apply. General Casualty alternatively argued that the indemnification provision in the in-store merchandising agreement was void pursuant to the Construction Contract Indemnification for Negligence Act (740 ILCS 35/0.01 et seq. (West 2008)).

On December 9, 2009, Virginia Surety filed a cross-motion for summary judgment. Virginia Surety argued that the "insured contract" exception to the liability exclusions did apply, so General Casualty had

a duty to defend PMR. It argued that Virginia Surety Co. was distinguishable because Home Depot's third-party complaint against PMR contained a count for contractual indemnity in addition to a count for contribution. PMR subsequently joined in Virginia Surety's cross-motion.

On March 19, 2010, the trial court granted General Casualty's motion for summary judgment and denied Virginia Surety's motion for summary judgment, reasoning that Virginia Surety Co. applied. The trial court included language under Supreme Court Rule 304(a) (Ill. S. Ct. R. 304(a) (eff. Feb. 26, 2010)) that there was no reason to delay the enforcement or appeal of the order. Virginia Surety, PMR, and Home Depot timely appealed. The three appeals were consolidated by this court. PMR chose to adopt Virginia Surety's briefs and not file its own briefs in the appeal.

I. ANALYSIS

We initially address General Casualty's motion, ordered taken with the case, to dismiss Home Depot's appeal. General Casualty notes that its motion for summary judgment did not address its coverage dispute with Home Depot, and Home Depot did not file a response to that motion or file its own cross-motion for summary judgment. General Casualty argues that Home Depot lacks standing to appeal because the trial court made no decision as to Home Depot's rights under the CGL policy, and Home Depot's rights have not been prejudiced by the judgment appealed from. General Casualty additionally argues that Home Depot forfeited its right to appeal the summary judgment order because it did not file any response to the motion for summary judgment, and arguments cannot be considered on appeal that were not raised by the appellant in the trial court.

Home Depot counters that General Casualty's motion is untimely because it waited 4½ months after Home Depot filed its notice of joining the appeal before filing the motion to dismiss. Home Depot further argues that it has standing because the judgment affects its interests by calling

into question its ability to secure insurance coverage under the in-store merchandising agreement. Home Depot maintains that at stake is both the interpretation of its agreement with PMR and its ability to satisfy a judgment against PMR. Home Depot also argues that it did not forfeit its right to appeal, because it was not required to file a written response to the summary judgment motion. Home Depot notes that it orally argued its position at the hearing on the cross-motions for summary judgment, without objection.

We agree with Home Depot's arguments regarding standing and forfeiture and therefore deny General Casualty's motion to dismiss. Regarding standing, a party to a case may seek appellate review from a final judgment that is adverse to his interests, and he need not be actually aggrieved by the decision. *In re Nitz*, 317 Ill. App. 3d 119, 122 (2000). "Even a nonparty has standing to appeal if he has a direct, immediate, and substantial interest in the subject matter that would be prejudiced by the judgment or benefitted by its reversal." *Id.* In the instant case, Home Depot has an interest in the trial court's grant of General Casualty's motion for summary judgment because a decision that the in-store merchandising agreement is not an "insured contract" is contrary to Home Depot's position that PMR agreed to indemnify Home Depot for Home Depot's own negligence, thereby negatively affecting Home Depot's third-party suit against PMR. Such an interpretation also means that PMR would not be able to obtain coverage under the insured contract exception, which would in turn decrease Home Depot's ability to satisfy a judgment against PMR. Regarding forfeiture, even if, *arguendo*, Home Depot was required to make arguments below, it did so when it orally presented its position at the hearing on the cross-motions for summary judgment.

We now turn to the merits of the case. Summary judgment is appropriate only where the pleadings, affidavits, depositions, admissions, and exhibits on file, when viewed in the light most favorable to the nonmoving party, show that there is no genuine issue of material fact and that the

moving party is entitled to judgment as a matter of law. *Zekman v. Direct American Marketers, Inc.*, 182 Ill. 2d 359, 374 (1998). We review *de novo* a grant of summary judgment. *Virginia Surety Co.*, 224 Ill. 2d at 556. Also, the construction of an insurance policy is a question of law, to which *de novo* review applies. *Id.*

The issue before us is whether General Casualty has a duty to defend PMR against Home Depot's third-party complaint in the *Jerman* suit. An insurer's duty to defend its insured is much broader than its duty to indemnify the insured. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 125 (1992). A duty to indemnify arises only if the insured has a judgment against it on any underlying claim and the insured's activity and the resulting loss or damage *actually* come within the policy's coverage. *Id.* at 127-28. In contrast, the precursor duty to defend arises if, liberally construing in the insured's favor the allegations in the underlying complaint against the insured, there are factual allegations that even *potentially* fall within the coverage. *General Agents Insurance Co. of America, Inc. v. Midwest Sporting Goods Co.*, 215 Ill. 2d 146, 154-55 (2005). Moreover, if the underlying complaint against the insured contains several theories of recovery and only one of the theories is potentially covered, the insurer must still defend the insured. *Id.* at 155. The insured has the initial burden to demonstrate coverage under the policy, and once it does so, the burden shifts to the insurer to prove that a limitation or exclusion applies. Addison Insurance Co. v. Fay, 232 Ill. 2d 446, 453-54 (2009).

Here, General Casualty does not dispute that the initial coverage grant of its policy would trigger its duty to defend but rather argues that policy exclusions apply. Determining whether the exclusions apply requires construing both the CGL policy and the indemnity provision in the in-store merchandising agreement. An indemnity agreement is a contract, subject to the rules of contract interpretation. Buenz v. Frontline Transportation Co., 227 Ill. 2d 302, 308 (2008). The fundamental rule of contract construction is to give effect

to the parties' intent, as discerned from the contract language. Virginia Surety Co., 224 Ill. 2d at 556. Unambiguous contract language should be given its plain and ordinary meaning. Id. Where there is no statutory provision to the contrary, contracts that clearly and explicitly indemnify a party's own negligence are valid and enforceable. Buenz, 227 Ill. 2d at 311-12 n.1. Conversely, an " 'indemnity contract will not be construed as indemnifying one against his own negligence, unless such a construction is required by clear and explicit language of the contract [citations] or such intention is expressed in unequivocal terms.' " Id. at 309, quoting Westinghouse Electric Elevator Co. v. LaSalle Monroe Building Corp., 395 Ill. 429, 433 (1946).

Here, the trial court relied on Virginia Surety Co. in granting summary judgment for General Casualty. In that case, a general contractor entered into a subcontract with De Graf Concrete Construction (De Graf) for work on a jobsite. Virginia Surety Co., 224 Ill. 2d at 552-53. The subcontract contained the following provision:

> " 'To the fullest extent permitted by law, [De Graf] WAIVES ANY RIGHT OF CONTRIBUTION AGAINST AND shall indemnify and hold harmless the [general contractor] *** from and against claims, damages, losses, and expenses, including but not limited to attorney fees, arising out of or resulting from performance of [De Graf's] Work under this Subcontract, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death *** WHICH IS caused in whole or in part by negligent acts or omissions of [De Graf or its] subcontractors, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, loss, or expense is caused in part by a party indemnified hereunder.' " Id. at 553.

De Graf obtained an employer's liability policy from Virginia Surety and a CGL policy from Northern Insurance Company of New York (Northern). Id. at 553-54. The CGL policy had an employer's liability exclusion that

generally excluded coverage for bodily injuries to De Graf's employees, but it contained an exception for liability assumed by De Graf under an "insured contract." The policy defined "insured contract" as any other contract or agreement under which De Graf assumed the tort liability of another party to pay for bodily injury or property damage to a third party. Id. at 553.

A De Graf employee was subsequently injured and filed suit against the general contractor, which then filed a third-party suit for contribution against De Graf. Id. at 553-54. De Graf tendered its defense of the third-party complaint to Virginia Surety, which accepted the tender. However, Northern refused to defend or indemnify De Graf. Id. at 554. Virginia Surety then filed suit against Northern, seeking a declaratory judgment that Northern was obligated to defend and indemnify De Graf under the CGL policy. Virginia Surety argued that the subcontract between De Graf and the general contractor was an "insured contract" within the meaning of the CGL policy. Northern in turn sought a declaratory judgment to the contrary. Id.

Our supreme court held that the "insured contract" exception to the employer's liability exclusion in the CGL policy did not apply because the subcontract did not require De Graf to assume the general contractor's tort liability; instead, De Graf was assuming liability only for its own negligence. Id. at 565. As a result, Northern had no duty to defend or indemnify De Graf against the general contractor's third-party complaint. Id. at 570. The court noted that in Kotecki v. Cyclops Welding Corp., 146 Ill. 2d 155 (1991), it held that an employer's liability in a third-party suit for contribution is limited to the employer's worker's compensation liability to its employee. Virginia Surety Co., 224 Ill. 2d at 558. The Virginia Surety court reasoned that in the case before it, De Graf and the general contractor intended the provision at issue in the subcontract to be a waiver of De Graf's affirmative defense of its Kotecki cap for liability in a

contribution action (Id. at 570), rather than a true indemnification clause in which De Graf assumed the general contractor's tort liability (Id. at 568-69).

General Casualty points out that the "insured contract" provision in Virginia Surety Co. is identical to the one in the CGL policy here, and General Casualty argues that the indemnification provision there was contingent on the conduct of the indemnitor just as the indemnification provision in the in-store merchandising agreement is contingent on PMR's conduct.

Home Depot argues that Virginia Surety Co. is distinguishable because that indemnification provision was very narrow and applied to only De Graf's own negligence, as demonstrated by the fact that indemnification was required only for claims arising out of De Graf's performance of work under the subcontract. Virginia Surety also argues that Virginia Surety Co. is inapposite because it involved a single-count third-party contribution action, whereas here Home Depot seeks to recover from PMR for contractual indemnification as well as for contribution and breach of contract to procure insurance. In other words, Virginia Surety argues that the instant case is distinguishable because Home Depot alleges that it is entitled to contractual indemnity from PMR, not just PMR's pro-rata share of contribution liability. Both Virginia Surety and Home Depot also argue that the indemnification provision in Virginia Surety Co. did not contain the broad "any and all" language present in the in-store merchandising agreement, which the supreme court found to be inclusive in the indemnification provision in Buenz, discussed later in our disposition.

Virginia Surety further maintains that because the indemnity provision in the in-store merchandising agreement requires PMR to indemnify Home Depot for actual or alleged injury to person caused "wholly or in part" by PMR, PMR would have a duty to indemnify Home Depot if both parties' negligence was found to be a proximate cause of the accident. That is, Virginia Surety argues that by agreeing to indemnify Home Depot for damages caused in part by PMR, it necessarily means that PMR agreed to be completely

responsible for tort liability that is not entirely its own and is therefore the tort liability of another. According to Virginia Surety, any other interpretation of the indemnification agreement would give no meaning to the phrase "wholly or in part." Virginia Surety maintains that there is at least the potential for coverage when the allegations of the third-party complaint and the CGL policy are compared, so General Casualty has a duty to defend PMR.

We now examine Buenz, the primary case relied on by Home Depot and Virginia Surety. There, a shipping company (COSCO) entered into an equipment interchange agreement with Frontline Transportation Company (Frontline). The agreement had an indemnity provision stating that Frontline:

> " 'shall indemnify [COSCO] against, and hold [COSCO] harmless for any and all claims, * * * damages, and liability * * * arising out of, [in] connection with, or resulting from posses

sion, use, operation or returning of the equipment during all periods when the equipment shall be out of the possession of [COSCO].' " (Emphas

e s

added.)

Id. at

306.

Subsequently, a semi driven by a Frontline employee struck a minibus, killing the plaintiff's wife. The plaintiff brought suit against Frontline and COSCO and alleged, inter alia, that COSCO was negligent because it owned the trailer on the semi and knew that the tractor and trailer were not in safe operating condition. Id. at 305-06. COSCO filed a counterclaim against Frontline alleging that Frontline was obligated, pursuant to the equipment interchange agreement, to indemnify COSCO in the plaintiff's action. Id. at 305. Specifically, COSCO argued that the use of the phrase "any and all" established the parties' intent that COSCO be indemnified even for claims arising from its own negligence. Id. at 307. The trial court granted COSCO's motion for summary judgment, and the appellate court affirmed. Id. at 305.

The supreme court agreed with the lower courts' decisions. In arriving at its conclusion, the supreme court stated that the phrase "any and all" alone will not determine whether a contract provides indemnification for an indemnitee's own negligence, but rather the phrase must be considered in the context of the entire contract. Id. at 316. The court stated that the following cases had express clauses limiting indemnification to negligence by the indemnitor, despite the presence of "any and all" or similar language: Westinghouse Electric Elevator Co., 395 Ill. at 430 (the indemnitor agreed to " ' "indemnify and hold the owner *** wholly harmless from any damages *** arising out of any acts or omissions by the [indemnitor]" ' "); Blackshare v. Banfield, 367 Ill. App. 3d 1077, 1078 (2006) (the indemnitor " 'shall defend and indemnify and save Owner and all of Owner's employees harmless from any and all claims *** arising or alleged to arise from personal injuries, including death, or damage to property, occurring during the performance of the work and due to

the negligent acts or omissions of the [indemnitor]' "); Hankins v. Pekin Insurance Co., 305 Ill. App. 3d 1088, 1089 (1999) (the indemnitor would indemnify the indemnitee " ' "from and against all claims, damages, losses[,] and expenses *** which might arise out of the performance of any work to be performed hereunder by [indemnitor] *** caused in whole or in part by [indemnitor's] negligent act or omission" ' "); McNiff v. Millard Maintenance Service Co., 303 Ill. App. 3d 1074, 1076 (1999) (the indemnitor agreed to indemnify the indemnitee against all claims " ' "relating to *** allegedly or actually arising out of or incidental to the Work, including, without limiting the foregoing, all acts and omissions of the officers, employees, and agents of [the indemnitor] or any of its subcontractors" ' "). Buenz, 227 Ill. 2d at 313-15.

The Buenz court also stated that "[i]f the contract warrants it, though, the use of the phrase 'any and all' may indicate, as COSCO contends, that the parties intended an indemnitee be indemnified, even for the indemnitee's own negligence." Id. at 316. It listed the following contracts, among others, as examples of parties' intent that an indemnitee be indemnified for its own negligence: Schek v. Chicago Transit Authority, 42 Ill. 2d 362, 363 (1969) (indemnitor " ' "shall indemnify and save harmless *** [indemnitee] from all claims for any such loss, damage, injury, or death, whether caused by the negligence of Licensor, [indemnitee], their agents or employees, or otherwise" ' "); Economy Mechanical Industries, Inc. v. T.J. Higgins Co., 294 Ill. App. 3d 150, 155 (1997) (indemnitor " 'will at all times protect, indemnify and save and keep harmless the [indemnitee] against and from any and all loss, cost, damage or expense, arising out of or from any accident or other occurrence' " (emphasis omitted)); Haynes v. Montgomery Ward & Co., 47 Ill. App. 2d 340, 341, 346-47 (1964) (indemnitor "holds the [indemnitee] harmless for any and all injuries or accident sustained by [the indemnitor's] employees while on the premises of [the indemnitee] or while en route to perform any service for [the indemnitee]' "). Buenz, 227 Ill. 2d at 310, 316-17. In addressing the contract before it, the Buenz court held that the contract did not have any limiting language suggesting that the indemnity provision was not

meant to cover claims resulting from COSCO's own negligence, meaning that Frontline was required to indemnify COSCO for COSCO's own negligence. Id. at 318.

Virginia Surety and Home Depot additionally cite *Nicor Gas Co. v. Village of Wilmette*, 379 Ill. App. 3d 925 (2008). There, the indemnification clause stated that Nicor:

> "shall indemnify, become responsible for and forever save harmless the Municipality from any and all *** damages *** which the Municipality may legally suffer *** for or by reason of the use and occupation of any Public Place in the Municipality by the Grantee pursuant to the terms of this ordinance or legally resulting from the exercise by the Grantee of any of the privileges herein granted." *Id.* at 931.

The *Nicor Gas Co.* court relied on *Buenz* in holding that the indemnification clause was very broad and that the phrase "any and all" was not accompanied by any limiting language, therefore requiring Nicor to indemnify claims arising out of even the Village's own negligence. *Id.* at 931-32.

Virginia Surety and Home Depot argue that as in *Buenz* and *Nicor Gas Co.*, the in-store merchandising agreement contains the inclusive "any and all language" requiring PMR to indemnify Home Depot for "any and all loss, damage, claim, lawsuit, judgment, liability, cost or expense." They argue that the indemnification provision does not have any language limiting PMR's indemnity obligation to just its own negligence, so the agreement shows the parties intent that PMR indemnify Home Depot for Home Depot's own negligence. Virginia Surety and Home Depot argue that, therefore, the in-store merchandising agreement qualifies as an "insured contract" under the CGL policy, so that the exception to the exclusion General Casualty relies on would apply, and General Casualty is required to defend PMR against Home Depot's third-party complaint in the Jerman action.

General Casualty argues that contrary to Virginia Surety's and Home Depot's argument that the "insured contract" analysis turns on the presence of the phrase "any and all" in the in-store merchandising agreement, the *Buenz* court specifically cautioned that the phrase alone was not outcome-determinative, but rather must be read in the context of the entire contract. General Casualty argues that the provision in *Buenz* is distinguishable because it is not contingent on any conduct by the indemnitor, whereas the cases *Buenz* cited as containing limiting language not indemnifying the indemnitee for its own negligence all contained some contingency on, or connection to, the indemnitor's involvement or conduct. General Casualty contends that the in-store merchandising agreement is similarly expressly connected to the conduct or work of the indemnitor, PMR, and therefore does not indemnify Home Depot for Home Depot's own negligence. As such, according to General Casualty, the in-store merchandising agreement is not an "insured contract," and the employer's liability and contractual liability exclusion in the CGL policy preclude coverage for PMR.

Home Depot responds that *Buenz* held that the use of "any and all" language in an indemnification agreement would not result in indemnification for an indemnitee's own negligence where the indemnification agreement expressly limits itself to the indemnitor's *negligence*, but General Casualty is improperly attempting to expand this holding to the indemnitor's *conduct.* Home Depot argues that such an interpretation is nonsensical because all claims for indemnification rest upon some type of conduct of the indemnitor under the relevant contract. Virginia Surety argues that such an interpretation is contrary to *Nicor Gas Co.*, because there indemnification was contingent upon Nicor's use and occupation of public places in the municipality, but the court held that the parties agreed that Nicor would indemnify the Village for its own negligence.

Home Depot additionally notes that the in-store merchandising agreement states that it "shall be governed by and construed in accordance with the laws of the State of Georgia ***."[1] Home Depot argues that the interpretation it advocates would be the same under Georgia law. Home Depot cites a federal district court case, *New Hampshire Insurance Co. v. Mendocino Forest Products Co.*, No. C 06-2909 SBA, 2007 WL 2875683 (N.D. Cal. 2007). There, the indemnity provision stated that the indemnitor would indemnify Home Depot against " 'losses arising, or alleged to have arisen out of *** [the indemnitor's] merchandise or its use.' " (Emphasis omitted.) *Id.* at *6. The court stated that under Georgia law, the phrase "arising out of" is broadly interpreted to encompass any causal relationship. *Id.* The court held that the indemnity provision was broad enough to require the indemnitor to indemnify Home Depot for Home Depot's own negligence because the underlying complaint alleged that the injury arose from the merchandise itself. *Id.* The in-store merchandising agreement here similarly includes "arising out of" language.

We conclude that the trial court properly granted General Casualty's motion for summary judgment and denied Virginia Surety's cross-motion for summary judgment. The language at issue in the in-store merchandising agreement states that PMR "shall indemnify, defend and hold harmless Home Depot *** against any and all loss, damage, claim, lawsuit, judgment *** to the extent arising out of (a) [PMR's] provision of Services, (b) any actual or alleged injury or death to persons *** caused directly or indirectly, wholly or in part, by [PMR], its employees, agents, or contractors, *** (e) any claims resulting, directly or indirectly, from the conduct or actions of [PMR]."

[1]The in-store merchandising agreement also provides that "[a]ny dispute arising hereunder shall" be brought in specific courts in Georgia.

As stated, an indemnity contract will be construed to indemnify a party against its own negligence only if the contract's language clearly requires such a construction or expresses such an intent in unequivocal terms. Buenz, 227 Ill. 2d at 309. "The nature of such a contract requires that the agreement be strictly construed against indemnity." *Hankins*, 305 Ill. App. 3d at 1093. We agree with General Casualty that the focus on liability from the indemnitee's conduct is what often distinguishes cases in which the indemnitor was found liable for only its own negligence from cases where the indemnitor was also found liable for the indemnitee's negligence. See *Buenz*, 227 Ill. 2d at 312-17 (cases cited therein). *Nicor Gas Co.* is distinguishable because indemnification extended to liability from Nicor's mere occupation of an easement with its gas lines, rather than solely from Nicor's actions. See *Nicor Gas Co.*, 379 Ill. App. 3d at 931 (Nicor agreed to "indemnify *** the Municipality from any and all *** damages *** which the Municipality may legally suffer *** for or by reason of the use and occupation of any Public Place in the Municipality by" Nicor).

Here, the plain language of the indemnification provision shows that PMR agreed to "indemnify" Home Depot for just PMR's own negligence. That is, PMR agreed to "indemnify" Home Depot for PMR's own provision of services; injury caused wholly or in part by PMR; and claims resulting from PMR's conduct or actions. At oral argument, Virginia Surety took the position that, at a minimum, subsection (a) of the indemnification provision requiring indemnity for liability arising out of PMR's "provision of services" did not implicate PMR's conduct and was sufficiently broad to cover liability arising from Home Depot's negligence. However, requiring liability to stem from PMR's "provision of services" is similar to requiring that liability arise from PMR's work, and courts have found that indemnification is limited to the negligence of the indemnitor where the provision specifically references the indemnitor in conjunction with the indemnitor's work. See *Tartar v. Maxon Construction Co.*, 54 Ill. 2d 64, 66 (1973) (subcontractor agreed to indemnify

general contractor against liability " 'by reason of, arising out of, or connected with, accidents, injuries, or damages, which may occur upon or about the Subcontractor's work' "); *Hankins*, 305 Ill. App. 3d at 1089, 1093 (provision stated the indemnitor would indemnify the indemnitee " 'from and against all claims *** which might arise out of the performance of any work to be performed hereunder by [indemnitor] *** caused in whole or in part by [indemnitor's] negligent act or omission' "); see also ***Zadak v. Cannon***, 59 Ill. 2d 118, 119 (1974) (indemnitor agreed to " 'indemnify and hold harmless the [indemnitee] of and from any and all suits, claims, liens, damages, taxes or demands whatsoever arising out of any such work covered by, necessitated or performed under this order' "). Cf. Buenz, 227 Ill. 2d at 306 (indemnitor liable for indemnitee's negligence where it agreed to indemnify indemnitee for liability from " ' possession, use, operation or returning of the equipment during all periods when the equipment shall be out of the possession of [COSCO].' " Even otherwise, subsection (a) does not contain the clear and explicit language required to construe that provision as PMR agreeing to indemnify Home Depot for Home Depot's own negligence. See Westinghouse Electric Elevator Co., 395 Ill. at 433.

Although the indemnity provision in the in-store merchandising agreement states that PMR will indemnify Home Depot against "any and all" claims or damages, the phrase "any and all" alone does not mean that the contract provides indemnification for an indemnitee's own negligence. *Buenz*, 227 Ill. 2d at 316. As discussed, the Buenz court listed a series of cases that it stated had express clauses limiting indemnification to negligence by the indemnitor, despite the presence of "any and all" or similar language (see Buenz, 227 Ill. 2d at 313-15), so the use of that phrase alone is not case dispositive. Further, contrary to Virginia Surety's argument, the fact that the in-store merchandising agreement requires PMR to indemnify Home Depot for actual or alleged injury to persons caused "wholly or in part" by PMR does not automatically mean that PMR agreed to indemnify Home Depot for Home Depot's own negligence.

The indemnification provision in *Virginia Surety Co.* similarly stated that De Graf would indemnify the general contractor for injury "caused in whole or in part" by De Graf, yet the supreme court found that the provision did not require indemnification for the general contractor's own negligence. *Virginia Surety Co.*, 224 Ill. 2d at 565. Virginia Surety's argument that *Virginia Surety Co.* is inapplicable because the suit was a contribution action rather than one based on indemnification is without merit, as our supreme court interpreted the plain and ordinary meaning of the subcontract provision and discussed both contribution and indemnity. See *Id.* at 565-70. We do agree with Virginia Surety that the "wholly or in part" language means that PMR would have a duty to indemnify Home Depot if both parties' negligence was found to be a proximate cause of the accident. However, the critical distinction is that it is not Home Depot's negligence that will trigger PMR's obligation to indemnify, but rather PMR's own negligence. See also *id.* at 565 (De Graf was required to indemnify the general contractor only for De Graf's own negligence, despite any common liability on the general contractor's part).

Additionally, Home Depot's reliance on the phrase "arising out of" under Georgia law, per *Medicino Forest Products*, is not persuasive. There, the phrase "arising out of" was connected to the indemnitee's "merchandise or its use," similar to the indemnity for damages "arising out of" possession or use of equipment in *Buenz*. See *Buenz*, 227 Ill. 2d at 306. Here, in contrast, the phrase "arising out of" modifies actions by PMR. We note that all of the aforementioned cases that the *Buenz* court found as containing express clauses limiting indemnification to negligence by the indemnitor also contained the phrase "arising out of" or similar language. See *Buenz*, 227 Ill. 2d at 313-15. While *Buenz* is an Illinois case, the *Medicino Forest Products* court did not rely on the phrase "arising out of" in a vacuum to find indemnification for the indemnitee's negligence, but rather looked at the phrase in conjunction with what it modified, *i.e.* the indemnitor's merchandise.

Accordingly, the phrase "arising out of" is similar to the phrase "any and all," which is generally broad language but must be interpreted in context. We do not consider Georgia law further, as Home Depot has relied exclusively on *Medicino Forest Products* for its argument regarding Georgia law. See *U.S. Bank v. Lindsey*, 397 Ill. App. 3d 437, 459 (2009) (a reviewing court is entitled to have the issues on appeal clearly defined and supported by relevant authority, and it is not our obligation to act as advocate).

We next look to the "insured contract" provision in the CGL policy, which, as General Casualty pointed out, is exactly the same as the one in Virginia Surety Co. The policy defines "insured contract" as, in relevant part, a contract under which PMR assumed the tort liability of another party to pay for bodily injury or property damage to a third party. "Tort liability" is defined as "a liability that would be imposed by law in the absence of any contract or agreement." Here, as in Virginia Surety Co., PMR is not assuming Home Depot's tort liability because it is not indemnifying Home Depot for Home Depot's own negligence. Rather, PMR is waiving the affirmative defense it would otherwise have under Kotecki to limit its liability in a third-party contribution action to its worker's compensation liability. See id. at 570. In this sense, the "indemnity" provision is, in effect, an anticipatory waiver of an affirmative defense in a contribution action rather than a true indemnification clause. See id. at 565, 568. Accordingly, the indemnity provision does not qualify the in-store merchandising agreement to be an "insured contract," so the employer's liability and contract liability exclusions in the CGL policy apply, and General Casualty is not obligated to defend PMR against Home Depot's third-party suit in the Jerman action.

Based on our determination that the CGL exclusions apply, we do not address General Casualty's alternative argument in the trial court that the in-store merchandising agreement was void pursuant to the Construction Contract Indemnification for Negligence Act.

III. CONCLUSION

For the foregoing reasons, we affirm the judgment of the Du Page County circuit court.

Affirmed.