FIRST DIVISION
June 10, 2013

No. 1-12-1670

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

DAVID OCON, Plaintiff, v. THERMOFORMING SYSTEMS, LLC, a Limited Liability Company; KIRBY SHEET METAL WORKS, INC., a Corporation; NSI INDUSTRIES L.L.C., TORK DIVISION, f/k/a TORK, INC.; TORK INC., a Corporation; FARADAY; and SIEMENS BUILDING TECHNOLOGIES, INC., a Corporation, Defendants.	)	Appeal from the Circuit Court of Cook County No. 07 L 7470
THERMOFORMING SYSTEMS, LLC, Third-Party Plaintiff, v. PRAIRIE PACKAGING, INC., Third-Party Defendant.	)	Honorable Diane J. Larsen, Judge Presiding.

JUSTICE DELORT delivered the judgment of the court.
Justices Cunningham and Rochford concurred in the judgment.

ORDER

¶ 1 ***Held:*** Contract between Washington seller of machine and Illinois purchaser contained a valid choice-of-law provision applying Washington state law. Indemnity clauses

> applying to an indemnitor's employee are not enforceable under Washington law, unless the contract expressly waives the employer's immunity from liability to its employees. Because the indemnity provision at issue here contained no such express waiver, it was unenforceable under Washington law.

¶ 2 David Ocon tragically lost both of his arms while using a trim press machine manufactured by Thermoforming Systems, a Washington state limited liability company (Thermoforming). Thermoforming had sold the machine to Prairie Packing, Inc., an Illinois corporation (Prairie). Prairie employed Ocon. Ocon sued Thermoforming and several other defendants regarding his injuries. Thermoforming, in turn, filed a third-party claim against Prairie, seeking to recover a portion of any of its liability to Ocon. Thermoforming's claim was largely based on the indemnity provision contained in its sales contract. Thermoforming and Prairie reached a good-faith settlement with Ocon, which eliminated Thermoforming's direct claims against Prairie, but left Thermoforming's claim for indemnity against Prairie under the contract unresolved. The trial court applied Washington law to the contract and dismissed Thermoforming's claims for indemnity. We affirm.

¶ 3 BACKGROUND

¶ 4 Ocon's original complaint against Thermoforming alleged it was negligent in the design, manufacture, installation, inspection, maintenance, modification and warnings of the trim press machine. Ocon alleged that due to unreasonably dangerous and/or negligent design, manufacture, or warnings of the machine, the machine activated without sufficient warning or without sufficient safety devices in place, resulting in Ocon's dismemberment. Thermoforming sold the machine to Prairie pursuant to a written sales proposal which included two pages of

terms and conditions. The sales proposal is the only written agreement between Thermoforming and Prairie with respect to the machine. Prairie accepted the proposal in writing and made a down payment for the manufacture of the machine. Prairie later accepted delivery and paid the balance of the purchase price. Prairie agreed to be bound by the terms and conditions in the sales proposal.

¶ 5 The terms and conditions included with the sales proposal provide, in part, as follows:

> "Buyer further agrees to indemnify and hold Seller harmless against all claims, damages, cost, expenses, and attorney's fees arising from claims for personal injury involving Articles delivered under this Sales Contract where Articles were either (a) altered by Buyer and injury is related to the modified features of the Article or (b) used in conjunction with equipment not supplied by Seller and injury is related to the equipment not supplied by Seller or (c) misused by Buyer where Seller's safety features and/or procedures were bypassed by Buyer resulting in the injury."

¶ 6 Thermoforming's fourth amended third-party complaint against Prairie (hereinafter "the complaint") alleged that when Ocon was injured, (1) Prairie had altered or modified some of the features of the machine, and Ocon's injury was related to the altered or modified features; (2) the machine was being used in conjunction with equipment Thermoforming did not supply, and Ocon's injury was related to that additional equipment; and (3) Prairie's employees misused the machine by bypassing certain safety features and/or procedures. Thermoforming tendered defense of Ocon's lawsuit to Prairie. Prairie refused to defend Thermoforming.

¶ 7 Count I of the complaint sought indemnification based on the sales proposal clause providing that Prairie would indemnify and hold harmless Thermoforming for all claims for personal injury involving the machine under certain conditions. Count II sought damages for breach of contract for failing to accept the tender of the defense of Ocon's lawsuit. Counts III, V, VI, VII and VIII sought contribution from Prairie under various theories. Specifically, Count III sought contribution based on Prairie's alleged negligence in connection with Ocon's injuries, and Count V sought limited contribution under our supreme court's holding in *Kotecki v. Cyclops Welding Corp.*, 146 Ill. 2d 155, 164 (1991)[1]. The remainder of the counts for contribution alleged the "*Kotecki* cap" should not apply. Thermoforming had previously voluntarily dismissed count IV, which alleged spoilation of evidence.

¶ 8 Prairie filed a motion to dismiss counts I through IV and counts VI through VIII of the complaint pursuant to section 2-615 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2008)). On September 9, 2010, the trial court granted Prairie's motion, finding that Washington law applied and that the indemnity clause was invalid. Prairie settled Ocon's claims, however, and later filed an unopposed motion asking for a finding of good-faith settlement and dismissal of those remaining claims with prejudice. The motion stated that Ocon and Prairie voluntarily reached a settlement agreement resolving any claims between them, and that pursuant

[1] In *Kotecki v. Cyclops Welding Corp.*, 146 Ill. 2d 155, 164 (1991), our supreme court held that an employer, sued as a third-party defendant in a case involving its injured worker, is liable for contribution, but the amount of the employer's contribution is limited by its workers' compensation liability (the *Kotecki* cap). In a subsequent case, the court held that "an employer may enter into a valid and enforceable contractual agreement to waive the *Kotecki* limitation on an employer's contribution liability." *Liccardi v. Stolt Terminals*, 178 Ill. 2d 540, 542 (1997).

to section 2(c) and 2(d) of the Joint Tortfeasor Contribution Act (Contribution Act) (740 ILCS 100/2(c), 2(d) (West 2008)), the release between Ocon and Prairie discharged Prairie from all liability for any contribution. The motion stated, on information and belief, that Ocon had also settled with Thermoforming.

¶ 9 On May 3, 2012, the trial court dismissed Ocon's claims against Prairie, Thermoforming, and various other entities. Although certain claims remained pending against Kirby Sheet Metal Works, Inc., the May 3, 2012 order stated there was no just cause to delay appeal of the previously dismissed claims against Prairie under Supreme Court Rule 304(a) (Ill. S. Ct. R. 304(a) (eff. Feb. 26, 2010) ("If multiple parties or multiple claims for relief are involved in an action, an appeal may be taken from a final judgment as to one or more but fewer than all of the parties or claims only if the trial court has made an express written finding that there is no just reason for delaying either enforcement or appeal or both"). This appeal followed.

¶ 10 ANALYSIS

¶ 11 This case comes before us on review of the trial court's September 9, 2010 order granting Prairie's motion to dismiss counts I through IV and counts VI through VIII of the complaint pursuant to section 2-615 of the Code. "This court reviews the grant of a section 2-615 motion to dismiss *de novo*, and we accept all well-pleaded facts in the complaint as true and draw all reasonable inferences from those facts in favor of the nonmoving party. We will uphold the dismissal of a complaint when it clearly appears that no set of facts could be proved under the pleadings that would entitle the plaintiff to relief." (Internal citations omitted.) *Addison v. Distinctive Homes, Ltd.*, 359 Ill. App. 3d 997, 1000 (2005).

¶ 12 The focus of Thermoforming's claims in this court is that the trial court erred in applying the law of the state of Washington to the contract, which, in turn, invalidated its indemnification agreement with Prairie. Under Washington law, "an indemnity clause of this type is enforceable only if it clearly and specifically contains a waiver of the immunity of the workers' compensation act, either by so stating or by specifically stating that the indemnitor assumes potential liability for actions brought by its own employees." *Brown v. Prime Constr. Co.*, 684 P.2d 73, 75 (Wash. 1984). Thermoforming does not contend that the indemnity clause contains an express waiver. Instead, it contends Illinois law, which contains no such limitation on enforceability, should apply. The contract does contain an express choice-of-law provision stating that: "This Sales Contract shall be governed by the laws of the State of Washington." Notwithstanding this contractual provision, Thermoforming argues that, under Illinois choice-of-law rules, Washington law cannot apply to the contract.

¶ 13 Thus, to resolve this appeal, we must determine (1) what state's law applies and (2) whether, under the applicable law, the indemnification clause applies to the pending claims. Both questions require us to construe the underlying contract. "The construction, interpretation and legal effect of a contract are questions of law." *Gilmore v. Carey*, 2011 IL App (1st) 103840, ¶ 13 (2011). "The terms of an agreement, if unambiguous, should generally be enforced as they appear, and those terms will control the rights of the parties." *Coghlan v. Beck*, 2013 IL App (1st) 120891, ¶ 27 (2013). Moreover, when the language of the contract is unambiguous, we need not inquire into the parties' intent. Any particular interpretation that one of the parties may have had at the time the contract was executed is immaterial. *American National Trust Company*

of Chicago v. Kentucky Fried Chicken of Southern California, Inc., 308 Ill. App. 3d 106, 119 (1999).

¶ 14 *Application of Illinois or Washington State Law*

¶ 15 Illinois follows the Restatement (Second) of Conflict of Laws (1971) (hereinafter "the Restatement") in making choice-of-law decisions. *Morris B. Chapman & Associates, Ltd. v. Kitzman*, 193 Ill. 2d 560, 568-69 (2000). In particular, where parties have made an express choice of state law in their written contract, section 187 of the Restatement applies. *Hall v. Sprint Spectrum L.P.*, 376 Ill. App. 3d 822, 825-26 (2007). "Essentially, section 187 provides that the parties' choice of law governs unless (1) the chosen State has no substantial relationship to the parties or the transaction or (2) application of the chosen law would be contrary to a fundamental public policy of a State with a materially greater interest in the issue in dispute." *International Surplus Lines Insurance Co. v. Pioneer Life Insurance Co.*, 209 Ill. App. 3d 144, 153 (1990).

¶ 16 A. Section 187(1)

¶ 17 We first address Prairie's argument that section 187(1) of the Restatement is dispositive. Section 187(1) of the Restatement provides that:

> "The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue."
> Restatement (Second) of Conflict of Laws, § 187(1) (1971).

According to Prairie, because the parties could have expressly contracted for the same result that comes from applying Washington law, the choice-of-law clause is valid under Section 187(1) and no further analysis is required. Thermoforming, on the other hand, points to section 187(2), arguing that we must consider the relative contacts in the two forums, as well as the competing policy considerations before simply applying the chosen state's law. Section 187(2) of the Restatement provides that:

> "The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either
>
> (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or
>
> (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties." Restatement (Second) of Conflict of Laws, § 187(2) (1971).

Although Thermoforming does not argue that the parties could *not* have achieved the same result contractually as would result from applying Washington law, it argues that section 187(2) applies nonetheless.

¶ 18 The contract contains no express language stating whether or not the indemnity clause applies to claims brought by Prairie's own employees. Applying section 187(1), we would find that by incorporating Washington law the parties *intended* to limit the scope of the indemnity. Restatement (Second) of Conflict of Laws, § 187, Comment c, at 563 (1971) ("The rule of this Subsection is a rule providing for incorporation by reference and is not a rule of choice of law"). Thermoforming points to nothing that would have precluded the parties from expressing that intent in the plain language of the contract. In fact, nothing in Illinois law prohibited the parties from specifically contracting to limit the indemnity. See *Water Tower Realty Co. v. Fordham 25 E. Superior, L.L.C.*, 404 Ill. App. 3d 658, 666 (2010) (party may narrow an indemnification clause to third-party damage but must do so expressly); *Buenz v. Frontline Transportation Co.*, 227 Ill. 2d 302, 316 (2008) ("[i]t is quite generally held that 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 or such intention is expressed in unequivocal terms") (emphasis added). "In such instances, the forum will apply the applicable provisions of the law of the designated state in order to effectuate the intentions of the parties." Restatement (Second) of Conflict of Laws, § 187, Comment c, at 563 (1971). Thus, section 187(1) directs us to apply Washington law.

¶ 19 B. Section 187(2)

¶ 20 Nonetheless, we must also look at the relevant provisions of section 187(2). See, *e.g.*, *Old Republic Insurance Co. v. Ace Property & Casualty Insurance Co.*, 389 Ill. App. 3d 356, 363 (2009) (applying section 187(2) factors without discussion of whether parties could have entered

agreement at issue under Illinois law). See also *Lyons v. Turner Construction Co.*, 195 Ill. App. 3d 36, 39 (1990) (applying section 188 of the Restatement and noting that "one commentator has recently noted that courts following the modern choice of law approach will not enforce foreign law that is contrary to a fundamental public policy of the forum. Illinois is among the States adhering to this approach") (Internal citation omitted.). Moreover, "the analysis contained in the Restatement is a guide for courts; it is not black-letter law to be upheld against all other considerations." *Maher & Assocs. v. Quality Cabinets*, 267 Ill. App. 3d 69, 77 (1994). The *Maher* court expressed the importance of considering whether the application of foreign law would offend the public policy of Illinois. Given the importance of the role of Illinois policy in determining whether to uphold a choice-of-law provision, we review the choice-of-law clause in light of the other Restatement rules.

¶ 21 Because sections 187(2)(a) and 187(2)(b) are stated in the disjunctive, we will analyze each separately. *In re E.B.*, 231 Ill. 2d 459, 468 (2008) ("Generally, use of the disjunctive indicates alternatives and requires separate treatment of those alternatives"). The public policy of a State "must be sought in its constitution, legislative enactments[,] and judicial decisions." *Hall*, 376 Ill. App. 3d at 825.

¶ 22 Thermoforming contends that the choice-of-law provision in the contract is ineffective under section 187(2)(a) because Washington has no substantial relationship to the parties or to the transaction. We disagree. Washington has a substantial relationship to the parties and to the transaction within the meaning of section 187(2)(a). This court has found that a substantial relationship between the forum and the parties and/or transaction exists where one of the parties

was a company operating in the chosen forum and the contract at issue was negotiated and completed in the chosen forum. *Old Republic*, 389 Ill. App. 3d at 36. See also *Hall*, 376 Ill. App. 3d at 826 (finding foreign jurisdictions had substantial relationship to different parties that were businesses with their principal places of business in the respective jurisdictions); *Maher*, 267 Ill. App. 3d at 76 (finding Illinois did not have a materially greater interest in the litigation where defendant in a contract dispute was incorporated in the foreign jurisdiction and had its principal place of business there). In this case, Thermoforming is a Washington limited liability corporation. Thermoforming sent the sales proposal containing the terms and conditions, including the indemnity clause, from Washington to Prairie in Illinois. Thermoforming accepted Prairie's written acceptance and/or purchase order and payments in Washington, and Thermoforming shipped the machine from Washington. We cannot say that Washington has "no substantial relationship" to the parties or to the transaction.

¶ 23 We further find that there was a reasonable basis for the parties' choice of Washington law. "Comment (f) to section 187 notes that generally the reasonable basis test in section 187(2)(a) is satisfied if the chosen State was the State of incorporation or principal place of doing business unless that place was wholly fortuitous and bears no reasonable basis for the parties' choice." *International Surplus*, 209 Ill. App. 3d at 154. The choice of Washington law is not wholly fortuitous. Washington is Thermoforming's principal place of business, and Thermoforming manufactured the machine there. Thermoforming argues that because any modifications, misuse, or failure to warn that would have triggered Prairie's liability under the indemnity clause would have occurred in Illinois, Washington has no substantial relationship to

the transaction and there is no reasonable basis to apply Washington law. That argument is unavailing. If, for instance, Prairie defended against any obligation to indemnify Thermoforming by arguing that no modifications, misuse, or failure to warn occurred or were not the cause of the injury, the design, manufacture, and warnings associated with the machine, all of which occurred in Washington, would be at issue. Moreover, in any litigation arising from this transaction, regardless of the claims or defenses, the liability of a Washington company hangs in the balance, based on a clause in a contract written and accepted in Washington.

¶ 24 Thermoforming also argues the contractual obligations related to Washington were completed years ago. This is incorrect, because the indemnification is an ongoing obligation formed in Washington with a Washington resident. Therefore, it is appropriate for Washington law to govern the parties' rights under the contract. See *International Surplus*, 209 Ill. App. 3d at 154 (finding substantial relationship test satisfied with regard to choice of law provision in insurance contract where the insured risk was located in the chosen forum). In sum, we hold that section 187(2)(a) of the Restatement is satisfied because Washington bears a substantial relationship to the transaction.

¶ 25 Next, Thermoforming points to section 187(2)(b) and argues that applying Washington law would contradict a fundamental public policy of Illinois. Washington does not provide for apportionment of liability between third parties and an employer when an employee is injured in a work-related accident[2]. In Illinois, on the other hand, "an employer's liability for an injury to

[2] The Washington Supreme Court has declined to adopt the doctrine of contribution. *Redford v. City of Seattle*, 615 P.2d 1285, 1289 (Wash. 1980) ("This court refused to adopt contribution as a matter of common law damages ***. However, our rejection of the common law doctrine does

its employee may come in several forms. The employer's exposure to pay benefits to an injured employee pursuant to the Illinois Workers' Compensation Act is the most common. *** An injured employee may also have a cause of action against a third party to the employment relationship, such as a general contractor, whose negligence allegedly caused or contributed to the employee's injuries. *** Although the employee is barred from bringing a civil suit directly against his employer, the third-party nonemployer may file a third-party suit against the employer for 'contribution' toward the employee's damages. The contribution lawsuit presents a second type of liability exposure for the employer." (Internal citations omitted.) *Virginia Surety Co., Inc. v. Northern Insurance Company of New York*, 224 Ill. 2d 550, 556 (2007).

¶ 26 The facts of this case are very similar to the facts of *Lyons v. Turner Construction Co.*, 195 Ill. App. 3d 36 (1990), but nonetheless lead to a different outcome. The court decided a conflict of state law issue in *Lyons* under section 188 of the Restatement because the parties' contract did not contain a choice of law provision. *Lyons*, 195 Ill. App. 3d at 39. In so doing, the *Lyons* court applied the reasoning of *Donaldson v. Fluor Engineers, Inc.*, 169 Ill. App. 3d 759 (1988), expressly finding that "[t]he existence of an express choice of law provision in [*Donaldson*], requiring application of a different section of the Restatement, does not render *Donaldson* inapplicable here; the vigor of a fundamental public policy is the same in either

---

not prevent us from honoring the agreement of private parties to allocate loss in a manner which may resemble contribution"). See also Wash. Rev. Code § 4.22.070 (1993) ("In all actions involving fault of more than one entity, the trier of fact shall determine the percentage of the total fault which is attributable to every entity which caused the claimant's damages except entities immune from liability to the claimant under Title 51 RCW").

situation." *Id*., at 41. Thus, we find *Lyons* instructive on the question presented in this case: whether applying Washington law would contravene a fundamental policy of Illinois.

¶ 27 In *Lyons*, the third-party plaintiffs also sought indemnity pursuant to an indemnification clause in a contract. *Lyons*, 195 Ill. App. 3d at 37. The third-party plaintiffs were general contractors hired to erect a building in Texas. The third-party defendant was a subcontractor hired for the project. The subcontractor's employee was an Illinois resident who was injured in the course of performing his duties on the work site in Texas. *Id*., at 37. The *Lyons* court noted that "the transaction had a number of contacts with *** Texas, and the indemnification provision in question would have been enforceable under Texas law." *Id*., at 37. The trial court applied Illinois law and dismissed the complaint, and the appellate court affirmed. *Id*. Similarly, in *Donaldson*, the appellate court affirmed the trial court's refusal to honor the parties' choice of California law to govern their agreement because an indemnity provision in the agreement was against Illinois public policy. *Donaldson*, 169 Ill. App. 3d at 761. The *Donaldson* court found the "the indemnity statute speaks in very explicit terms when it provides that an agreement to indemnify or hold harmless another person from that person's own negligence is void as against public policy and wholly unenforceable." (Internal quotation marks and citation omitted.) *Donaldson*, 169 Ill. App. 3d at 760. The *Lyons* court, following *Donaldson*, held that "Texas law cannot be applied to validate the construction contract indemnification agreement at issue *** because such agreements violate a fundamental public policy of the State of Illinois." *Id*., at 42.

¶ 28 In each case, the Illinois public policy at issue was clearly expressed in the Indemnification Contracts or Agreements Act (now the Construction Contract Indemnification

for Negligence Act) (Indemnification Act). Section 1 of the Indemnification Act read, and still reads, as follows: "With respect to contracts or agreements, either public or private, for the construction, alteration, repair or maintenance of a building, structure, highway bridge, viaducts or other work dealing with construction, or for any moving, demolition or excavation connected therewith, every covenant, promise or agreement to indemnify or hold harmless another person from that person's own negligence is void as against public policy and wholly unenforceable." 740 ILCS 35/1 (West 2008). The *Lyons* court found the quoted provision to be "clear and unmistakable language" declaring the public policy of the state. *Id*., at 41. Here, in contrast, no constitutional provision, legislative enactment, or judicial decision contradicts Prairie's right to exclude work-related injuries to employees from its agreement to indemnify Thermoforming. See *Hall*, 376 Ill. App. 3d at 825-26. In fact, case law demonstrates that similar exclusions are routinely enforced in Illinois. See *Midland Insurance Co. v. Bell Fuels, Inc.*, 159 Ill. App. 3d 780, 785 (1987) (employer's insurance policy found to "exclude from coverage an obligation of the insured to indemnify for damages resulting from injury to the insured's employee whether the obligation is asserted by way of contribution or indemnification"); *Aetna Casualty & Surety Co. v. Beautiful Signs, Inc.*, 146 Ill. App. 3d 434, 436 (1986) (finding that a general-liability policy did not cover employee injuries).

¶ 29 Thermoforming also argues that applying Washington law would undermine Illinois' policy with regard to contribution among joint tortfeasors. It contends that Illinois' contribution policy is relevant because it could only recover from Prairie under the indemnity agreement if Prairie was at fault. Applying Washington law to the indemnification agreement does not,

however, run afoul of Illinois' policy regarding contribution between joint tortfeasors. In Illinois, unlike Washington, apportionment of fault based on relative degree of culpability is governed by the Joint Tortfeasor Contribution Act (Contribution Act). 740 ILCS 100/2 (West 2008). Under the Contribution Act, each party whose fault contributed to an injury pays its *pro rata* share of the common liability. 740 ILCS 100/2, 3 (West 2008). In Illinois, an employer's maximum liability in a third-party suit for contribution is limited to its liability to its employee under the Workers' Compensation Act, but an employer may waive that protection by contract and thereby be liable for its full *pro rata* share of contribution. *Virginia Surety Co., Inc.*, 224 Ill. 2d at 558. Further, "[c]ontribution *** and indemnification are distinct causes of action. Contribution is a remedy that allows jointly liable tortfeasors to hold other culpable parties responsible for their proportionate share of the joint liability." *Enterprise Leasing Co. of St. Louis v. Hardin*, 2011 IL App (5th) 100201, ¶ 18 (2011). "[I]ndemnity *** shifts the entire loss from one tortfeasor who has been compelled to pay it to the shoulders of another who should bear it instead." (Internal quotations marks and citation omitted.) *Herington v. J.S. Alberici Construction Co.*, 266 Ill. App. 3d 489, 494 (1994).

¶ 30 Preserving the indemnification agreement is not necessary to give effect to Illinois' policy as to apportionment of fault. Because this case does not arise under the Contribution Act, it does not implicate Illinois' policy apportioning fault between joint tortfeasors. The settlements with Ocon extinguished Thermoforming's contribution rights under Illinois law. 740 ILCS 100/2(d) (West 2008) ("The tortfeasor who settles with a claimant pursuant to paragraph (c) is discharged from all liability for any contribution to any other tortfeasor"). Therefore, we cannot say that

applying Washington law would be so odious as to justify rejecting the chosen law of the parties. *International Surplus*, 209 Ill. App. 3d at 155 ("A court should not refuse to apply the chosen law of another jurisdiction, however unlike its own, unless it is contrary to the public morals or natural justice, or unless the enforcement of it would be of evil example or harmful to its citizens").

¶ 31 Thermoforming also argues that an Illinois employer could have had no expectation of being relieved of an indemnity provision it accepted in a contract and Prairie cannot take the position that it is fortuitously entitled to protections which the state of Washington decided to provide to its local employers. However, this argument ignores the "well-established principle of contract law that statutes and laws in existence at the time a contract is executed are considered part of the contract. The parties are presumed to have entered into their agreement with knowledge of the existing law." *Liccardi v. Stolt Terminals*, 178 Ill. 2d 540, 549 (1997). Because the parties agreed to apply Washington law in the contract, Prairie presumably would have left the bargaining table knowing that it did not waive its immunity.

¶ 32 Finally, Thermoforming argues that Illinois has a materially greater interest in the case because Illinois concerns itself with "corporations doing business in Illinois, the safety of workplaces in Illinois, injuries to a resident of Illinois, and litigation pending in Illinois courts." Thermoforming argues that Washington has no interest in these matters. Further, it notes that the "significant contacts" are grouped in Illinois. However, "under section 187 of the Restatement, when an express choice of law is made, it will be given effect in Illinois unless it would *both* violate fundamental Illinois public policy and Illinois has a materially greater interest in the

litigation than the chosen State." (Emphasis in original.) *English Co. v. Northwest Envirocon, Inc.*, 278 Ill. App. 3d 406, 411 (1996). Thus, Thermoforming's argument that the significant contacts are grouped in Illinois is only relevant if application of Washington law would contravene a fundamental public policy of Illinois.

¶ 33 *Miller v. Long-Airdox Co.*, 914 F. 2d 976, 980 (7th Cir. 1990), is instructive here. In *Miller*, the court found that Illinois had the most significant relationship to a claim, and that Indiana had no interest in how Illinois' policy of contribution among joint tortfeasors affected its policy of exclusivity of workers' compensation remedies because, under the facts of that case, any such effect would not affect Indiana's Workmen's Compensation Act. *Id*. at 980[3]. Similarly, in this case, Illinois has no interest in how Washington's exclusive-remedy policy affects Illinois' contribution rules, because under the facts of this case, Washington law does not implicate our Contribution Act. Moreover, we can apply Washington law to the contract without "legalizing" some practice which Illinois law specifically prohibits. Compare *Lyons*, 195 Ill. App. 3d at 42 (holding that parties' chosen forum could not be applied to validate indemnification agreement prohibited by Illinois statute). See, e.g., *International Surplus*, 209 Ill. App. 3d at 157 ("Illinois public policy does not prohibit insuring against punitive damages based on vicarious liability"). Even with the indemnity clause invalidated by operation of Washington law, Ocon can receive the full amount of his recovery, and Thermoforming's right to contribution is not abrogated. In sum, we find that applying Washington law, to the effect that the indemnity clause does not apply

[3] Indiana enacted a law which, under the facts of that case, required Illinois law to apply to a claim for an injury that occurred in Indiana. The law provided that Illinois law applies to injuries that occur in mines in Indiana, where the mine opening was in Illinois. *Miller*, 914 F. 2d at 979.

to claims by the indemnitor's employee, contravenes no substantial Illinois policy. Therefore, we find no basis to ignore the parties' choice of law and hold that Washington law applies to the contract.

¶ 34 *Application of the Indemnity Clause under Washington Law*

¶ 35 Having determined that Washington law applies to the parties' contract, we must interpret the contract itself and determine whether Prairie's limited agreement to indemnify included indemnifying third parties for claims by Prairie's employees. Washington grants employers immunity from tort claims by their employees. See Wash. Rev. Code § 51.04.010 (1977) ("all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished, except as in this title provided"). Washington law requires an *express* waiver of the indemnitor's immunity from its employee's claims. "Accordingly, where employers agree to contract away their immunity *** and to indemnify third parties for employee injuries, such an intent should be clearly expressed in the agreement. Thus, for such a contractual obligation to be enforceable, the employer must have, in writing, explicitly waived its *** immunity in the contract at issue." (Internal quotation marks and citations omitted.) *Hatch v. City of Algona*, 167 P.3d 1175, 1179 (Wash. App. Div. 1, 2007). A Washington court will "examine the contract at issue to ascertain if it contains the requisite explicit, written waiver of *** immunity." *Hatch*, 167 P.3d at 1180.

¶ 36 In *Hatch*, the third-party plaintiff alleged that an agreement between it and the employer was a written contract which contained an implied agreement to indemnify the third-party plaintiff for money it paid to the indemnitor's employee to satisfy a tort claim. *Id.*, at 756. The

third-party plaintiff also alleged that the employer's immunity did not apply. *Id.* There, the court assumed, without deciding, that the letter was a written contract and that the contract did include an implied agreement by the employer to indemnify a third party for sums that the third party paid for an employee's tort claim. The *Hatch* court found that the "inquiry becomes whether the [contract] contains an effective waiver of [the employer's] immunity." *Id.* The court held it did not because "[a]n employer's waiver of its *** immunity is enforceable only if it appears in writing in the contract at issue and is explicit." *Id.* The *Hatch* court explained as follows:

> "[T]he contract must specifically waive the *** immunity, in writing, either by so stating or by specifically stating that the indemnitor assumes potential liability for actions brought by its own employees. While courts may infer the existence of an indemnity agreement, *Brown* requires that a waiver of [employer] immunity be expressly written into the contract at issue for it to be enforceable." (Internal quotation marks and citations omitted.) *Hatch*, 167 P.3d at 1180.

¶ 37 Thermoforming does not argue that Prairie expressly assumed liability for claims by its employees; it only argues that Prairie implicitly did so. Thus, under *Hatch*, the indemnity clause is unenforceable because it does not specifically state that Prairie waived its immunity or that it accepts potential liability for actions brought by its own employees. *Brown*, 684 P.2d at 75.

¶ 38 Alternatively, Thermoforming argues that, even under Washington law, it can seek indemnity from Prairie for injuries to Prairie's employee because the indemnity provision at issue here is different from the indemnity provision the Washington supreme court construed in *Brown.* The alleged difference is that here, Prairie's responsibility to indemnify is limited to

instances where it is at fault, whereas the indemnity provision in *Brown* applied to all losses of any kind incident to the indemnitor's work, except for losses causes by the indemnitee's own negligence.

¶ 39 There is no indication in *Brown* that the express waiver or acceptance requirement excludes situations where the employer is indemnifying the third party for the employer's own negligence. The immunity applies to any liability of an employer to an employee. *Doty v. Town of South Prairie*, 155 Wash. 2d 527, 531 (2005) ("In return for providing statutorily based fault-free recovery, the legislature removed claims by workers against their employers from private controversy"). In *Waters v. Puget Sound Power and Light Co.*, 924 P.2d 925, 926 (Wash. App. Div. 1, 1996), the court construed an indemnity provision covering "any and all claims" arising out of the employer's use of the indemnitee's utility poles. *Waters*, 924 P.2d at 926. The *Waters* court rejected the indemnitee's argument that the indemnity clause at issue in *Waters* did not fall under *Brown*. *Id*., at 926. The *Waters* court held that the employer did not waive its employer immunity by indemnifying against "any and all claims" because "*Brown* requires a specific expression of intent to waive employer immunity." *Id*., at 926. See also *McDowell v. Austin Co.*, 693 P.2d 744, 748 (Wash. App. Div. 1, 1985) (construing term "all liability" in indemnity clause as including protection against indemnitor's negligence and indemnitee's negligence). Applying *Waters* and *McDowell*, the fact that Prairie only assumed indemnification liability in the face of its own alleged negligence is irrelevant, as it does not clearly show an intent to waive its immunity or to accept liability for actions by its employees.

¶ 40 Thermoforming also argues that under *Calkins v. Lorain Division of Koehring Co.*, 613 P.2d 143 (Wash. App. Div. 2, 1980), the indemnity provision at issue in this case is enforceable under Washington law. In *Calkins*, the employee was injured while using a crane his employer leased from the third-party. The lease included a provision which stated that the lessee (the employer) assumed liability and shall indemnify the lessor against all liability for injury caused by the operation of the crane. *Calkins*, 613 P.2d at 144. The court recognized that the indemnity clause involved two public policies. The first "provides employers with freedom from suit for injuries to their employees ***." *Id*., at 145. The second "disfavors allowing an indemnitee to contract away liability resulting from his own negligence. *Id*. In Washington, "an intent to indemnify for concurrent negligence must be clearly expressed. *Id*., at 145. The *Calkins* court held that "[t]he indemnity clause in the instant case violated both of the policies discussed above. The clause did not expressly state an intent to deprive [the employer] of his immunity under the industrial insurance act. The parties would have sufficiently indicated such an intent if, in recognition of the second policy, they had expressly provided for indemnity where the lessor and lessee were concurrently negligent." *Id*., at 145.

¶ 41 Thermoforming contends here that because the indemnity clause here expressly provides for indemnity where it and Prairie are concurrently negligent, the parties automatically indicated an intent to waive Prairie's immunity from liability to its employees. See *Calkins*, at 145 ("The parties would have sufficiently indicated such an intent if, *** they had expressly provided for indemnity where the lessor and lessee were concurrently negligent"). This argument is not persuasive. *Calkins* was decided before *Brown*. The *Brown* court relied on *Calkins* for the

proposition of law that "[w]here employers agree to contract away their immunity *** such an intent should be clearly expressed in the agreement." *Brown*, 684 P.2d at 75. *Brown* went on to hold that a clear expression of a waiver of the immunity requires "either so stating or by specifically stating that the indemnitor assumes potential liability for actions brought by its own employees." *Id*., at 75.

¶ 42 *Brown* makes clear that the waiver must be specific, and modified prior decisions inconsistent with that holding. *Brown*, 684 P.2d at 76 n. 3. *Brown* and the cases decided thereafter make clear that general statements of the type in the indemnity clause before us are insufficient to waive immunity and invalidates indemnity clauses as to claims by indemnitors' employees. See *Waters*, 924 P.2d at 927 (Wash. App. Div. 1, 1996) ("The court's rejection of the indemnification claim in *Calkins* was due to factors other than the lack of language which could constitute a waiver of employer immunity"). The indemnity clause at issue does not contain an express waiver of immunity or an express assumption of liability for employees' claims. Therefore, it is unenforceable as to Ocon's claim under Washington law.

¶ 43 *Remaining Issues*

¶ 44 Finally, count II of the complaint alleged that Prairie's refusal to accept the tender of the defense of Ocon's lawsuit against Thermoforming constitutes a breach of the parties' contract. Count II is based on the same indemnity clause. The duty to defend is separate from an obligation to indemnify. Thermoforming has not cited language in the contract giving rise to a duty to defend. Thermoforming's failure is fatal to its claim. *Martusciello v. JDS Homes, Inc.*, 361 Ill. App. 3d 568, 575 (2005) ("In stating a claim for breach of contract, only a duty imposed

by the terms of the contract can give rise to the breach"). Regardless, Thermoforming makes no specific argument regarding a duty to defend. Accordingly, pursuant to Illinois Supreme Court Rule 341(h), Thermoforming has forfeited the argument the trial court erred in dismissing count II of the complaint. *Vancura v. Katris*, 238 Ill. 2d 352, 370 (2010) ("An issue that is merely listed or included in a vague allegation of error is not 'argued' and will not satisfy the requirements of the rule"). The trial court's order dismissing count II of the complaint is affirmed.

¶ 45 CONCLUSION

¶ 46 We find: (1) the parties chose Washington law in their contract; (2) the parties could have achieved the same result obtained by applying Washington law by expressly providing for it in the contract; (3) Washington has a substantial connection to the parties and transaction at issue and; (4) applying Washington law does not offend a fundamental Illinois public policy. Accordingly, Washington law applies to the parties' contract. Under Washington law, the indemnification clause is not enforceable against Prairie for Prairie's employee's claims against Thermoforming. Construing the indemnification clause under Washington law, we find that Prairie is immune from any liability to its employee, and Prairie did not expressly waive that immunity. We therefore affirm the judgment of the trial court.

¶ 47 Affirmed.