SJC-12903

PSYCHEMEDICS CORPORATION vs. CITY OF BOSTON.

Suffolk. October 9, 2020. - January 29, 2021.

Present: Lenk, Gaziano, Lowy, Budd, Cypher, & Kafker, JJ.[1]

Indemnity. Contract, Municipality, Indemnity, Construction of contract. Notice. Practice, Civil, Summary judgment. Waiver. Proximate Cause. Estoppel. Judicial Estoppel.

Civil action commenced in the Superior Court Department on August 7, 2017.

The case was heard by Mitchell H. Kaplan, J., on a motion for summary judgment.

The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

Thomas S. Fitzpatrick (Courtney Simmons also present) for the defendant.

Peter A. Biagetti (Joel D. Rothman also present) for the plaintiff.

[1] Justice Lenk participated in the deliberation on this case and authored this opinion prior to her retirement.

LENK, J. For over twenty years, the city of Boston (city) has contracted with Psychemedics Corporation (Psychemedics) to conduct hair follicle tests for the Boston police department to screen for the use of illicit drugs by police officers and recruits. The contracts have included an indemnification clause (article 7.3) in which Psychemedics agreed to "assume the defense of" the city, and to "hold [it] harmless" from all suits and claims arising from "wrongful or negligent" acts by Psychemedics.[2]

Long after a number of officers, who had been terminated in connection with positive drug hair tests by Psychemedics, brought suit against the city, Psychemedics sought declaratory relief on the ground that it had no duty to indemnify the city, because the city had not "allowed" it to assume the defense of those cases. The city, however, maintained that it had informed Psychemedics repeatedly, both orally and in writing, of its contractual obligation to defend and hold the city harmless from certain claims arising from Psychemedics's purported negligence. The city also brought counterclaims alleging breach of contract and seeking declaratory relief.

---

[2] After the events at issue here, the clause was modified to provide for indemnification for Psychemedics's "tasks, functions, and responsibilities," rather than its "wrongful or negligent" conduct or omissions.

A Superior Court judge, relying on the substance of communications that the parties agreed took place between them,[3] construed these communications as meaning that the city indeed had deprived Psychemedics of the opportunity of assuming the defense. On that basis, the judge granted Psychemedics's motion for summary judgment.[4] The city appealed, and we transferred the case to this court on our own motion.

Where, as here, the parties do not specify the proper form of notice or what would constitute the opportunity to defend, we must decide what constitutes, as a matter of law, the provision of such notice and opportunity. See Browning-Ferris Indus., Inc. v. Casella Waste Mgt. of Mass., Inc., 79 Mass. App. Ct. 300, 312 (2011), quoting Fay, Spofford & Thorndike, Inc. v. Massachusetts Port Auth., 7 Mass. App. Ct. 336, 342 (1979) ("Where the parties to a contract have not agreed with respect to a term which is essential to a determination of their rights and duties, a term which is reasonable in the circumstances will be supplied by the court"). We conclude that, in the absence of any specific contractual provisions by the parties, a simple

---

[3] Other key portions of the communications were hotly disputed.

[4] Because of his decision on the duty to defend, the judge did not reach Psychemedics's other claims, any one of which, it asserted, would have required that summary judgment be entered in its favor. The judge also did not reach the city's counterclaims.

statement of claims that are encompassed by the indemnification clause is sufficient to trigger the obligation to assume the defense; the notice need not be in writing or in any particular form of words, and the indemnitee need not explicitly ask for the assumption of the defense or to hold the indemnitee harmless. Once notice has been received, the burden shifts to the indemnitor proactively to attempt to assume the defense. To attempt proactively to assume the defense entails good faith efforts promptly to assume and control the defense of the claims asserted.[5]

Given this, and on the record before us, we conclude that Psychemedics did not meet its burden to establish by undisputed facts that it was entitled to judgment as a matter of law. Accordingly, the allowance of summary judgment and the entry of a declaratory judgment in Psychemedics's favor were incorrect.

1. Background. a. Parties' prior course of dealing. Beginning in 1998, the city entered into a series of contracts[6] with Psychemedics for hair follicle testing services.[7] The tests

[5] If the scope of coverage is contested, this might be done under a reservation of rights.

[6] The contracts generally were renewed annually, although the first contract was for eighteen months, and the 2013 and 2016 contracts each covered a period of three years.

[7] The city previously had conducted random drug testing of officers through urinalysis. It abandoned that method after

were conducted on recruits and officers of the Boston police department. When a test returned a positive result, as indicated by criteria set forth in Psychemedics's standard operating procedures, a review process was triggered. The review included a second, "safety net" test. If that test, too, returned a positive result, the employee would be subject to a disciplinary hearing. At the end of the process, the police commissioner made the final determination as to the action to be taken against the officer, including termination.

Some scientific research at the time the parties entered into their first contract had cast doubt upon the efficacy of hair follicle tests, and had raised questions as to whether the method was racially biased. Critics noted, inter alia, that environmental exposure to drugs could contaminate hair samples, and that melanin content in hair, as well as hair texture (often associated with race or ethnicity) had a significant impact on the test results, leading to potential racial bias. The city sought and obtained assurances from Psychemedics with respect to the accuracy of its tests in identifying voluntary ingestion and the absence of racial bias.

---

this court held in Guiney v. Police Comm'r of Boston, 411 Mass. 328, 333-334 (1991), that random urinalysis testing constituted an unreasonable search and seizure under art. 14 of the Massachusetts Declaration of Rights.

b. Litigation related to the hair follicle tests. Between 2001 and 2006, ten Boston police officers challenged their terminations (pursuant to positive results from Psychemedics's hair drug tests) before the Civil Service Commission (commission). In 2013, six officers succeeded in obtaining reversals of their terminations. See Thompson v. Civil Serv. Comm'n, 90 Mass. App. Ct. 462, 470-471 (2016). A Superior Court judge affirmed the commission's decision that the officers should be reinstated, and increased the amount of back pay to be awarded to them. The Appeals Court affirmed. See id.

Eight officers also joined in a civil rights action against the city and its police department, alleging disparate impact under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq. See Jones v. Boston, 845 F.3d 28 (1st Cir. 2016) (Jones III); Jones v. Boston, 752 F.3d 38 (1st Cir. 2014) (Jones I); Jones v. Boston, 118 F. Supp. 3d. 425 (D. Mass. 2015) (Jones II). The plaintiffs in the Jones case asserted that Psychemedics's hair tests disproportionately yielded false positives for people of color, resulting in disparate impact by race. See Jones I, supra at 45. The parties await a final determination in the Jones matter, following a jury-waived trial in 2018. See Jones III, supra at 38 (remanding for further proceedings on question whether city refused to adopt testing method that would have reduced disparate impact of hair test).

The racial bias claims are not themselves before us. We instead examine whether Psychemedics met its burden to establish that the city did not "allow" it to assume the defense of certain litigation and that Psychemedics thereby was relieved of its contractual obligations pursuant to article 7.3.

c. Contract provisions. The initial contract, based on one of the city's standard agreements for outside contractors, was executed in 1998; it has been renewed regularly since then, with the most recent three-year agreement signed in 2016. The two clauses at issue here -- articles 7.3 and 8.2 -- were largely consistent across the various contracts.[8] Article 7.3 provided:

---

[8] This language remained virtually identical from 1998 to 2008 (the period of the testing at issue here), when article 7.3 was revised to provide, "The Contractor shall assume the defense of and hold the City, its officers, agents or employees, harmless from all suits and claims against them or any of them arising from tasks, functions, and responsibilities the Contractor is obligated to perform under the contract before performance of services is complete and after performance of services if the service of work product fails to conform to specifications. This shall include Contractor's obligations to conduct testing and convey test results to the designated recipient. The Contractor shall not assume the defense of nor hold the City, its officers, agents or employees, harmless from suits and claims resulting from tasks or functions the City or its agents perform. The City shall assume the defense of and hold the Contractor [its] officers, agents or employees, harmless from all suits and claims against them or any of them arising from the City's collection, handling and submission by the City of test samples, application of the City's personnel policies, and the interpretation, use and confidential treatment by the City of the test results." (Emphasis supplied.)

> "The Contractor [(Psychemedics)] shall assume the defense of and hold the City, its officers, agents or employees, harmless from all suits and claims against them or any of them arising from any wrongful or negligent act or omission of the Contractor, its agents or employees in any way connected with performance under this Contract."

Article 8.2 stated:[9]

> "If the damages sustained by the City resulting from the Contractor's wrongful or negligent acts or omissions exceed sums due or to become due, the Contractor shall pay the difference to the City."

d. City's requests for assistance. The parties agree that, beginning in 2006, the city communicated with Psychemedics regarding the subject of indemnification. They also agree as to the content and nature of certain of these communications, and, because it is upon these undisputed communications that the judge relied in awarding summary judgment to Psychemedics, we begin our analysis by focusing on them as well.

In early 2006, the city orally requested in some form that Psychemedics share in the defense costs of the Jones case. The record does not contain details as to the words exchanged during this communication. Psychemedics's letter in response, however,

---

Article 8.2 also was slightly revised to state, "If the damages sustained by the City resulting from tasks, functions, and responsibilities the Contractor is obligated to perform under the contract exceed sums due or to become due, the Contractor shall pay the difference to the City upon demand" (emphasis supplied).

[9] The city relied upon article 8.2 in its counterclaims. See discussion, infra.

dated February 15, 2006, indicates that the city requested that Psychemedics "share in the out-of-pocket costs to hire an outside attorney to represent the [c]ity in the Jones et al. case." Psychemedics declined, but offered to make its scientific and legal staff available to assist the city, without charge.

On June 9, 2006, the city sent a letter to Psychemedics reiterating its request for financial contribution to the defense case in Jones I, 752 F.3d at 45. In that letter, the city quoted article 7.3 of the parties' contract, the indemnification clause, and stated, "The conduct alleged in the [Jones] Complaint is wrongful or negligent conduct on the part of Psychemedics Corporation." The letter suggested that cost sharing would be reasonable "in light of the alternative remedy provided for in the contract." Psychemedics replied in writing on June 19, 2006, and again declined to contribute financially. It asserted that article 7.3 was not applicable because Psychemedics had yet to be adjudicated negligent,[10] and reiterated the offer of technical support.

The parties dispute whether, in 2006, a "cooperation agreement" was reached between Psychemedics and the city stating that, in lieu of a financial contribution to, or assumption of

[10] Psychemedics since has disavowed this argument.

the defense of the ongoing lawsuits, Psychemedics would provide free legal and scientific expertise. In October 2007, the city filed a motion in the Jones case, seeking leave to file a third-party complaint for indemnification and contribution against Psychemedics. The motion was denied.

At that point, there was a lull in the parties' communications about indemnification; Psychemedics provided a disputed amount of technical and legal assistance at points during the more than ten-year period of litigation, in the Jones case and the appeals before the commission. The city continued to contract with Psychemedics for drug testing services, and also continued its own defense of Psychemedics's testing before the commission and in the Jones case. Although the extent of its contribution and the terms under which that contribution was made are contested, Psychemedics supported the ongoing litigation through its legal and scientific staff.

Ten years passed. In February 2017, the city orally requested that Psychemedics indemnify it for expenses and losses connected to the Jones case and the commission appeals. In July of that year, the city reiterated the request in an electronic mail message. The message demanded "indemnification from Psychemedics in connection with its liability and costs in [the Jones and commission matters], including anticipated settlement payments, pursuant to the [c]ity's contracts with

[Psychemedics], which the [c]ity maintains requires indemnification for all suits and claims against the [c]ity arising from any wrongful or negligent act or omission of Psychemedics, its agents, or employees."

In August 2017, Psychemedics filed the instant complaint in the Superior Court, seeking a judgment declaring that the city is not entitled to indemnification from Psychemedics for liability and costs related to the Federal civil rights suit and the commission appeals (count one). The complaint also contained claims for breach of contract, breach of the implied covenant of good faith and fair dealing, quantum meruit, unjust enrichment, estoppel, and detrimental reliance.

The city denied liability as to all counts and asserted counterclaims for declaratory relief and breach of contract. Psychemedics moved for summary judgment on its affirmative claims and for declaratory relief on the city's counterclaims.[11] A Superior Court judge granted Psychemedics's motion on count one after concluding that "the [c]ity breached the indemnification clause by not allowing Psychemedics to assume the defense of the civil-rights lawsuits [against the city]." The judge stated that, as a result of this determination, there

[11] The city did not file a cross motion for summary judgment.

was no need to reach Psychemedics's other claims or the city's counterclaims, and he did not do so.

2. Discussion. The key issue in this case is whether the judge erred in allowing Psychemedics's motion for summary judgment on the ground that the city had not allowed it to assume the defense of the lawsuits, and thus that Psychemedics had no obligation under article 7.3 to defend and indemnify the city. We conclude that he did.

We also briefly address the city's counterclaims, and three other arguments by Psychemedics in favor of summary judgment, that the judge viewed as moot. Psychemedics had argued that (1) the city orally waived its rights to indemnification after it and Psychemedics entered into an oral arrangement for technical and legal support; (2) Psychemedics was not the proximate cause of the city's damages, as the police commissioner, and not Psychemedics, made the employment decisions; and (3) the city was estopped from claiming Psychemedics's tests were flawed after arguing otherwise in previous and then-ongoing litigation in State and Federal courts. We conclude that the judge incorrectly decided that summary judgment in favor of Psychemedics on count one of its complaint effectively disposed of, among other things, the city's counterclaims based on article 8.2 of the parties'

contract. Further, on the record before us, Psychemedics has not shown an entitlement to summary judgment on any other basis.

a. Standard of review. We review a motion for summary judgment de novo. See Mass. R. Civ. P. 56, 365 Mass. 824 (1974); Federal Nat'l Mtge. Ass'n v. Hendricks, 463 Mass. 635, 637 (2012). In doing so, we must determine "whether, viewing the evidence in the light most favorable to the nonmoving party, all material facts have been established and the moving party is entitled to judgment as a matter of law." Augat, Inc. v. Liberty Mut. Ins. Co., 410 Mass. 117, 120 (1991), citing Mass. R. Civ. P. 56 (c), as amended, 436 Mass. 1404 (2002). We also review de novo a judge's "interpretation of the meaning of a term in a contract." See Balles v. Babcock Power Inc., 476 Mass. 565, 571 (2017), quoting EventMonitor, Inc. v. Leness, 473 Mass. 540, 549 (2016).

b. Duty to defend under article 7.3. We must determine whether, in this case, the judge erred in concluding that the city did not "allow" Psychemedics to assume the defense, and that the city therefore was not entitled to indemnification. The city maintains that it provided more than adequate notice of the need for a defense, it did nothing to prevent Psychemedics from assuming the defense, and Psychemedics then failed to perform its duty under article 7.3 to defend and indemnify the city.

To enforce an indemnification clause, the indemnitee first must give the indemnitor "notice and an opportunity to defend." Trustees of the N.Y., N.H. & H.R.R. v. Tileston & Hollingsworth Co., 345 Mass. 727, 732 (1963) (Trustees). See Pasquale v. Shore, 343 Mass. 239, 243-244 (1961). The indemnitee then must allow the indemnitor to take over the defense (if it attempts to do so), and must not later block the indemnitor from doing so.

Parties may agree to any reasonable prerequisites for providing notice of the need for indemnification and the tendering of a defense. See Beacon Hill Civic Ass'n v. Ristorante Toscano, Inc., 422 Mass. 318, 320 (1996), quoting Smith v. The Ferncliff, 306 U.S. 444, 450 (1939) ("[t]he general rule of our law is freedom of contract"). See, e.g., Cheschi v. Boston Edison Co., 39 Mass. App. Ct. 133, 142 (1995) (where contract required notice be "prompt," delay relieved indemnitor of obligation). If, on the other hand, the notice procedures necessary to invoke indemnification are not explicitly set forth in the contract, "no particular form of words is necessary" to present notice and the opportunity to assume the defense. Bowditch v. E.T. Slattery Co., 263 Mass. 496, 499 (1928).

Once notice and the opportunity to defend are proffered, the indemnitor is on the proverbial hook for claims that it has promised to indemnify. "When a person is responsible over to another, either by operation of law or by express contract, and

he is duly notified of the pendency of the suit, and requested to take upon him the defence of it, he is no longer regarded as a stranger, because he has the right to appear and defend the action, and has the same means and advantages of controverting the claim as if he was the real and nominal party upon the record. In every such case, if due notice is given to such person, the judgment, if obtained without fraud or collusion, will be conclusive against him, whether he has appeared or not" (citation omitted). Boston v. Worthington, 10 Gray 496, 498–499 (1858), and cases cited.

For reasons that are unclear, the parties here did not specify any requirements to effect notice of a request for indemnification or the tendering of a defense. See, e.g., Trustees, 345 Mass. at 732 (contract contained no "demand or request"). Article 7.3 provided only that Psychemedics "shall assume the defense of and hold the [c]ity . . . harmless" (emphasis supplied). Therefore, a simple statement of the existence of allegations of conduct covered by the indemnification provision would suffice to provide notice. See, e.g., Trustees, supra; Bowditch, 263 Mass. at 499; Worthington, 10 Gray at 499.

The judge, however, stated that, while no specific form of words was required to establish adequate notice, "the indemnitee must make it clear that it is calling upon the indemnitor to

take over the case or be responsible for an adverse outcome," and decided that

> "there is simply no evidence that the [c]ity provided Psychemedics with either explicit or implicit demands that they provide a defense in Jones or the [commission] appeals. Rather, it is undisputed that the [c]ity immediately assumed the defense in both matters and there is nothing in the summary judgment record indicating that the [c]ity discussed Psychemedics'[s] defense obligations under [a]rticle 7.3 before doing so."

In so doing, the judge went astray in several respects. First, rather than viewing the facts in the light most favorable to the city, as he was required to do in considering a motion for summary judgment, the judge appears to have viewed written communications in the record in Psychemedics's favor, and to have placed the burden on the city, as the nonmoving party, to prove that it did (or did not) do something. See Ajemian v. Yahoo!, Inc., 478 Mass. 169, 171 (2017), cert. denied, 138 S. Ct. 1327 (2018) (on summary judgment, facts are viewed in light most favorable to nonmoving party). In this sense, the judge approached the question as though he were the trier of fact, making credibility determinations and resolving material disputes of fact that appropriately should be resolved at a future trial. Second, in stating that the facts were undisputed, the judge disregarded multiple material disputes of fact. This appears to be related to the first error; having acted essentially as the trier of fact, the judge concluded that

there were no material factual disputes. Third, he applied an incorrect standard of law to a situation where the parties' agreement does not contain explicit notice provisions. Fourth, the judge conflated the legal question of the adequacy of the notice provided by the city with the factual questions whether the city subsequently thwarted or rejected any efforts by Psychemedics to defend, or waived any right to a defense. We address each in turn.

i. Facts disputed or resolved in favor of Psychemedics. In a June 9, 2006, letter, noting as the subject, "Jones, et al. v. City of Boston et al., United States District Court, Civil Action No. 05-11832-GAO," the city presented its "request that Psychemedics Corporation contribute financially to the defense" of the Jones lawsuit, and outlined that

> "Article 7.3 of the contract between the [city] and [Psychemedics] provides that Psychemedics 'shall assume the defense of and hold the [c]ity . . . harmless from all suits and claims against [it] arising from any wrongful or negligent act or omission of [Psychemedics].' The conduct alleged in the Plaintiff's Complaint is wrongful or negligent conduct on the part of [Psychemedics]. The [c]ity's request that you share in the cost of . . . defending this suit is a reasonable one in light of the alternative remedy provided for in the contract."

The judge took this to mean that the city was aware that it "could but was not demanding that Psychemedics take over the

defense of Jones."[12] In so doing, the judge improperly resolved the disputed question of waiver in favor of Psychemedics, required the city to have met an incorrect legal standard for notice, and conflated the questions of notice, opportunity to defend, and later efforts to thwart the defense. Had he instead viewed the letter in the light most favorable to the city as nonmoving party, it would have established not a lack of notice, but the contrary, that the city had, no later than June 2006, alerted Psychemedics in writing that claims encompassed by the contractual indemnification clause had arisen. The burden was on Psychemedics, not on the city, to show on undisputed facts -- or on facts taken in the light most favorable to the city -- that the city then did not allow Psychemedics to take on the defense. See part 2.b.ii, infra. By relying on the letter alone, which is all that is contained in the summary judgment record, Psychemedics did not meet this burden. Compare Pasquale, 343 Mass. at 243 (oral notice that indemnitee was

[12] Notwithstanding the judge's conclusion that there were no material disputes of fact, the record indicates that critical facts are contested, including with respect to the substance and intent of the communications between the city and Psychemedics, portions of which are included in the parties' later statements. See note 13, infra. With respect to the city's initial notice, for example, it first may have been provided in January of 2006, during a telephone call the content of which is in part disputed. See Richstein v. Welch, 197 Mass. 224, 230 (1908) ("while formal notice in writing, because of the ease and accuracy of proof thereby afforded, is desirable, yet it may be oral").

"getting sued," that indemnitor was "liable," and that "it was his duty to defend" was sufficient notice to tender defense).

Moreover, in a June 19, 2006, letter discussing the city's need for a defense, Psychemedics responded:

> "[N]o reasonable interpretation of the [a]rticle 7.3 language would sweep in any allegation of negligence or a wrongful act with respect to our drug tests. . . . [The] language [of the provision] only applies to instances in which an act or omission by Psychemedics is adjudicated to be wrongful or negligent, not merely claimed as so."

Viewed in the light most favorable to the city as nonmoving party, this letter underscores that, as of at least June 19, 2006, Psychemedics both was aware of the city's claims and foreswore any contractual indemnification obligation, including the duty to defend, until such time as a judicial finding of liability was obtained.[13] See CSX Transp., Inc. vs. Massachusetts Bay Transp. Auth., U.S. Dist. Ct., No. 06-40211-FDS (D. Mass. July 27, 2011), citing Trustees, 345 Mass. at 732 ("once an indemnitor has declined to furnish a defense, an indemnitee should be at liberty to weigh the advantages of

[13] The parties also dispute whether, as Psychemedics claims, they entered into a separate support agreement, and the city consequently waived its right to indemnification. The judge appears to have disregarded these contested issues, which preclude summary judgment. Further, the decision apparently settled these disputed matters in favor of Psychemedics, the moving party, rather than in favor of the city as nonmoving party. See Ajemian v. Yahoo!, Inc., 478 Mass. 169, 171 (2017), cert. denied, 138 S. Ct. 1327 (2018).

settlement against the risk of trial, with the certainty that a subsequent court will not disturb the outcome").

ii. Standard to establish tender of an opportunity to defend. The judge also applied an improper standard to determine whether the city afforded Psychemedics notice and the opportunity to defend. The judge concluded that the city's June 2006 "suggestion that it is Psychemedic[s]'s obligation as indemnitor to come forward and insist upon the right to assume the defense is simply not supported by the Massachusetts case law, which although old is nonetheless binding on this court." The judge's determination that an explicit call to action had to be made by the city, demanding Psychemedics come forward and take up the defense, appears to have been based on a misapprehension of the notice standard, and a misplaced emphasis on Consolidated Hand-Method Lasting Mach. Co. v. Bradley, 171 Mass. 127 (1898) (Bradley).[14] See, e.g., Pasquale, 343 Mass. at

[14] In Consolidated Hand-Method Lasting Mach. Co. v. Bradley, 171 Mass. 127, 132 (1898) (Bradley), a case in which the claims sought to be indemnified were, unlike here, not covered by the contract between the parties, the court held:

> "Whatever may be the form of such a notice, we think that, under the circumstances in which it is given, it should call upon the person notified to come in and defend the suit, or should offer him an opportunity of doing so. The party notifying cannot insist upon retaining control of the defence, and yet hold the party notified bound by the result of the suit. . . . [T]he notice must be such in substance as to give the person notified the information

243 ("no particular form of words is necessary if it is evident that the giver intended to charge the receiver therewith" [quotation and citation omitted]).

An indemnitee is "not bound to make any formal and explicit demand," beyond providing information alerting the indemnitor to the existence of the claim. See, e.g., Trustees, 345 Mass. at 731-733. In Worthington, 10 Gray at 499, decided in 1858, for example, the indemnitors were "informed when [the] writ [of the plaintiff in the underlying action] was returnable; that he had sued for an injury received on a day named, by a defect in the highway, called Congress Square, in a place occupied by [the indemnitors]; they were directed to take notice that the [indemnitees] would hold those responsible who had the charge and custody of the place of the accident; and [the indemnitors] were required to govern themselves accordingly. They were not, in terms, requested to take upon themselves the defence of that action. And this was not necessary in order to render the judgment conclusive against them as to the facts thereby established" (emphasis supplied).

Likewise, in a 1928 decision, we held that "[t]here [was] no force in the contention that the notice here given was

---

that he is called upon to come in and defend the suit, or that he is given an opportunity to do so, and that if he does not defend it he will be held responsible for the result."

insufficient, because it did not in terms state that the [indemnitor] would be held responsible if the result should be unfavorable." Bowditch, 263 Mass. at 499. Although we agreed that notice would be ineffectual "unless it made evident that the giver intended to charge the receiver therewith," id., citing Bradley, 171 Mass. at 132, we reiterated that "no particular form of words is necessary," Bowditch, supra. In that case, "[t]he notice, taken with the words of the contract . . . [made] manifest the intent to charge the [indemnitor] with the result of the action." Id.

Otherwise put, the degree of detail required to indicate an intent to charge the indemnitor with the defense depends in no small part on the relationship between the parties and the particular context. Where the parties have an existing contractual relationship -- albeit, as here, one lacking specificity as to what constitutes adequate notice of claims requiring a defense -- it takes very little on the part of the indemnitee to indicate an intent to charge the indemnitor with the defense, as the obligation already has been agreed upon. "When there is an express agreement of indemnity in a contract, a claim for indemnity accrues when there is a breach of that provision." Fall River Hous. Auth. v. H.V. Collins Co., 414 Mass. 10, 13 (1992). See id. at 13-14, citing Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124, 130 (1956) (formal

indemnity bond creates independent contract right to recovery, as "if a person were injured due to [the indemnitor's] negligence, then a breach of contract would occur when [the indemnitee] pays damages to the injured person because [the indemnitor] expressly agreed to pay such damages. Consequently, a claim against [the indemnitor] for contractual indemnity would accrue from the time the indemnity provision was breached"). See, e.g., Miller v. United States Fid. & Guar. Co. 291 Mass. 445, 448-449 (1935) (where claims against insured clearly fell under insurance policy, notice and opportunity to defend bound insurer to indemnify insured, even though insurer refused to defend case); Bowditch, 263 Mass. at 498-499 (where real estate agreement included indemnification of seller by purchaser, notice of suit by broker who later filed claim seeking commission that was not part of contract was sufficient even where notice "did not in terms state that the [purchaser] would be held responsible if the result should be unfavorable"); Richstein v. Welch, 197 Mass. 224, 230-231 (1908) (oral notice of easement dispute between plaintiff, with covenant of warranty from defendant, and third party was sufficient to provide warrantor notice and opportunity to defend).[15]

[15] The same is true in situations where a preexisting duty of some kind exists. See, e.g., Boston v. Worthington, 10 Gray 496, 498-499 (1858) (tenants were bound by judgment against city

Where, unlike here, the putative indemnitor and the indemnitee have no existing relationship, and no evident duty,[16] by contrast, the indemnitor must be told explicitly of the need for it to defend. For example, in Bradley, 171 Mass. at 129, the plaintiff company had an agreement with the defendants that they would furnish lamps and electricity to light the plaintiff's premises. After one of the plaintiff's employees was killed by touching a defective lamp, and his next of kin successfully sued his employer, the plaintiff commenced an action against the defendants seeking to recover the amount of the judgment and the defense costs of the previous suit. Id. at 128-129. The court concluded that the putative notice[17] did

---

for injury caused by their failure to remedy defect in premises even though lease prohibited alterations; although not explicitly requested to "take upon him the defence," tenants had notice of claims sufficient to render them liable to city); Standard Oil Co. v. Robins Dry Dock & Repair Co., 32 F.2d 182, 182-184 (2d Cir. 1929) (gangway installer was liable for costs incurred when employee who was injured using gangway sued dry dock employer, who subsequently sought indemnification from gangway installer; installer had had notice and opportunity to defend in prior suit, which determined gangway was defective, and thus was on notice of need to defend in suit for indemnification).

[16] Indemnification also "is a common-law right available to one who is 'without fault, [and] compelled by operation of law to defend himself against the wrongful act of another.'" Thomas v. EDI Specialists, Inc., 437 Mass. 536, 538 n.1 (2002), quoting Santos v. Chrysler Corp., 430 Mass. 198, 217 (1999).

[17] The putative notice in Bradley, 171 Mass. at 129, a letter from the plaintiffs to the defendants, stated,

not present an opportunity to defend, because the claims were not encompassed by the agreement between the parties, and thus could not, as a matter of law, bind the defendants. Id. at 133. The court noted that the defendants' counsel "might well doubt whether this suit was one which [they] were required to defend," because the defendants' possible liability to the plaintiff, under a claim of breach of contract, was obvious, but liability to an employee's next of kin was not. Id. at 132, 134. Thus, where it was unclear if the defendants could be liable for the claims, the court held that "[w]hatever may be the form of such a notice, we think that, under the circumstances in which it is given, it should call upon the person notified to come in and defend the suit, or should offer him an opportunity of doing so" (emphasis supplied). Id. at 132. The court concluded that

---

> "Boston, Mass., May 31, 1893. Messrs. Bradley & Woodruff, 234 Congress St., Boston, Mass. Dear Sir: The suit of Tierney v. Consolidated Hand-Method Lasting Machine Company for the death of John Tierney, January 1, 1891, when he was killed, the result of touching or holding the electric light apparatus in the room occupied by the Machine Company, where the electricity was furnished by you, will come on for trial on Monday next, in the second session of the Superior Court. We hope and expect to be able to win the case and thus relieve the parties from liability. In case, however, we should be beaten, we shall look to you to recompense the Machine Company; and we shall expect you to assist in the conduct of the defence of the case. Yours truly, Strout & Coolidge, Attorneys for C. H. M. L. Machine Co."

notice of the suit by the next of kin was not sufficient, in those circumstances, to provide notice and an opportunity to defend such that the defendants would be liable. Id. at 135.

While Bradley is often cited for its seminal statement of principal requiring notice and an opportunity to defend, its call for explicit language from the indemnitee requiring the indemnitor to act is not. Indeed, an extremely limited number of cases have come anywhere close to following Bradley's requirement of an explicit demand for action.[18] As the court explained in Pasquale, 343 Mass. at 243,

> "In [Bradley, 171 Mass. at 132,] this court, with citation of earlier cases, said that the notice, whatever its form, 'should call upon the person notified to come in and defend the suit, or should offer him an opportunity of doing so. The party notifying cannot insist upon retaining control of the defence. . . . [In substance there must be notice] that if he does not defend . . . he will be held responsible for the result.' Although this statement was not necessary to the decision, the case 'is a leading case on the subject,' Buhl v. Viera, 328 Mass. 201, 203 [(1952)], and in plain terms it shows the great advisability of unequivocal written notice to the party sought to be charged. Nevertheless an oral notice may serve ([Richstein, 197 Mass. at 231]; see Chamberlain v. Preble, 11 Allen 370, 374 [(1865)]; Bowditch[, 263 Mass. at] 499), and no particular form of words is necessary if

[18] See Keljikian v. Star Brewing Co., 303 Mass. 53, 54 (1939) (restaurateur sued by customer who was injured by act of third party on premises could not bind third party to judgment where third party had no notice at all); Boston & Me. R.R. v. Hartford Fire Ins. Co., 252 Mass. 432, 438-439 (1925) (applying Bradley to hold that notice of claims against insured did not bind insurer to undertake defense of case where third party alleged injury from fire at insured's property, but did, with judgment against insured, render insurer liable to insured afterward).

> it is 'evident that the giver intended to charge the receiver therewith'" (emphasis supplied).

The low burden for the provision of notice and an opportunity to defend is not inequitable where, as here, a contract includes indemnification provisions. While parties are free to negotiate a higher bar by including specific language as to what would constitute adequate notice of claims requiring defense and indemnification, even a bare-bones indemnification provision nonetheless sets forth the types of claims covered. In it, the parties prescribe certain occurrences against which the indemnitee must be protected, and against which the indemnitor agrees to defend and hold the indemnitee harmless.[19] It may fairly be presupposed -- insofar as that is the purpose of an indemnification agreement -- that the indemnitor would be aware of the type of conduct that would require it to tender a defense against claims arising therefrom. See Pasquale, 343 Mass. at 243. Mandating that an indemnitor wait to be asked explicitly to defend against an occurrence that it has been notified took place, where to do so is the only course of action open to it without a breach of the contract, is superfluous and serves only to create delay. By entering into an indemnification agreement concerning that specific conduct, the

[19] Here, those claims are described in article 7.3 as arising from Psychemedics's "wrongful or negligent" acts.

parties have negotiated their rights and responsibilities in the event such an occurrence were to take place, and the only appropriate course for the indemnitor upon learning of its existence is to act. See id. at 245-246. Compare Fireside Motors, Inc. v. Nissan Motor Corp. in U.S.A., 395 Mass. 366, 371-372 (1985).

Recent decisions in those few courts in other jurisdictions to have addressed the issue are consistent with this position. In Crawford v. Weather Shield Mfg., Inc., 44 Cal. 4th 541, 553-554 (2008), for example, the Supreme Court of California held that notice of claims embraced by an indemnity clause was sufficient to transfer the burden to the indemnitor to assume the defense. In that case, the indemnitee (a developer-builder) sought declaratory relief against the indemnitor (a subcontractor). The defense was "tendered" through a cross complaint. Id. at 548 & n.2. The court concluded:

> "A contractual promise to 'defend' another against specified claims clearly connotes an obligation of active responsibility, from the outset, for the promisee's defense against such claims. The duty promised is to render, or fund, the service of providing a defense on the promisee's behalf -- a duty that necessarily arises as soon as such claims are made against the promisee, and may continue until they have been resolved."

Id. at 553-554.

The Supreme Court of Wisconsin also has addressed the adequacy of a tender of defense and has come to the same

conclusion. See Towne Realty, Inc. v. Zurich Ins. Co., 201 Wis. 2d 260, 268 (1996). In that case, the indemnitee -- the insured -- sent a letter notifying the insurer of the claim for the purposes of "review and discussion," and announcing that the insured had retained its own attorney. Id. at 264-265. The letter did not specifically ask the insurer to assume the defense. The court held that, "if it is unclear or ambiguous whether the insured wishes the insurer to defend the suit, it becomes the responsibility of the insurer to communicate with the insured before the insurer unilaterally forgoes the defense." Id. at 269. This burden, the court noted, should not be too onerous, as a simple letter requesting clarification is sufficient, and if "the insured is uncooperative or unresponsive, the insurer need not pursue the matter further." Id. at 269 n.2.

iii. Whether the city provided Psychemedics notice and an opportunity to defend. Viewed in the light most favorable to the city as nonmoving party, the city informed Psychemedics, in its June 2006 letter, that the Jones case stated claims of negligence and wrongdoing by Psychemedics with respect to the hair follicle tests, claims that necessitated a defense that Psychemedics contractually was obligated to provide. While the city did not in so many words call on Psychemedics to "assume the defense," "[t]he express requirement of the contract to give

'opportunity to defend' imposed no greater duty in respect of notice and tender of defense than do the established rules for binding an indemnitor to the result of a pending action." See Pasquale, 343 Mass. at 243; Bowditch, 263 at 499 (there is no requirement that notice "in terms state that the defendant would be held responsible if the result should be unfavorable," and exchange of letters provided notice that claims had been raised). See also Trustees of N.Y., 345 Mass. at 732 ("The numerous communications between [the parties], culminating in the [indemnitor's] denial of liability, make it clear that sufficient 'notice and an opportunity to defend' were given").

Although the language of the notice in some ways is similar to that in Bradley, the key distinction here is the underlying contract between the parties: it explicitly provided for indemnification for claims arising from negligent hair testing services. Thus we consider whether "[t]he notice, taken with the words of the contract, here makes manifest the intent to charge the [the indemnitor] with the result of the action." Bowditch, 263 Mass. at 499. We construe the terms of the contract according to their plain meaning. Balles, 476 Mass. at 571.

Article 7.3 states that Psychemedics "shall assume the defense of and hold the city . . . harmless" (emphasis supplied). The contract does not specify any preconditions

necessary before Psychemedics is to assume the defense. See, e.g., Trustees of N.Y., 345 Mass. at 732 (no obligation that indemnitee make "demand or request" that indemnitor "take over the defense").

Thus, the phrase "shall assume the defense," which appears in the clause that defines the conditions under which indemnification would be necessary, by its terms created an obligation for Psychemedics to act. See Pasquale, 343 Mass. at 241, 245 (indemnification contract that provided that "buyer shall indemnify" was explicit and unquestioned); Bowditch, 263 Mass. at 498 (indemnitor had duty to indemnify and defend upon occurrence of damages that contract indemnified). See, e.g., Trustees of N.Y., 345 Mass. at 732-733 (notice, coupled with provisions of contract, was sufficient to establish opportunity to defend). Psychemedics's letters to the city on February 15 and June 19, 2006, when viewed in the light most favorable to the city as nonmoving party, twice refused the city's indemnification requests. Indeed, Psychemedics's June 19 response to the city, to the effect that it deemed article 7.3 inapplicable because a judgment of liability had not then been entered, underscores that it understood that it was obliged under that article to defend, were the obligation triggered. See Bowditch, supra ("The reason given for refusing to act shows that the defendant so understood it").

In sum, where, as here, notice has been provided and an indemnitor has contracted that it "shall" defend, but the contract does not specify procedures for notice or tender of the opportunity to defend, the burden shifts to the indemnitor upon receiving notice that claims subject to the indemnification clause have arisen. See Trustees of N.Y., 345 Mass. at 731-732. The failure of an indemnitee to say "you shall defend" is not dispositive where the indemnitor was alerted to its contractual duty to do so. See Pasquale, 343 Mass. at 245 (it "is not unfair in the circumstances" to place on indemnitor "the burden of asking for the writ and taking over the defense").

iv. Whether the city prevented Psychemedics from assuming the defense. At the same time, "once the duty to defend has been triggered, the indemnitee must allow the indemnitor to take over the defense." See Riva vs. Ashland, Inc., U.S. Dist. Ct., Nos. 09-CV-12074, 11-CV-12269, 11-CV-12277 (D. Mass. Mar. 26, 2013), citing Bradley, 171 Mass. at 132. "[A]n indemnitee's failure to allow the indemnitor to take charge of the defense relieves the indemnitor of its obligation to indemnify if liability is established." See Riva, supra. Although Psychemedics contends that the city "never allowed Psychemedics to assume its defense," on the record before us, Psychemedics has not shown that the city's request for financial contribution from it meant that the city insisted upon keeping control of the

defense, or that the city refused Psychemedics's efforts to assume the defense. The city's June 2006 letter asking that Psychemedics share in the defense costs "in light of the alternative remedy provided for" in article 7.3 of their contract,[20] when viewed in the light most favorable to the city, as required when deciding a motion for summary judgment,[21] is not on its face the equivalent of affirmative acts by the city thwarting, refusing, or in any way blocking efforts by Psychemedics to assume the defense.[22]

---

[20] As noted supra, the city's June 2006 letter stated that the city "request[ed] that [Psychemedics] contribute financially to the defense of the . . . lawsuit, currently pending in the United States District Court." Citing article 7.3, the letter continued, "[t]he conduct alleged in the [lawsuit] is wrongful or negligent conduct on the part of [Psychemedics]. The [c]ity's request that you share in the cost of . . . defending this suit is a reasonable one in light of the alternative remedy provided for in this contract."

[21] The judge noted that "[t]he letter suggests that the [c]ity could but was not demanding that Psychemedics take over the defense" and determined that this language "cannot be read as an offer to allow Psychemedics to assume the defense." He then determined that Psychemedics was not allowed to do so.

[22] The letter was written in the context of prior communications between the parties concerning the lawsuits against the city challenging the use of the hair follicle tests. It was delivered six months after the first conversation between the parties in January of 2006, the content of which is disputed, see note 12, supra, and Psychemedics's response in February of 2006 to what Psychemedics stated was the city's request "that [Psychemedics] share in the out-of-pocket costs to hire an outside attorney to represent the [c]ity in the Jones et al. case."

Once it had notice of claims of conduct encompassed by the indemnification clause, the burden was on Psychemedics to assume the defense. On the summary judgment record before us, Psychemedics has not established that it attempted to assume this duty, let alone that the city kept it from doing so.[23] See Pasquale, 343 Mass. at 243 (while indemnitee attorney "gave no indication of expectation that [indemnitor] would take over the defense or offer to turn over the defence to him," its "attitude . . . [did] not destroy the force of the threshold" notice). Therefore, the determination whether Psychemedics in fact did tender a defense that the city rejected should have been left to the trier of fact, and the allowance of Psychemedics's motion for summary judgment on this ground was erroneous.

c. Remaining claims. As a result of allowing summary judgment in favor of Psychemedics on count one, the judge concluded that Psychemedics' other arguments that it was entitled to summary judgment, and the city's counterclaims, were moot. This, too, was error.

---

[23] That the letter, standing alone, does not establish that the city insisted on maintaining control, waived its rights to a defense, or otherwise rejected Psychemedics's efforts to defend does not preclude Psychemedics from demonstrating at trial, by use of the letter and other evidence not in the summary judgment record, that Psychemedics indeed did attempt to assume the defense, and that the city waived its right to a defense, or rejected Psychemedics's efforts to defend.

i. City's counterclaims. Apart from its contention that count one was incorrectly decided, the city maintains that its counterclaims under article 8.2 should not have been dismissed as moot. It argues that the language of article 8.2 could be read as a distinct claim under the contract, and thus unrelated to any decision under article 7.3.

Psychemedics contends that the city waived its claim under article 8.2 by failing to argue in the Superior Court that the claim should survive a finding of no liability under article 7.3, and because the city failed adequately to present the claims to this court. This argument is not supported by the record. The city presented the substance of its counterclaims on several occasions in the Superior Court.[24] Accordingly, the city's counterclaims are not precluded on the ground that they were waived in that court.

Furthermore, notwithstanding Psychemedics's contentions to the contrary, the city also pursued its arguments relating to its claims under article 8.2 at several points in its brief before this court. Indeed, the city's brief contains a three-

[24] In particular, the city cited article 8.2 as precluding Psychemedics's claims for declaratory relief and breach of contract. In its counterclaim for declaratory relief, argued at a hearing before the same judge, the city maintained that Psychemedics was liable "under [a]rticle 8.2 of the Contracts" for the costs of the commission appeals and the city's liability, if any, as well as the costs in the Jones cases.

page section entitled, "The Superior Court erred by dismissing the City's counterclaims under Article 8.2 without analysis or consideration of those counterclaims," as well as a nine-page section discussing the merits of those claims. Accordingly, the counterclaims, which rest on independent grounds, should be reinstated on remand.

ii. Psychemedics's other arguments. The judge did not reach three of Psychemedics's other arguments[25] -- waiver, lack of proximate cause, and judicial estoppel, after he concluded that Psychemedics had no obligation to indemnify the city and granted summary judgment in its favor on count one. Psychemedics asserts that it would be entitled to judgment as a matter of law on each of these other theories. On the record before us, Psychemedics is not entitled to judgment as a matter of law on any of them. We discuss each in turn.

A. Waiver. Psychemedics argues that, through an oral "original cooperation agreement" that modified the parties' written contract, the city agreed to accept legal and scientific assistance by Psychemedics in lieu of its right to indemnification, thereby waiving that right.

[25] The claims Psychemedics asserted in the Superior Court for breach of contract, breach of the implied covenant of good faith and fair dealing, quantum meruit, unjust enrichment, and detrimental reliance are not at issue before us.

Waiver is the "intentional relinquishment of a known right." Dynamic Mach. Works, Inc. v. Machine & Elec. Consultants, Inc., 444 Mass. 768, 771 (2005), quoting Doujotos v. Leventhal, 271 Mass. 280, 282 (1930). "[W]aiver must be shown clearly, unmistakably, and unequivocably" (citation omitted). Boston v. Labor Relations Comm'n, 48 Mass. App. Ct. 169, 174 (1999). Where the facts establishing waiver are undisputed, summary judgment is appropriate. See, e.g., Dynamic Mach. Works, Inc., supra at 773.

On this record, Psychemedics has not met its burden to show, based on undisputed facts, that the city waived its right to indemnification through an unwritten "cooperation agreement."[26] While Psychemedics contends that this oral waiver agreement took place in 2006, it has not shown this to be so on undisputed material facts or on disputed ones viewed in the light most favorable to the city; in a motion for summary judgment, it was for Psychemedics to prove, on undisputed facts,

[26] As an initial matter, Psychemedics has not shown by undisputed facts in the summary judgment record that the city waived the contractual requirement that modifications to the contract be in writing. See First Penn Mtge. Trust v. Dorchester Sav. Bank, 395 Mass. 614, 625 (1985). The record contains no evidence of a course of dealing in which the parties waived the requirement of a writing. Indeed, the record indicates that the city and Psychemedics completed other contract modifications, around the same time, in writings, suggesting that the requirement of written modification remained in force.

as a matter of law, that the city undisputedly waived its rights to indemnification. The summary judgment record, however, does not support Psychemedics's contention. For example, in 2007, the city sought to bring a third-party claim against Psychemedics; at that point, more than a year later, the city thus appeared to believe that it retained its right to indemnification by Psychemedics.

In 2009, as Psychemedics points out, the city acknowledged that it had "an agreement" with Psychemedics concerning scientific and legal support. The existence of an agreement, without more, does not establish that its provisions included that the city had waived its right to indemnification. Moreover, the city disputes that the agreement, as described by Psychemedics, ever existed. Because of these disputes of material fact, Psychemedics has not shown that it would be entitled to judgment as a matter of law on its claim of waiver.

B. Proximate cause. Psychemedics also maintains that its conduct did not proximately cause harm to the city, because the terminations that resulted in the ligation at issue were as a result of the city's own actions.

Proximate cause is the "active efficient cause that sets in motion a train of events which brings about a result." Lynn Gas & Elec. Co. v. Meriden Fire Ins. Co., 158 Mass. 570, 575 (1893). Showing that something was a substantial contributing factor is

sufficient to establish proximate cause, see O'Connor v. Raymark Indus., Inc., 401 Mass. 586, 591-592 (1988), where the result was reasonably foreseeable, Poskus v. Lombardo's of Randolph, Inc., 423 Mass. 637, 640 (1996). The intervention of an independent source may disrupt the causal chain so as to eliminate proximate cause. See Kent v. Commonwealth, 437 Mass. 312, 321 (2002).

Psychemedics argues that the police commissioner's final review before the employment actions were taken constituted a break in the causal chain. See, e.g., Girardi v. Gabriel, 38 Mass. App. Ct. 553, 559 (1995) (plaintiff's damages after poor investments of late husband's assets that should have passed by trust were not proximately caused by lawyer's negligent drafting of will). Psychemedics, however, has not met its burden to establish that the commissioner's role indeed disrupted the causal chain. Moreover, "a non-participating indemnitor may not, after receiving notice and an opportunity to defend, challenge in a subsequent action material facts established in the underlying case that bear on the indemnification obligation." CSX Transp., Inc., supra. See Polaroid Corp. v. Travelers Indem. Co., 414 Mass. 747, 763 n.20 (1993); Miller v. United States Fid. & Guar. Co., 291 Mass. 445, 448-449 (1935).

"Generally, questions of causation, proximate and intervening, present issues for the jury to decide." Solimene

v. B. Grauel & Co., 399 Mass. 790, 794 (1987). The commissioner's role in the employment decisions was a final, nonscientific review of a process that ultimately relied heavily on Psychemedics's actions. That the commissioner would recommend termination of individuals who wrongly or negligently had been flagged by Psychemedics on suspicion of illicit drug use was foreseeable and did not break the causal chain. See, e.g., id. at 796 (because it was foreseeable that employee of company that purchased defective machine would use machine as designed, employer's lack of special instructions or warnings were not supervening event of harm caused by machine). Therefore, Psychemedics has not shown that it is entitled to judgment as a matter of law that its actions were not a proximate cause of the city's harm.

C. Estoppel. Psychemedics argues that the city is estopped from obtaining indemnification because, in previous litigation in State and Federal court, the city asserted that Psychemedics's hair test (upon which the city based its decision to terminate an officer's employment) was reliable, and, in this case, the city contradicts that assertion.

The doctrine of judicial estoppel "precludes a party from asserting a position in one legal proceeding that is contrary to a position it had previously asserted in another proceeding." Blanchette v. School Comm. of Westwood, 427 Mass. 176, 184

(1998). To prevail on a motion for summary judgment on this claim, Psychemedics would have to demonstrate that (1) "the position being asserted . . . [is] directly contrary to the position previously asserted," and (2) "the party [had] succeeded in convincing the court to accept its prior position." Otis v. Arbella Mut. Ins. Co., 443 Mass. 634, 640-641 (2005).

Although the city previously did defend the use of Psychemedics's tests, it is not "contrary" to that position for the city thereafter to seek indemnification if wrongdoing subsequently were uncovered. There is no inconsistency in permitting a plaintiff to recover through indemnification claims that were unsuccessful in prior litigation. Indeed, that is precisely the situation that indemnification is designed to address. Compare Otis, 443 Mass. at 648 (judicial estoppel might apply where plaintiff would receive verdict "that is mutually inconsistent with the judgment [plaintiff] already has obtained").

Moreover, nothing in the record suggests that the initial defense here was not made in good faith. See Otis, 443 Mass. at 640 (judicial estoppel seeks to "prevent the manipulation of the judicial process by litigants" [citation omitted]). On this record, Psychemedics has not shown manipulation by the city of directly contrary positions. Additionally, and contrary to Psychemedics's assertions, the record does not support that the

commission and the reviewing courts "accepted" the city's prior position that Psychemedics's methods were reliable, see Thompson, 90 Mass. App. at 467-468, and the Federal District Court judge has yet to render a final ruling after the jury-waived trial in 2018 in the Jones matter. Thus, Psychemedics has not shown that it would be entitled to judgment as a matter of law on this claim.

3. Conclusion. The judgment allowing Psychemedics's motion for summary judgment is vacated and set aside, and the matter is remanded to the Superior Court for further proceedings consistent with this opinion.

So ordered.