IN THE SUPREME COURT OF THE STATE OF ALASKA

Williams Alaska Petroleum, Inc. and The Williams Companies, Inc. Appellants, v. State of Alaska, Flint Hills Resources, LLC, Flint Hills Resources Alaska, LLC, and City of North Pole, Appellees.	Supreme Court No. S-17772 Superior Court Case No. 4FA-14-01544CI

APPEAL FROM THE SUPERIOR COURT
FOURTH JUDICIAL DISTRICT AT FAIRBANKS
THE HONORABLE WARREN W. MATTHEWS

BRIEF OF APPELLEES FLINT HILLS RESOURCES, LLC AND FLINT HILLS RESOURCES ALASKA, LLC

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Filed in the Supreme Court
of the State of Alaska on this
9th day of June, 2021

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Appellate Courts
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AS 46.03.822(a). Liability for the release of hazardous substances

Notwithstanding any other provision or rule of law and subject only to the defenses set out in (b) of this section, the exceptions set out in (i) and (m) of this section, the exception set out in AS 09.65.240, and the limitation on liability provided under AS 46.03.825, the following persons are strictly liable, jointly and severally, for damages, for the costs of response, containment, removal, or remedial action incurred by the state, a municipality, or a village, and for the additional costs of a function or service, including administrative expenses for the incremental costs of providing the function or service, that are incurred by the state, a municipality, or a village, and the costs of projects or activities that are delayed or lost because of the efforts of the state, the municipality, or the village, resulting from an unpermitted release of a hazardous substance or, with respect to response costs, the substantial threat of an unpermitted release of a hazardous substance:

(1) the owner of, and the person having control over, the hazardous substance at the time of the release or threatened release; this paragraph does not apply to a consumer product in consumer use;

(2) the owner and the operator of a vessel or facility, from which there is a release, or a threatened release that causes the incurrence of response costs, of a hazardous substance;

(3) any person who, at the time of disposal of any hazardous substance, owned or operated any facility or vessel at which the hazardous substances were disposed of, from which there is a release, or a threatened release that causes the incurrence of response costs, of a hazardous substance;

(4) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by the person, other than domestic sewage, or by any other party or entity, at any facility or vessel owned or operated by another party or entity and containing hazardous substances, from which there is a release, or a threatened release that causes the incurrence of response costs, of a hazardous substance;

(5) any person who accepts or accepted any hazardous substances, other than refined oil, for transport to disposal or treatment facilities, vessels or sites selected by the person, from which there is a release, or a threatened release that causes the incurrence of response costs, of a hazardous substance.

AS 46.03.822(g). Liability for the release of hazardous substances

An indemnification, hold harmless, or similar agreement, or conveyance of any nature is not effective to transfer liability under this section from the owner or operator of a facility or vessel or from a person who might be liable for a release or substantial threat of a release

under this section. This subsection does not bar an agreement to insure, hold harmless, or indemnify a party to the agreement for liability under this section. This subsection does not bar a cause of action that an owner, operator, or other person subject to liability under this section, or a guarantor, has or would have, by reason of subrogation or otherwise against another person.

AS 46.03.822(i). Liability for the release of hazardous substances

In an action to recover damages and costs, a person otherwise jointly and severally liable under this section is relieved of joint liability and is liable severally for damages and costs attributable to that person if the person proves that

(1) the harm caused by the release or threatened release is divisible; and

(2) there is a reasonable basis for apportionment of costs and damages to that person.

AS 46.03.822(j). Liability for the release of hazardous substances

A person may seek contribution from any other person who is liable under (a) of this section during or after a civil action under (a) of this section or after the issuance of a potential liability determination by the department. Actions under this subsection shall be brought under the Alaska Rules of Civil Procedure and are governed by state law. In resolving claims for contribution under this section, the court may allocate damages and costs among liable parties using equitable factors determined to be appropriate by the court. This subsection does not diminish the right of a person to bring an action for contribution in the absence of a civil action under (a) of this section.

AS 46.03.822(n). Liability for the release of hazardous substances

In this section,

(1) "damages" has the meaning given in AS 46.03.824 and includes damage to persons or to public or private property, damage to the natural resources of the state or a municipality, and damage caused by acts or omissions of a response action contractor for which the response action contractor is not liable under AS 46.03.823 or 46.03.825;

(2) "Native corporation" has the meaning given in 43 U.S.C. 1602(m);

(3) "potential liability determination" means an administrative determination issued by the department notifying a person of the person's potential liability under (a) of this section as the result of the release or threatened release of hazardous substances and includes a

(A) letter notifying the person that the person is a potentially responsible party;

(B) notice to a person of state interest in a release or threatened release of a hazardous substance;

(C) request to the person for site characterization or cleanup;

(D) notice of violation; and

(E) similar notification by the department of a person's potential liability under this section.

AS 46.03.824. Damages

Damages include but are not limited to injury to or loss of persons or property, real or personal, loss of income, loss of the means of producing income, or the loss of an economic benefit.

AS 46.03.826. Definitions for AS 46.03.822-46.03.828

In AS 46.03.822 - 46.03.828,

...

(4) "having control over a hazardous substance" means producing, handling, storing, transporting, or refining a hazardous substance for commercial purposes immediately before entry of the hazardous substance into the atmosphere or in or upon the water, surface, or subsurface land of the state, and specifically includes bailees and carriers of a hazardous substance;

(5) "hazardous substance" means

(A) an element or compound which, when it enters into the atmosphere or in or upon the water or surface or subsurface land of the state, presents an imminent and substantial danger to the public health or welfare, including but not limited to fish, animals, vegetation, or any part of the natural habitat in which they are found;

(B) oil; or

(C) a substance defined as a hazardous substance under 42 U.S.C. 9601(14);

(6) "natural resources" means land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the state or a municipality;

(7) "oil" means a derivative of a liquid hydrocarbon and includes crude oil, lubricating oil, sludge, oil refuse or another petroleum-related product or by-product

INTRODUCTION

Though it tried mightily, Williams cannot rewrite history. Its poor environmental practices, including spills, leaky sumps, and failure to report high levels of sulfolane in its groundwater in 1996, led to an offsite sulfolane plume of roughly three miles at the time Flint Hills bought the refinery in 2004. [Exc. 2163] It is uncontested that Williams's shoddy environmental practices produced over 90 percent of the sulfolane plume – and all of the PFAS contaminating the soil and groundwater at the Refinery.

Williams cannot rewrite the Asset Sale and Purchase Agreement between Flint Hills and Williams (2004 Agreement). The 2004 Agreement did not transfer all sulfolane liability to Flint Hills, as Williams suggests in its brief. It only transferred liability for "known, disclosed" sulfolane at the "real property"—meaning the refinery premises. Williams retained all other liability for its sulfolane pollution, including all liability for offsite sulfolane contamination. [Exc. 2163] It is uncontested that when Williams sold the refinery to Flint Hills in 2004, there was an unknown offsite sulfolane plume roughly mirroring the existing plume. Williams retained liability for this offsite sulfolane plume.

Williams cannot erase its failure to address the pollution that it caused, including its adamant refusal to participate in the mitigation and remediation of the pollution plume, and its refusal to assist the State, City of North Pole, or Flint Hills in their extensive efforts. Rather, Williams has litigated, spinning conspiracy theories and falsehoods which were finally laid to rest after a lengthy trial and a comprehensive decision by the trial court. The trial court's decision should be affirmed, and Williams's continued attempts to avoid responsibility – which now span more than a decade – should end.

ISSUES PRESENTED FOR REVIEW

1. *2004 Asset Sale and Purchase Agreement.* Can Williams utilize the 2004 asset purchase agreement with Flint Hills to avoid its liability and contribution obligations under AS 46.03.822 for sulfolane contamination it caused that was unknown and already beyond the boundaries of the North Pole Refinery in 2004, and which still persists today?

2. *"Hazardous substances."* Did the trial court clearly err when it determined sulfolane was a hazardous substance?

3. *Response costs.* Did the trial court properly award the State and Flint Hills costs and damages that it found were reasonable and necessary to address contamination?

4. *Equitable Allocation.* Did the trial court abuse its discretion when it chose and applied equitable factors to allocate 75% of costs and damages to Williams, 25% to Flint Hills, and 0% to the State of Alaska?

5. *Civil Assessments.* Did the trial court properly award statutory assessments against Williams for the environmental harm Williams caused?

6. *Injunctive Relief.* Did the trial court abuse its discretion when it enjoined Williams from further violations of Williams's statutory obligations?

7. *Declaratory Relief.* Did the trial court abuse its discretion when it declared Williams statutorily liable and contractually liable for future damages?

8. *Primary Jurisdiction.* Did the trial court abuse its discretion denying Williams's untimely motion invoking primary jurisdiction for onsite PFAS contamination?

9. *Due Process.* Does holding Williams responsible for the harm it caused violate its due process rights?

10. *Takings.* Does a judgment holding Williams liable to pay damages for the harm it caused constitute an unconstitutional "taking?"[1]

STATEMENT OF THE CASE

Williams operated the North Pole Refinery ("Refinery") from 1977 through 2004. [Exc. 1788, 2172] During that time, Williams polluted the environment with oil and its constituents (including sulfolane), pure sulfolane, and PFAS. [Exc. 2158, 2246] When exceedingly high levels of sulfolane were detected on-site at the Refinery in 1996, Williams did not report those findings to the Alaska Department of Environmental Conservation (DEC). [Exc. 2168] When Williams belatedly reported sulfolane in its groundwater to the DEC in 2001, DEC told Williams to find the source of the sulfolane. [*Id.;* Exc. 2236-37] Williams never did. [Exc. 2168] It is uncontested that the sulfolane pollution came from Williams's operation of leaky sumps that contained sulfolane, leaky lagoons it used to store sulfolane-laden wastewater, and spills of pure sulfolane on the refinery premises. [Exc. 2158-59; 2189-99; 2309] Those sources leached into the groundwater, which then moved offsite – long before Williams's 2004 sale of the Refinery to Flint Hills. [Exc. 2163; 2243]

Flint Hills purchased the Refinery from Williams in 2004 pursuant to an Asset Sale and Purchase Agreement ("2004 Agreement"). Under the 2004 Agreement, Flint Hills agreed to assume select and circumscribed liabilities at the Refinery property. [Exc. 2257-

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[1] Flint Hills does not brief Issue Nos. 2, 5, 6, and 8-10 herein because they are covered by the State of Alaska or otherwise concern issues specific to the State of Alaska's claims, and are accordingly addressed in the State of Alaska's appellee brief ("SOA Br").

58] Williams retained liability for everything else. [*Id.*] Prohibited from conducting its own sampling prior to the transfer of ownership [Exc. 2732 (¶6.3)],[2] Flint Hills only assumed liability for the "known" sulfolane disclosed to exist "at the Real Property" (*i.e.,* onsite at the refinery), while Williams retained liability for unknown and offsite sulfolane pollution at the time of transfer – a fact admitted by Williams's corporate witness who negotiated the 2004 Agreement. [Exc. 2261; Tr. 2496-2500]

At the outset of its tenure, Flint Hills drastically shifted the processes, procedures, and incentive structure among personnel at the Refinery, elevating environmental safety and compliance compared to Williams's prior profit-focused approach. [Exc. 2202-05; 2195-96] Those practices led Flint Hills to conduct a comprehensive environmental review, the installation of additional monitoring wells, and, ultimately, to discover the offsite sulfolane plume in 2009—a discovery that set into immediate motion a rapid series of events and responses. [Exc. 2169-71; 2206-07] Almost immediately, Williams was notified and directed to participate. [Exc. 2237]

During the ten years leading up to trial since the discovery, Williams did nothing to help to address the pollution it caused. [Exc. 2237] It did not help in providing alternative water to affected citizens. [*Id.*] It ignored the State's request for assistance to help characterize the plume. [Exc. 2238] It did not help in providing a piped water system – a solution necessitated by the fact that sulfolane does not readily degrade in the aquifer, leading experts to conclude that it will exist for generations to come. [Exc. 2163; Tr. 1572]

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[2] Williams's excerpt of the Record includes an incomplete version of the parties' 2004 Agreement. As such, the complete version is cited herein within Appellees' excerpt.

While Williams shirked its responsibilities, Flint Hills provided North Pole's residents with clean water, characterized the contamination, and coordinated with DEC to develop and implement solutions, among other efforts. [Exc. 2240-43] Although it is uncontested that Williams created over 90 percent of the offsite sulfolane plume, the court equitably allocated 75% of the sulfolane liability to Williams – after correctly finding Williams statutorily liable under AS 46.03.822(a). [Exc. 2243; 2309]

Without meritorious grounds to argue that Justice Matthews's equitable cost allocation was an abuse of discretion, Williams asks this Court to hold that the 2004 Agreement completely "bars Flint Hills'[s] statutory contribution claim." [Wms. Br. 24.] Neither the 2004 Agreement nor Alaska law permit such a result. AS 46.03.822(g); Exc. 2298, 2302. Consistent with federal precedent addressing analogous provisions in CERCLA, private party agreements are treated as one of many factors a court can, and oftentimes should, consider *within* its equitable allocation. Justice Matthews did just that when he considered the parties' Agreement as part of his equitable analysis, providing it significant weight and adjusting the court's equitable allocation accordingly. [Exc. 2302]

The 2004 Agreement did *not* transfer Williams's liability for the plume of sulfolane contamination that was unknown and already well beyond the refinery's boundaries in March 2004. [Exc. 2304] Williams has always possessed liability for such pollution, and the court's corresponding .822(j) allocation is in full accord with the parties' Agreement. [Exc. 2307] Section .822(j)'s equitable relief (contribution) also parallels the parties' express reservation of rights for "any equitable relief" without regard to the 2004 Agreement's indemnity provisions. [Exc. 2268, 2298]

Williams's statutory obligations to Flint Hills for offsite sulfolane are not limited by a $32 million "indemnity cap" within the 2004 Agreement. [Exc. 2311] The trial court found that the 2004 Agreement's indemnity provisions are inapplicable because each party contributed to the plume. [*Id.;* Exc. 2305] This conclusion is not challenged on appeal. Put simply, if there are no *indemnity* payments, then there are no *indemnity* amounts to count against an *indemnity cap* that limits such *indemnity* payments.

Williams's derelict refinery practices, including the use of leaky underground storage tanks to hold its waste, also led to the same result with respect to PFAS pollution: that pollution leached into the groundwater and was later discovered onsite in the Refinery soils. [Exc. 2199] Williams retained complete liability for all its PFAS pollution under the 2004 Agreement and there was no evidence that Flint Hills contributed to the PFAS pollution at the Refinery. [Exc. 2247; 2305]

STANDARDS OF REVIEW

A decision of the trial court may be affirmed on any basis supported by the record.[3] Unless a factual or legal error by the trial court is "'inconsistent with substantial justice,' the court's judgment will not be disturbed."[4]

When a judge is the finder of fact, the judge's factual findings are set aside by an appellate court "only when they are clearly erroneous."[5] Clear error occurs when, after review of the record as a whole, a firm and definite conviction exists that a mistake was

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3 *Afognak Joint Venture v. Old Harbor Native Corp.*, 151 P.3d 451, 456 (Alaska 2007).

4 *Id.* (quoting Alaska R. Civ. P. 61).

5 *Oakly Enters., LLC v. NPI, LLC*, 354 P.3d 1073, 1078 (Alaska 2015).

made.[6] Williams's challenge to the court's equitable allocation is subject to an abuse of discretion standard.[7] A court's decision to admit or exclude evidence is also subject to review for abuse of discretion.[8]

The interpretation of a contract is reviewed *de novo*.[9] But where the court considers extrinsic evidence to elucidate the meaning of contract terms, the court's factual determinations are reviewed for clear error "and inferences drawn from that extrinsic evidence for support by substantial evidence."[10] Questions of statutory interpretation are reviewed *de novo*.[11]

An appellant's failure to develop an argument on appeal constitutes a waiver of that argument.[12] Similarly, where a point is given only a cursory statement in the argument portion of a brief, the point will not be considered on appeal.[13]

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6 *Id.*

7 *See, e.g., Flint Hills Res. Alaska LLC v. Williams Alaska Petroleum, Inc.*, 377 P.3d 959, 967 (Alaska 2016) ("We review the decision to grant equitable relief for an abuse of discretion because equitable relief is 'a matter addressed to the sound discretion of the trial court.'") (citation omitted); AS 46.03.822(j) ("[T]he court may allocate damages and costs among liable parties using equitable factors determined to be appropriate by the court."); *see also Lundquist v. Lundquist,* 923 P.2d 42, 53 (Alaska 1996); *Lockheed Martin Corp. v. United States ("Lockheed II"),* 833 F.3d 225, 234 (D.C. Cir. 2016); *Agere Sys., Inc. v. Advanced Envtl. Tech. Corp.*, 602 F.3d 204, 216 (3d Cir. 2010).

8 *Oakly*, 354 P.3d at 1078.

9 *Nautilus Marine Enters., Inc. v. Exxon Mobil Corp.,* 305 P.3d 309, 315 (Alaska 2013); *Estate of Polushkin ex rel. Polushkin v. Maw,* 170 P.3d 162, 167 (Alaska 2007).

10 *Nautilus Marine,* 305 P.3d at 315.

11 *Pederson v. Arctic Slope Reg'l Corp.*, 421 P.3d 58, 65 (Alaska 2018).

12 *See Wright v. Anding,* 390 P.3d 1162, 1175 (Alaska 2017).

13 *Id.*

ARGUMENT

I. THE TRIAL COURT PROPERLY CONSIDERED AND APPLIED THE PARTIES' CONTRACT WHEN IT DETERMINED WILLIAMS WAS STATUTORILY LIABLE TO FLINT HILLS FOR OFFSITE SULFOLANE COSTS UNDER AS 46.03.822(j).

Williams's releases of hazardous substances exposed Williams to statutory liability under AS 46.03.822(a) and (j). [Exc. 2289, 2302] The uncontested evidence showed that Williams released substantial volumes of sulfolane during its tenure at the North Pole Refinery, the vast majority of which was already offsite but unknown in 2004, and still exists today. [Exc. 2188, 2243, 2263, 2416-17; Tr. 3557]

Flint Hills *never* assumed Williams's liability for the offsite and unknown contamination that existed prior to 2004, *nor* did Flint Hills agree to indemnify Williams for such liability. [*E.g.,* Exc. 2304] Nevertheless, once the offsite contamination was discovered in 2009, Flint Hills promptly responded. [Exc. 2240; Tr. 1506-07] Williams did not. [Exc. 2237; Tr. 185, 4092-97] Williams's rejection of its obligations forced Flint Hills to incur response costs for all onsite and offsite contamination throughout the entire time of the Refinery's operation—including Williams's 27 years of operations. Flint Hills ultimately spent over $138 million in response costs (as of the date of trial). [Exc. 3427]

Flint Hills's compliance with Alaska's statutory mandate entitled Flint Hills to utilize the statute's corresponding remedy: equitable contribution from Williams under section .822(j). The trial court ultimately determined that Williams was obligated to pay Flint Hills $52.5 million in contribution to reimburse Flint Hills for Williams's equitable share of these costs. [Exc. 2310] Williams's present effort to reverse the trial court's contribution award, based upon provisions of the parties' 2004 Agreement, is meritless.

A. A Party's Liabilities and Remedies Under AS 46.03.822 Are Not Barred by the Presence of a Private Agreement.

Williams's 2004 Agreement to sell the refinery to Flint Hills did not relieve Williams from its strict statutory liability under AS 46.03.822(a), or its liability for contribution under section 822(j). As the plain language of .822(g) provides: agreements or conveyances "of any nature" between private parties are "not effective to transfer liability under this section from the owner or operator of a facility or vessel or from a person who might be liable for a release or substantial threat of a release under this section." AS 46.03.822(g).[14] This explicit affirmation of section .822 liability notwithstanding any private agreements between the responsible parties is consistent with the legislative purpose behind AS 46.03.822: to encourage *prompt* response and remediation by responsible parties.[15] In effect, section .822 encourages conduct like Flint Hills's in this

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[14] When this Court interprets a statute, it considers the language of the statute, its purpose, and its legislative history, in an attempt to give effect to the legislature's intent, with due regard for the meaning the statutory language conveys to others. *Alyeska Pipeline Serv. Co. v. State Dep't of Envtl. Conserv.*, 145 P.3d 561, 566 (Alaska 2006). "In considering legislative history, [the Court] follows the maxim that 'the plainer the language, the more convincing contrary legislative history must be.'" *Id.* (citation omitted) To prevail on a question of statutory interpretation, the burden is on the proponent to "explain why the plain text of [the] statute should not govern the outcome of the case." *Id.*

[15] *Oakly,* 354 P.3d at 1080 (recognizing the "legislative policy that determinations of liability . . . should not stand in the way of prompt environmental response"); *see also FDIC v. Laidlaw Transit, Inc.*, 21 P.3d 344, 347 n.9 (Alaska 2001) (noting the legislative history and necessity "to provide appropriate tools to ensure that hazardous substance releases may be responded to properly"); *Lockheed Martin Corp. v. United States ("Lockheed I"),* 35 F. Supp. 3d 92, 120 (D.D.C. 2014) (recognizing .822's federal counterpart, CERCLA, was "designed to promote the timely cleanup of hazardous waste sites.") *aff'd,* 833 F.3d 225 (D.C. Cir. 2016).

matter, while seeking to prevent the very inaction and corresponding recalcitrance displayed by Williams.[16]

To be sure, section .822(g) does not "bar" private agreements "to insure, hold harmless, or indemnify a party to the agreement for liability," but the role of such agreements within the statutory framework is limited by AS 46.03.822(j). Notably, the language in section 822(g) that prevents owners and operators from using private agreements to evade their section .822 liability is not restricted to liability arising from section 822(*a*), but extends more broadly to *all* liability under "this section" – thus including liability for contribution under section 822(j). Section 822(j) authorizes a party who pays more than its equitable share of the joint liability (here, Flint Hills) to obtain contribution from other responsible parties. Section .822(j) provides that "[i]n resolving claims for contribution under this section, the court may allocate damages and costs among liable parties using factors determined to be appropriate by the court."[17] Private indemnity agreements are one factor that a court may consider within its section .822(j) equitable allocation analysis.[18] That is precisely what the trial court did here. In its equitable

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16 *See, e.g., Smith Land & Imp. Corp. v. Celotex Corp.* 851 F.2d 86, 89-90 (3d Cir. 1988) (refusing to apply caveat emptor defense between private parties because a complete bar to recovery that ignores other equities "frustrates Congress' desire to encourage clean-up by any responsible party. If fair apportionment of the expense is not assured, it is unlikely that one party will undertake remedial actions promptly when it could simply delay, awaiting a legal ruling on the contribution liability of other responsible parties.").

17 *See also Oakly,* 354 P.3d at 1082; *Lockheed,* 35 F.Supp.3d at 122-123 ("In any given case, a court may consider several factors, a few factors, or only one determining factor ...depending on the totality of circumstances presented to the court.").

18 *See, e.g., infra* at 11.

allocation analysis under section .822(j), the court considered the provisions in the 2004 Agreement and gave those provisions "significant" weight. [Exc. 2302]

The trial court's use and consideration of the 2004 Agreement is also in accord with federal cases addressing similar provisions in CERCLA.[19] For instance, in *Lockheed I*, numerous contracts and indemnity clauses between the parties were considered within the court's equitable allocation, although they were ultimately provided no weight.[20] And in *Beazer East, Inc. v. Mead Corp.*, the Third Circuit recognized the importance of the parties' contract within the court's analysis, but rejected the defendant's effort to elevate the parties' contract over other equitable factors.[21]

Based on these contractual indemnity provisions, the court reduced Williams's 90% share of the sulfolane response costs by 30%. [Exc. 2302; 2307] The court did not commit error or abuse its discretion by doing so.

B. The Trial Court Did Not Misinterpret the 2004 Agreement.

Williams's challenge to the trial court's contribution award rests on a false premise that the 2004 Agreement transferred "all" of Williams's liability for sulfolane to Flint Hills,

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19 *See Berg v. Popham,* 113 P.3d 604, 608 (Alaska 2005) ("[T]he Alaska legislature intended that CERCLA be used as a framework for interpreting section .822. Accordingly, we look first to the federal cases for guidance.").

20 35 F.Supp.3d at 141-44.

21 *Beazer,* 412 F.3d 429, 448-49 (3d Cir. 2005) ("[The defendant] would have us go further and prescribe that the purchase agreement factors must be prioritized on remand, but we think this is inappropriate. CERCLA places both the selection and weighing of equitable factors in the sound discretion of the district court, not the appellate court."); *see also Trinity Indus., Inc. v. Greenlease Holding Co.,* 903 F.3d 333, 349 (3d Cir. 2018); *United States v. Davis,* 31 F. Supp. 2d 45, 62-63 (D.R.I. 1998) (noting a court's broad discretion to consider equitable factors it deems appropriate for circumstances of the case).

including Williams's liability for offsite sulfolane contamination that was already well beyond the Refinery's boundaries when the parties executed the 2004 Agreement. [Wms. Br. 16-17] It is undisputed that an unknown and offsite sulfolane plume already existed on March 31, 2004 and was comparable in size to the three-mile plume that exists today.[22] The plain terms of the 2004 Agreement demonstrate the parties never intended to transfer Williams's liability for that unknown and offsite sulfolane contamination to Flint Hills.

1. Flint Hills did not assume "all" of Williams's "Environmental Liabilities" for sulfolane.

The 2004 Agreement is governed by Texas law. [Exc. 2756, §11.1] Texas law states that, when interpreting a contract, "the prime directive is to ascertain the parties' intent as expressed in the instrument."[23] "Contract terms are given their plain, ordinary, and generally accepted meanings unless the contract itself shows them to be used in a technical or different sense."[24] The entire writing must be considered "in an effort to harmonize and give effect to all the provisions of the contract so that none will be rendered meaningless."[25]

Words matter. The 2004 Agreement clearly provides that Flint Hills only agreed to assume responsibility for contamination that was known and "at" the Refinery Property, along with the costs to keep the refinery's onsite environmental systems operating.

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22 Exc. 2243; Tr. 3556-3557 (Williams's Expert, Nigel Goulding); Tr. 1219, 1221 (Flint Hills's expert, Dr. Andy Davis).

23 *URI, Inc. v. Kleberg Cty.*, 543 S.W.3d 755, 757 (Tex. 2018).

24 *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 662 (Tex. 2005).

25 *Id.*

[Exc. 2824-25] Flint Hills did *not* agree to take on Williams's liability for any contamination that was offsite at the time and otherwise unknown or undisclosed.[26]

a) Liability for contamination offsite in 2004 remained with Williams.

The 2004 Agreement between Williams ("Seller") and Flint Hills ("Buyer") is an "asset purchase agreement" that conveyed only *specific* assets and *select* liabilities to Flint Hills, with Williams maintaining responsibility for everything else:

> **2.3 Liabilities.** Except as otherwise expressly stated in this Agreement, Seller shall retain, and shall pay and discharge, all Liabilities to the extent relating to or arising out of the use, ownership or operation of the Assets prior to the Effective Time. Notwithstanding anything to the contrary contained herein, Buyer shall not assume, or in any way be liable or responsible for, any Liabilities of Seller (whether accrued or contingent or due or not due) which are not expressly stated in this Agreement. Without limiting the generality of the foregoing, Seller's retained Liabilities shall include:

[Exc. 2713] The 2004 Agreement went on to provide a non-exhaustive list of Williams's "retained Liabilities," which included, *inter alia,* property losses arising out of Williams's tenure and operations; personal injuries relating to Williams's tenure and operations; and "Environmental Liabilities" arising out of Williams's tenure other than those set forth in a particular disclosure schedule to the Agreement ("Disclosure Schedule"): [Exc. 2713-15]

> (xvii) Environmental Liabilities to the extent arising in, relating to or accruing in periods up to and including the Effective Time, other than the Environmental Liabilities set forth on Section 10.2(a)(iv) of the Disclosure Schedule;

Williams's brief conspicuously omits the above language of §2.3, which sets forth Williams's *retention* of all "Environmental Liabilities" that are not expressly set forth in

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[26] Notably, Williams does not contest the trial court's decision holding Williams *contractually* liable to Flint Hills for the PFAS contamination that Williams released during its tenure—which was also never disclosed within the 2004 Agreement.

the referenced schedule. [*Id.*; Wms. Br. 15-16] Williams also conflates the term "Environmental Liabilities" to be broadly synonymous with the "matters" Flint Hills assumed under that Disclosure Schedule, contending even "unknown" and "undisclosed" liability was conveyed. [Wms. Br. 16] To the contrary, in that schedule, the *only* "Environmental Liabilities" that Flint Hills agreed to assume from Williams were expressly limited to a distinct subset of "matters" located "*at the Real Property*" that were "*existing*" and "*known*" at the time, along with the corresponding costs to keep Williams's environmental systems running under then-existing regulatory orders:

SCHEDULE 10.2(a)(iv)
KNOWN ENVIRONMENTAL MATTERS

A. Any and all costs of clean-up, monitoring, corrective actions and compliance with regulations incurred after the Effective Time with respect to contamination specifically identified in the referenced figures, tables and text described below. Buyer has agreed to assume full responsibility for all existing, known contamination at the Real Property specifically identified in the referenced figures, tables and text described below. Therefore, Buyer understands and acknowledges that the levels of Hazardous Materials measured in monitoring wells and contained in the figures, tables and text described below will vary over time, and that Buyer is responsible for such normal variations, as well as any changes in such contamination resulting from Buyer's actions or omissions after the Effective Time. Although the figures, tables, and text described below contain data representing contaminant concentrations at discrete locations and times, the Buyer further understands that the data is representative of site conditions and can be used to support reasonable conclusions about present contaminant concentrations at the locations sampled and contaminant contours outside those locations.

[27]

Subparts (B) and (C) of the same Disclosure Schedule "clarifi[ed]" that the "costs" referenced in subpart (A) concerned existing regulatory actions Williams had been performing at the time. [Exc. 2825-26] With regard to the "existing" and "known" contamination "at the Real Property," the Disclosure Schedule "specifically" referred to

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[27] Exc. 2824 [Schedule 10.2(a)(iv)] (emphasis added).

figures and tables listed in the schedule—one of which was a "Sulfolane Data" table from 2001. [Exc. 2824] That Sulfolane Data table was a single sheet of paper with a column listing onsite detections (and non-detections) in various wells from a sampling event conducted three years earlier (2001). [Exc. 0040]

The Disclosure Schedule further stated that, although the listed figures and tables identified contaminant concentrations at "discrete *locations* and times," it was understood that the data could "be used to support *reasonable* conclusions . . . and contaminant contours outside those *locations*." [Exc. 2824 (emphasis added)] Notwithstanding the foregoing, the disclosure schedule stated the data was "representative of *site* conditions," reinforcing the geographic limitation that the assumed "matters" were only those "at the Real Property."[28] And, as this Court previously recognized, the contamination was already "far beyond the contours of the sulfolane identified in the disclosure schedule" at the time of sale.[29] Significantly, the contract also prohibited Flint Hills from doing any of its own testing at the site. [Exc. 2732 (§6.3)]

Williams's appeal brief ironically includes an illustration of a refinery map excerpted from a demonstrative trial exhibit used by Flint Hills's expert. [Wms. Br. 20] That illustration depicted the estimated well locations at the refinery property (as dots) along with what Flint Hills's expert contended would have been the "reasonable" contours at the time surrounding the 2001 well detections of sulfolane—contours that, while outside

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28 *Id.* (emphasis added); *see also* Exc. 2708 (defining "Real Property" to mean the real property owned by Williams and constituting an Asset or leased by Williams pursuant to a lease.); *see also* Exc. 2243 (¶ 469).

29 *Flint Hills,* 377 P.3d at 963.

the "discrete locations" of the wells demarcated on the illustration, were still onsite "at the Refinery property."[30] Nothing in that refinery map depicts an extended, offsite plume that, according to Williams's expert, mirrored the size of the offsite plume that exists today.[31]

The Court need go no further to determine that, under the plain language of §2.3 and the Agreement's Disclosure Schedule, the trial court correctly concluded Flint Hills *never* assumed Williams's "Environmental Liabilities" for contamination not located "at the Real Property" and that was otherwise "unknown" on March 31, 2004. [Exc. 2824] Such liabilities instead clearly remained with Williams. Additional contract terms reinforce the parties' clear intent, as described below.[32]

b) Williams's initial post-sale obligations further reflect its ongoing liability for all offsite contamination existing prior to March 2004.

Williams's initial obligation to hold Flint Hills harmless *after* the 2004 Agreement's Effective Time, set forth within §10.2(a)(iv) of the Agreement, further elucidates the parties' intent. [Exc. 2749] Within §10.2(a)(iv) subclause (B), Williams was required—at the very outset of the 2004 Agreement—to hold Flint Hills harmless for "Environmental Conditions" that were "not located on the Assets or the property underlying the Real Property" and in existence prior to March 31, 2004:[33]

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30 Wms. Br. 20 (citing Exc. 2126).

31 Tr. 3556-57.

32 *See Valence*, 164 S.W.3d at 662 (harmonizing all provisions of contract to avoid rendering any meaningless).

33 Williams's obligation initially requiring indemnity for offsite conditions was ultimately not a source of recovery for offsite sulfolane costs because Flint Hills's operations subsequently "contributed" to that offsite contamination, invoking the exception within §10.2(a)(iv). The exception's applicability is not contested in this appeal.

10.2 Indemnification.

(a) Indemnification by Seller. From and after the Effective Time, to the fullest extent permitted by law, Seller shall indemnify, defend and hold Buyer, any Affiliates of Buyer, and their respective shareholders, partners, officers, directors, members, managers, employees, agents and assigns (each, a "Buyer Indemnified Party") harmless, from and against any and all Damages incurred by any Buyer Indemnified Party in connection with or arising or resulting from any one or more of the following:

(iv) except to the extent that Damages are caused or contributed to by Buyer's operations, actions or omissions after the Effective Time, the following environmental matters (herein "Environmental Claim(s)"):

(B) loss, property damage, natural resource damage, injury to, or death of any third-party arising out of or related to any Environmental Condition to the extent (i) not located on the Assets or the property underlying the Real Property and (ii) existing prior to the Effective Time;

[Exc. 2749-50] Williams's appellate brief wholly ignores this subclause (B). If any "Environmental Condition" already existed offsite on March 31, 2004, those conditions were Williams's continuing problem to address. In this clear regard, Williams's assertion that there is no distinction between offsite and onsite contamination is belied by the contract's plain language. [Wms. Br. 18]

Moreover, Williams's contention that the trial court erred in interpreting §10.2(a)(iv) is of no moment. [Wms. Br. 23] While §10.2(a)(iv) subclause (B) expressly concerns offsite conditions, subclause (A) addresses onsite conditions. Williams nevertheless argues that subclause (A) includes offsite conditions, and that because an exception exists in subclause (A) for matters identified in the disclosure schedule, Williams interprets the exception to encompass offsite sulfolane. Aside from ignoring subclause (B), Williams's argument regarding the practical scope of subclause (A) does not alter the court's judgment nor its interpretation of the contract's separate and distinct conveyance provisions. Williams's argument on subclause (A) also misconstrues the 2004 Agreement's

terms (again), erroneously conflating "Environmental Conditions" with the specifically excepted onsite "matters" referenced in the disclosure schedule (*i.e.*, the "matters" Flint Hills agreed to assume). [Wms. Br. 23] Those "matters," again, were limited. Williams's interpretation of subclause (A) would also effectively render subclause (B) meaningless.

c) Flint Hills has no duty to indemnify Williams for liabilities that never transferred to Flint Hills.

In Sections I(A)(2) and I(B) of its brief, Williams argues that Flint Hills was required to indemnify Williams for "all" sulfolane contamination. [Wms. Br. 17, 18] This argument ignores the fact that Flint Hills never assumed Williams's liability for the offsite sulfolane plume in existence at the time of sale. *See* pages 12-16, *supra*. Williams's brief indeed gives the conveyance provisions in the 2004 Agreement relatively short shrift, devoting only one page to them [Wms. Br. 15-16], while instead focusing nearly twenty pages on the indemnity clauses. But because Flint Hills never assumed Williams's liability for unknown and offsite contamination existing in 2004, its contractual indemnity obligations *to Williams* did not encompass these liabilities under the 2004 Agreement.

Williams's textual interpretation of § 10.2(b)(v)(C) is also nonsensical. [Wms. Br. 19] Williams asserts that the phrase "*with respect to*" is a broadening phrase, with the result that Flint Hills's obligation to indemnify Williams "*with respect to* matters set forth on Section 10.02(a)(iv) of the Disclosure Schedule" includes *offsite* conditions, even though the Disclosure Schedule lists only *onsite* conditions. [Wms. Br. 19.] But the dictionary Williams relies upon actually defines "With respect to" as "As regards; with

reference to," making clear that §10.2(b)(v)(C) is merely meant to cover the same matters as the Disclosure Schedule.[34]

Finally, Williams mistakenly claims the "court ignored the parties' agreed definitions when it concluded Williams unambiguously retained liability for unknown, undisclosed matters, but not for known and disclosed matters." [Wms. Br. 21] In reality, the trial court accurately applied the parties' agreed-upon definitions and adjusted its equitable allocation under .822(j) accordingly, attributing liability for all 2004 *onsite* sulfolane to Flint Hills, and all 2004 *offsite* sulfolane to Williams. [Exc. 2307 (¶745)] To the extent that the 2004 *onsite* sulfolane subsequently migrated *offsite* and commingled with Williams's *offsite* sulfolane, the trial court reduced Williams's share accordingly.[35] The trial court's decision gave all relevant contractual terms their due weight and deference, and did not render any terms meaningless.

2. No error was committed related to the court's purported reliance on testimonial evidence surrounding the 2004 Agreement.

Although Williams argues the court improperly relied on testimonial evidence when it interpreted the parties' contract [Wms. Br 21], there is no support in the Memorandum

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[34] Williams again misconstrues the terms of the parties' Agreement, this time applying the term "Environmental Claims" within §10.2(b)(v)(A) to Flint Hills's separate indemnity obligation in §10.2(b)(v)(C). [Wms. Br. 17] No reference to "Environmental Claims" appears in §10.2(b)(v)(C). This is yet another attempt by Williams to extend a broadly defined term to a context in which it does not apply. *See supra* at pages 14, 17-18.

[35] [Exc. 2307]; Williams's separate assertion that its equitable share should be reduced due to a decision permitting Flint Hills to turn off its pump and treat systems in 2017 [Wms. Br. 58], is misguided. All costs for sulfolane existing onsite in 2004, including onsite sulfolane that migrated offsite after 2017, was already allocated to Flint Hills. [Exc. 2304, 2307]. As such, Williams's 75% share was already reduced accordingly. No basis exists to reduce Williams's allocation even further.

of Decision for its argument. The "extrinsic" evidence Williams refers to, presumably cited in ¶¶ 561-572 of the court's Memorandum of Decision [Wms. Br. 21-22], neither conflicts with nor adds language to the contract that does not otherwise exist. Moreover, to the extent the court relied on the "extrinsic" evidence—and it is not clear it did[36]—such reliance to aid its understanding of the contract would have been appropriate under either Texas or Alaska law.[37] The "extrinsic" evidence Williams refers to was also separately relevant to equitable factors unrelated to the parties' contract.

a) Extrinsic evidence may be used to aid the meaning of an unambiguous contract.

Under Texas law, a "clear distinction" exists between "extrinsic evidence that illuminates contract language and extrinsic evidence that adds to, alters, or contradicts the contract's text."[38] In *URI, Inc. v. Kleberg County,*[39] the Texas Supreme Court recognized that the parol evidence rule "*does not* . . . prohibit courts from considering extrinsic evidence of the facts and circumstances surrounding the contract's execution as 'an aid in the construction of the contract's language,' but the evidence may only 'give the words of a contract a meaning consistent with that to which they are reasonably susceptible, *i.e.,* to 'interpret' contractual terms.'"[40] "Whether a court is considering if an ambiguity exists *or construing the terms of an unambiguous contract*, surrounding facts and circumstances can

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36 The trial court's legal conclusions at ¶¶720-740 do not state that the court relied on any specific testimonial evidence as the basis for the court's interpretation of the 2004 Agreement. [Exc. 2303-06]

37 *See, e.g., URI,* 543 S.W.3d at 757; *Nautilus Marine,* 305 P.3d at 316.

38 *URI,* 543 S.W.3d at 768.

39 543 S.W.3d 755 (Tex. 2018).

40 *Id.* at 765 (internal citations omitted) (emphasis added).

only provide context that elucidates the meaning of the words employed, and nothing else."[41] Put simply, courts *may* use extrinsic evidence "to aid the understanding of an unambiguous contract's language."[42]

The trial court's decision, concluding that Williams unambiguously retained liability for the unknown and offsite sulfolane contamination that existed in 2004, properly applied the law to the facts of the case. [Exc. 2304] To the extent the court considered *any* extrinsic evidence addressing offsite contamination, it was testimony from both parties' percipient witnesses (*i.e.* those involved in the agreement's negotiations) that merely echoed that which was already in the contract, further reinforcing the court's interpretation. [*E.g.,* Tr. 2496-2500, 2234-35] Indeed, consistent with the court's interpretation, Randy Newcomer, the Williams executive who negotiated the sale, admitted that Williams retained liability for any sulfolane offsite at the time of purchase by Flint Hills. [Tr. at 2496-97; 4004-05] No error occurred.

b) Testimony surrounding the 2004 Agreement was separately relevant to other equitable factors.

Williams also claims the court erroneously "admitted" such extrinsic evidence into the record, but it makes only a cursory argument regarding admissibility. [Wms. Br. 22.] Accordingly, this Court should conclude the argument has been forfeited.[43] If this Court

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41 *Id.* (emphasis added).

42 *Id.* at 757. In this regard, Texas law is consistent with Alaska contract law. *See Nautilus Marine,* 305 P.3d at 316 ("[I]t is not necessary to find that an agreement is ambiguous before looking to extrinsic evidence as an aid in determining what it means."); *Flint Hills,* 377 P.3d at 975 (same).

43 *See Wright,* 390 P.3d at 1175.

does reach the merits of the issue, however, it can easily conclude that there was no error, because the "extrinsic" evidence and related findings of fact were independently relevant to non-contractual factors. The parties' respective knowledge at various points in time, their relative duties of care, their intent with regard to ongoing responsibilities, and their distinct responses to the contamination once it was discovered offsite, were all proper components of the court's equitable allocation under section .822(j).[44] For that reason, the admission of such evidence and the corresponding findings were neither erroneous nor was the court's potential reliance on them for non-contractual purposes improper.[45]

C. Flint Hills Expressly Reserved its Right to Obtain Equitable Relief, including Contribution.

Williams erroneously asserts that Flint Hills "forfeited any right" to contribution under AS 46.03.822(j) because "[t]he Agreement bars Flint Hills'[s] statutory contribution claim." [Wms. Br. 24.] To the contrary, the court's equitable award of contribution relief to Flint Hills is in full accord with the parties' 2004 Agreement.

Williams's argument that Flint Hills forfeited its contribution rights under the 2004 Agreement is belied by §10.5's plain language:

> **10.5. Exclusivity of Remedies**. Except for (a) any equitable relief, including injunctive relief or specific performance to which any Party hereto or Williams Guarantor may be entitled, (b) remedies available under the Williams Guaranty, and (c) fraud, the indemnification provisions of this Article X shall be the sole and exclusive remedy of each Party (including Buyer Indemnified Parties, Seller Indemnified Parties and Williams

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44 *See, e.g., Lockheed I,* 35 F. Supp.3d at 123.

45 For example, Williams's intent to maintain responsibility for any contamination that was already offsite in 2004, but its subsequent refusal to participate in remediation efforts once that contamination was discovered, was a relevant factor concerning the parties' relative cooperation with government. *Compare* Tr. 2496-2500 and Tr. 4092-4097.

Guarantor) with respect to any and all Actions or Damages arising out of this Agreement from and after the Closing.

[Exc. 2755 (emphasis added)]. The court's equitable allocation and resulting contribution award under .822(j) is a form of equitable relief.[46] In *Oakly Enterprises,* this Court addressed claims under section .822(j) and recognized that, in contrast with apportionment under section .822(i), "contribution claims essentially seek to allocate damages **equitably** among those who share responsibility."[47] The *Oakly* court further affirmed the equitable nature of a section .822(j) allocation by holding that the trial court had acted within its authority by allocating damages under section .822(j) during a separate *non-jury* contribution phase of the case, because "equitable relief" does not entail a right to trial by jury.[48] Alaska's treatment of contribution under its statute as an *equitable* remedy is not unique. Other courts addressing similar equitable relief under CERCLA, and the absence of a jury trial right, are in accord.[49]

When a party expressly preserves its right to seek other forms of relief, there can be no forfeiture. As it relates to Williams's forfeiture argument [Wms. Br. 24], *Trinity Industries Inc. v. Greenlease Holding Co.*[50] is particularly analogous. The *Trinity* case dealt

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46 Exc. 2298, 2307 (¶744).

47 354 P.3d at 1080 (emphasis added).

48 *Id.* at 1082, n. 36 ("If a party seeks only equitable relief, then there is no right to a jury trial." (quoting *Vinson v. Hamilton,* 854 P.2d 733, 736 (Alaska 1993)).

49 *See, e.g., Hatco Corp. v. W.R. Grace & Co. Conn.* 59 F.3d 400, 412 (3d Cir. 1995) (concluding there is no right to a jury trial on CERCLA contribution claims because the *relief* is equitable rather than legal); *American Cyanamid Co. v. King Indus., Inc.,* 814 F. Supp. 209, 214 (D.R.I. 1993) ("A CERCLA action to recover response costs is equitable in nature, and therefore no jury right attaches to it.").

50 903 F.3d 333 (3d Cir. 2018)

with environmental claims as well as an asset purchase agreement between the current and former owners of a manufacturing facility who were both responsible for contamination at the site.[51] The *Trinity* defendant argued, in part, that the plaintiff's contribution claim under CERCLA was prohibited because the parties had negotiated an indemnity provision, which the defendant claimed was the exclusive recovery mechanism between the parties.[52] Noting that the parties had included a non-waiver and reservation of rights provision, the court held that the parties expressly preserved their rights to contribution, above and beyond the agreement's indemnity provisions.[53]

Like the *Trinity* plaintiff, Flint Hills preserved its right to obtain relief beyond the contract's indemnity provisions. Williams cannot misuse the indemnity provisions to do what was never intended under the 2004 Agreement: transfer all *its* liability onto Flint Hills.

Williams's effort to disregard the parties' express reservation of rights by focusing on the contract's definition of "Damages" is also a red herring. [Wms. Br. 25.] That is because the parties' right to obtain "any equitable relief" *applies to* "any and all Actions or Damages." [Exc. 2755] Put another way, Flint Hills reserved the right to obtain equitable relief with respect to "any and all Actions or Damages," as those terms are defined, *after*

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51 *Id.* at 341-43.
52 *Id.* at 349-50.
53 *Id.* at 350.

the 2004 Agreement's execution. [*Id.*] The trial court's award under .822(j) is in accord with the 2004 Agreement.[54]

Williams also argues that the statutory relief provided under .822(j) was improper because it awarded Flint Hills costs that Flint Hills was otherwise unable to obtain through an alternate, contract-based theory. [Wms. Br. 26.] As an initial matter, parties are permitted to assert alternate theories of recovery.[55] This Court recognized as much when it reversed and remanded a lower court's dismissal of Flint Hills's .822(j) claim for offsite sulfolane contamination along with concurrent contract claims in a prior appeal.[56] Moreover, the statutory relief provided under .822(j) is particularly appropriate given that it is uncontested the contract's indemnity provisions were not available for the offsite sulfolane costs at issue. [Exc. 2305; Wms. Br. 18]

When the Alaska Legislature passed .822(j) and called upon courts resolving contribution claims to use "equitable factors determined to be appropriate by the court" under .822(j), it enhanced the traditional equitable powers of the courts to further its

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54 Had the harm been "divisible" and costs "reasonably capable of apportionment" under .822(i), the court would have instead apportioned "costs and damages" under .822(i) rather than equitably allocate under section .822(j). *See Oakly,* 354 P.3d at 1079 ("Equitable considerations play no role in the apportionment analysis[.]"). But the uncontested evidence in this case did not support apportionment. Equitable relief under .822(j) was instead appropriate.

55 Alaska R. Civ. P. 8(a) ("Relief in the alternative or of several different types may be demanded."); *Hofmann v. von Wirth*, 907 P.2d 454, 455 n.1 (Alaska 1995); *Golden Valley Elec. Ass'n v. Coll. Enters*, 455 P.2d 215, 216 (Alaska 1969).

56 *Flint Hills*, 377 P.3d at 976.

legislative goal of environmental protection.[57] The legislature gave responsible and proactive parties an independent cause of action and framework to recover costs incurred from shared statutory liability. Without a statutory contribution right, Flint Hills would have been incented to sit on its hands and allow unremediated contamination and its effects to worsen, just as Williams did. In making its equitable allocation, the trial court faithfully effectuated the will of the Alaska Legislature.

Williams's reliance on *Riddell v. Edwards*[58] is misguided. [Wms. Br. 55.] In that case, the probate court used its equitable powers to impose a constructive trust. The equitable constructive trust was at odds with the statutory scheme, which "unconditionally" gave the surviving spouse in a valid marriage the right to a marital allowance. This Court held that *common law* equitable powers cannot be employed to override the express terms of a statute: "the 'particular provisions' of statutory law . . . *affirmatively "displaced" the equitable remedy* of constructive trust."[59] To that end, *Riddell* represents the *opposite*

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57 To the extent Williams argues the equitable *relief* provided by statute is precluded because the *claim* was of a statutory or "legal" nature [Wms. Br. 26], it misapprehends the law. *See United States v. Waste Indus., Inc.*, 734 F.2d 159, 168 (4th Cir. 1984) (holding that statutory equitable relief was not precluded by the presence of legal remedy under an alternate statute, recognizing the legislature "chose to enhance the courts' traditional equitable powers in order to protect the public and the environment."); *United States v. Price*, 688 F.2d 204, 214 (3d Cir. 1982) (addressing the Clean Water Act and holding that "[c]ourts should not undermine the will of Congress by either withholding relief or granting it grudgingly"). Williams's argument also ignores that historically both courts of law and courts of equity deferred to statutory mandates. *See Plumbers & Pipefitters, Local 367 v. Municipality of Anchorage*, 298 P.3d 195, 202 (Alaska 2013) (explaining that "[c]ourts of equity can no more disregard statutory and constitutional requirements and provisions than can courts of law") (alteration in original)).

58 76 P.3d 847 (Alaska 2003)

59 *Id.* at 849, 855 (emphasis added).

situation from what occurred here: rather than "affirmatively 'displac[ing]'" common law equitable remedies, section .822(j) actively *supplies* the equitable contribution remedy the trial court imposed.[60]

D. No Error Occurred Regarding the Application of Insurance Proceeds or a Limit on a Non-Existent Indemnity Obligation.

1. Williams's arguments that it *was* contractually liable to Flint Hills for offsite sulfolane but satisfied those obligations are wrong.

The trial court concluded that the 2004 Agreement did not require Williams to indemnify Flint Hills for damages resulting from offsite sulfolane. The trial court reached this conclusion because the 2004 Agreement's indemnity provision contained an exception "to the extent that Damages are caused or contributed to by Buyer's operations, actions or omissions." [Exc. 2305] Flint Hills conceded that its operations likely contributed some portion of the sulfolane contained in the present-day offsite plume (albeit a far lesser amount than Williams). [Exc. 2305] As a result, the trial court denied Flint Hills's contractual indemnity claim seeking to hold Williams liable for its portion of the offsite sulfolane contamination. (For the same reason, the court also denied Williams's contractual indemnity claim against Flint Hills) [*Id.;* Exc. 2314].

Williams does not contest such interpretations of the 2004 Agreement's indemnity provisions nor the corresponding denial of Flint Hills's breach of contract claim

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60 *Id.* at 855.

encompassing sulfolane costs. Indeed, Williams repeatedly endorses this outcome.[61] Nevertheless, even though Williams has no contractual obligation to indemnify Flint Hills for offsite sulfolane, Williams paradoxically argues the court should have applied a contractual indemnity cap to limit the statutory contribution judgment against Williams. [Wms. Br. 27-28] The error in this logic is clear: because the court held that Williams had no contractual duty to indemnify Flint Hills for offsite sulfolane response costs, Williams is not required to make any contractual indemnity payments to Flint Hills. As a result, Williams will not make any indemnity payments to Flint Hills that can be credited against a cap that limits such payments. Put simply, the $32 million cap on contractual indemnity does not apply when contractual indemnity is unavailable. [Exc. 2311] Thus, the trial court's decision is consistent with this Court's decision in *Flint Hills.*[62]

2. The court's alternate holding that the indemnity cap was unenforceable to limit Williams's statutory obligations is consistent with public policy.

Williams further claims the trial court erred by invoking public policy considerations regarding the enforcement of the 2004 Agreement's indemnity cap to limit Williams's statutory obligations. [Wms. Br. 28] While the court's public policy grounds

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61 *See, e.g.,* Wms. Br. 17-18 ("trial court correctly concluded that the Agreement did not permit Flint Hills to recover indemnity from Williams for sulfolane."), *id.* at 26 ("properly determined Flint Hills is not entitled to indemnity"), *id* at 55 ("trial court correctly concluded that the Agreement's Contribution Clause barred any recovery").

62 Williams suggests this Court's prior decision held otherwise, but it disregards the fact that the Court's prior discussion regarding "all environmental liabilities" was made solely in the context of Flint Hills's *contractual claim* for indemnification, not Flint Hills's statutory claim for contribution. *See* Wms. Br. 27 (citing *Flint Hills*, 377 P.3d at 976).

were merely an alternate basis for its decision,[63] Williams's actions nevertheless confirm the trial court's conclusion. The State of Alaska and Flint Hills each sought Williams's participation in the remediation process since early 2010, which Williams continuously rejected.[64] This conduct continued for years, even after Williams's corporate representative admitted in 2011 that Williams was responsible for any offsite sulfolane at the time of purchase in 2004. [Tr. 4001-05] Williams not only intentionally disregarded its statutory remediation obligations but made a concerted effort to file motions on the eve of trial intended to further delay the proceedings and judgment. [Exc. 2157 (¶ 82)]

The record is replete with evidence of Williams's recalcitrance, forcing Flint Hills to bear the burden alone.[65] As Flint Hills's costs surpassed the $32 million mark, Williams endeavored to delay the proceedings and its participation, all the while contending that each subsequent dollar Flint Hills spent on Williams's liability was a dollar that Williams would claim Flint Hills could no longer recover under the parties' 2004 Agreement, due to a "cap" on indemnity or otherwise. [*See, e.g.,* Wms. Br. 27] Flint Hills ultimately amassed over $138 million in total sulfolane response costs by the time of trial. [Exc. 2253; Exc. 3427] Williams took its approach, despite knowing that it continued to possess ongoing

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63 Within ¶764, the trial court articulated numerous reasons for the indemnity cap's inapplicability, including the lack of the underlying indemnity obligation. [Exc. 2311]

64 *See, e.g.,* Exc. 3111; Exc. 3107-10.

65 *See, e.g.,* Tr. 185, 448-50, 2631, 4092-97; Exc. 3216-17, 3428-30 (Sept. 2019 Letter from Williams declining to provide alternative water to a North Pole resident).

liability for the majority of contamination in the offsite sulfolane plume.[66] Williams's actions demonstrate the validity of the trial court's conclusion and concerns that enforcing such a "cap" would inhibit prompt response, contrary to the legislative purpose of AS 46.03.822.[67]

3. Flint Hills's insurance proceeds did not come "from Williams" and therefore did not satisfy any indemnity obligations or the cap.

While unnecessary to address Williams's arguments further due to the indemnity provisions' uncontested inapplicability to the sulfolane costs at issue, the trial court also did not err in pretrial rulings when it separately determined that, even if the indemnity provisions applied, proceeds from Flint Hills's insurance policy did not come "from Williams," and therefore did not implicate the parties' payment obligations or an indemnity "cap." [Exc. 2153; Exc. 2349 (Pretrial Hrg.); Exc. 3289-302 (Mar. 12, 2018 Order)[68]]

The court correctly recognized that the "Environmental Cap" within the 2004 Agreement was expressly defined to be "the maximum amount of indemnifiable Damages which may be recovered by [Flint Hills] ***from*** [Williams] and by [Williams] ***from*** [Flint Hills]." [Exc. 2153; Exc. 3297-98; Exc. 2700] The insurance proceeds that Flint Hills received *from its own insurance policy* were not payments "from Williams." As a

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66 *See* Tr. 2496-2500; Tr. 3557; *see also* supra at n. 16 (citing *Smith Land,* 851 F.2d at 89-90 ("If fair apportionment of the expense is not assured, it is unlikely that one party will undertake remedial actions promptly when it could simply delay, awaiting a legal ruling on the contribution liability of other responsible parties.")).

67 *See McKnight v. Rice, Hoppner, Brown & Brunner,* 678 P.2d 1330, 1334 (Alaska 1984) (explaining when contracts are unenforceable on public policy grounds).

68 Reference to Appellees' excerpt is included herein because Appellant's Excerpt of the Record contains an incomplete copy of the superior court's order.

consequence, the insurance proceeds could not be used as a proxy for Williams's obligations. [Exc. 2153; Exc. 3301] As a named insured, when Flint Hills drew on the policy, it was drawing from *its own* policy and the proceeds were coming from *its own* insurer. [*E.g.,* Exc. 2922, 3298] Such payments were never "from Williams" nor was it "Williams' insurance money," as Williams now claims. [Wms. Br. 29.] Williams also admitted as much at trial. [*See, e.g.,* Tr. 4022, 4305]

For the reasons set forth within Judge Blankenship's pretrial ruling, which were reaffirmed by Justice Matthews, Williams's challenge to the treatment of insurance proceeds is without merit.[69]

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN ALLOCATING COSTS BETWEEN THE PARTIES.[70]

Williams's contentions within Section V of its appellate brief all concern various factors relevant to the court's equitable allocation—factors whose consideration plainly fall within the court's equitable discretion under AS 46.03.822(j).[71] Williams misstates the standard of review as *de novo*, further contending the "court's allocation was erroneous and should be reversed." [Wms. Br. 14, 55.] The court's allocation, however, including the

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69 Williams also improperly *adds* language to §10.3(b) to alter the clear process set forth under the indemnity provisions. Specifically, §10.3(b) does *not* qualify its use of the term "Damages" to be "indemnifiable Damages," as Williams represents. [*Compare* Wms. Br. 29 and Exc. 2753] Given the prerequisite conditions necessary for "Damages" to become "indemnifiable" under §10.4 [Exc. 2755, 3297], Williams's effort to rewrite §10.3(b) with added language effectively renders the 2004 Agreement's indemnity provisions meaningless if all that was necessary was the provision of insurance.

70 The elements of section 822(a), including Williams's release of a hazardous substance, were amply supported by the record. *See, e.g.,* Exc. 2217-32; SOA Br. Arg. § I.

71 AS 46.03.822(j) ("In resolving claims for contribution . . . the court may allocate damages and costs . . . using equitable factors determined to be appropriate by the court.").

factors it chose to consider, is evaluated against an abuse of discretion standard, which Williams fails to allege was violated.[72]

When distilled, Williams's arguments "boil down to a disagreement with the particular equitable factors the [trial] court chose to use and how the court applied them."[73] In particular, Williams argues the court erred when it purportedly (a) "*ignored* the parties' [contractual] allocation to Flint Hills;" (b) took "*into account* Williams's alleged 'recalcitrance' and 'refusal to assist;'" (c) "*ignored* DEC's non-regulation of sulfolane prior to 2004;" (d) "*ignored* Williams's [equitable defenses]; and (e) "*fail[ed] to consider* the City's" alleged contributions to the sulfolane plume.[74] Williams's contentions are, however, expressly belied by the substantial evidentiary support painstakingly detailed and expressly cited *throughout* the trial court's 184-page Memorandum of Decision. [*E.g.*, Exc. 2132-15, 2236-40, 2307-09] Those record citations include references to numerous evidentiary exhibits as well as trial testimony. [*Id.*] The trial court clearly acted within the bounds of its discretion.

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72 *See supra* at 7. While the gatekeeping "decision" to equitably allocate costs under .822(j) rather than legally apportion damages under .822(i) may indeed involve a question of law subject to *de novo* review, that "decision" is not at issue here. *See, e.g., United States v. NCR Corp.,* 688 F.3d 833, 838 (7th Cir. 2012). Williams does not challenge the trial court's conclusions regarding the indivisibility of damages under .822(i) and its corresponding decision to equitably *allocate* costs rather than legally *apportion* damages.

73 *United States v. Consolidated Coal Co.*, 345 F.3d 409, 415 (6th Cir. 2003).

74 Wms. Br. 55 (contract), 56 (regulation), 57 (recalcitrance), 58 (defenses), 60 (City) (emphasis added).

A. The Trial Court Properly Considered the Parties' 2004 Agreement and Adjusted the Allocation Accordingly.

Williams erroneously claims the trial court "fail[ed] to enforce the parties' own allocation." [Wms. Br. 55.] Williams is incorrect, both as to the parties' supposed "allocation" and to the court's enforcement. As addressed *supra* at 11, the trial court properly considered the parties' 2004 Agreement, giving it "significant weight." [Exc. 2302, 2309] And, with ample support and unrebutted evidence in the record, the court ultimately adjusted its allocation accordingly. [*E.g.,* Exc. 2212-16, 2307] The court's consideration was in accord with comparable federal case law addressing .822(j)'s counterpart in CERCLA.[75]

The court found that Williams was responsible for releasing 90% of the sulfolane comprising the present-day sulfolane plume. [Exc. 2216, 2307] Williams does not challenge this factual finding. In its contribution allocation, the court reduced Williams's 90% share by 30% based upon the terms of the parties' 2004 Agreement. [Exc. 2307] The court's 30% reduction reflected the sulfolane contamination that existed onsite in 2004, which Flint Hills specifically agreed to assume under the 2004 Agreement. [*Id.*; Exc. 2243; Tr. 1221]

B. Because Williams Was Never Permitted to Release Sulfolane, Any "Regulatory" Distinction Between Operating Tenures was Immaterial.

Williams claims the trial court ignored DEC's purported "non-regulation of sulfolane prior to 2004" within its allocation. [Wms. Br. 56.] Williams's assertion that

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[75] *E.g., Lockheed,* 35 F.Supp.3d at 141-142; *Beazer E.,* 412 F.3d at 448-449; *Trinity,* 903 F.3d at 349; *Davis,* 31 F. Supp. 2d at 62-63.

sulfolane was not "regulated" prior to 2004 is wholly belied by the evidentiary record and regulatory history. Williams was *never* permitted to release sulfolane into the groundwater at the Refinery.[76] Reinforcing the "regulatory" prohibition on releases and reporting, Williams reported hazardous substance spills of sulfolane to DEC prior to 2004. [*E.g.*, Tr. 502-03; Exc. 2618-56] Williams's attempt to conflate its obligation to *remove or remediate* sulfolane after it was released onsite at the Refinery with *the act of releasing* it, contorts the testimony and regulatory history at the Refinery site. [Wms. Br. 56] Put simply, neither Williams nor Flint Hills were permitted to release sulfolane during their tenures. The court's allocation properly considered the parties' distinct tenures and respective regulatory requirements.

C. The Trial Court Properly Considered Williams's (Non) Cooperation with Government as Part of Its Allocation.

Williams claims that the court's consideration of equitable factors improperly "punished" Williams for defending itself. [Wms. Br. 57-58.] Williams is mistaken. First, the parties' relative cooperation with the government's efforts to identify and mitigate damages is a recognized and often-used factor by courts when allocating environmental costs between responsible parties.[77] Consideration of this factor is not a form of punishment, but simply gives equitable consideration to the party's cooperation in

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[76] *See, e.g.*, Tr. 223-27.

[77] *E.g.*, *Consolidated Coal*, 345 F.3d at 414-15; *Goodrich Corp. v. Town of Middlebury*, 311 F.3d 154, 173 (2d Cir. 2002); *Agere Sys.*, 602 F.3d at 235; *ASARCO LLC v. Atl. Richfield Co.*, 975 F.3d 859, 870 (9th Cir. 2020); *see also Oakly*, 354 P.3d at 1077 & n.6 (affirming a trial court order applying the "Gore factors," including "the degree of cooperation by the parties with Federal, State or local officials").

addressing the harm caused by its own conduct. Williams intentionally avoided active participation in remediation efforts despite repeated overtures and opportunity, exhibiting Williams's relative non-cooperation with the government. [Exc. 3107-10, 3111; Tr. 1777-81] Williams's refusal to contribute to the efforts sharply contrasted with Flint Hills's conduct and was properly characterized as recalcitrant. [Exc. 2308-2309] Williams chose instead to devote its time, resources, and even environmental insurance funds to its litigation defense and efforts to delay trial. [Exc. 2101-03, 2157, 2271, 2310] The trial court did not abuse its discretion when it took Williams's non-cooperation into account.

The Sixth Circuit case, *United States v. Consolidated Coal Co.*,[78] cited by Williams [Wms. Br. 61], is instructive.[79] *Consolidated Coal* dealt with an allocation of environmental costs between potentially responsible parties ("PRPs").[80] As part of its equitable allocation, the lower court *doubled* one PRP's share after finding that the PRP "did not participate in any efforts of the other PRPs to work with the government to investigate the site, design a remedy, abide by the remedy . . . [or] meaningfully cooperate in any phase of the CERCLA process," despite being "given ample opportunity to do so."[81] On appeal, the Sixth Circuit found no error nor abuse of discretion in the enhanced allocation, noting that CERCLA was meant to "facilitat[e] prompt cleanup of hazardous waste sites financed by those responsible for the hazardous waste."[82]

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78 345 F.3d 409 (6th Cir. 2003).
79 *Berg,* 113 P.3d at 608 (referring to federal CERCLA cases for guidance).
80 345 F.3d at 411.
81 *Id.* at 415.
82 *Id.* at 413.

As in *Consolidated Coal*, the trial court's factual findings—which are not contested on appeal—reflect Williams's refusal to meaningfully participate despite its statutory obligations and repeated opportunities to do so.[83] Williams's conduct was particularly egregious given its contractual agreement to bear liability for any sulfolane contamination that was already offsite in 2004, and the fact it was established years ago that the contamination had already been "far beyond the contours of the sulfolane identified in the disclosure schedule" at the time of sale.[84] Williams's avoidance contrasted sharply with Flint Hills's efforts, which the trial court characterized as "exemplary," while Williams "did little else than sit on the sidelines." [Exc. 2308]

Williams's non-cooperation during its *pre*-2004 tenure as refinery operator was also properly factored into the court's allocation. [*Id.*] For example, despite discovering high concentrations of sulfolane onsite in 1996, Williams never reported the discovery to DEC. [Tr. 1121-23; Exc. 2174] In late 2001, when a third-party contractor reported the contamination, DEC directed Williams to find its source. [Exc. 22-25, 2236] Williams's "search" efforts were abandoned after only a matter of months.[85] When evaluating the parties' respective cooperation, the court properly considered the parties' relative conduct. [Exc. 2308] Any adjustment to its allocation was not to penalize Williams, but instead merely factored into the court's analysis to determine an equitable allocation of costs. [*Id.*]

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83 Exc. 2237-2240; *see also* Exc. 2157 (noting Williams filed a motion during pretrial proceedings "primarily for the purposes of delay").

84 *See, e.g., Flint Hills,* 377 P.3d at 963 (2016) (noting superior court's prior finding).

85 Tr. 2958-59; Exc. 3023; Exc. 2175-76, 2236 ("Williams cessation of sampling exhibits a lack of cooperation and failure to comply with DEC requirements…").

Williams's cited cases do not hold otherwise.[86] The court's consideration of the parties' relative cooperation was not an abuse of discretion.

D. The Trial Court Properly Considered the Parties' Relative Degree of Care, including any "Delay" in Addressing the Sulfolane Contamination.

The court's allocation properly accounted for the parties' relative conduct in addressing the sulfolane contamination and its offsite discovery. [Exc. 2308] Williams's assertion that its "laches defense should have comparatively reduced Williams' responsibility" [Wms. Br. 59] misapprehends the defense's application to a claim asserted within the statute of limitations period and ignores the court's express consideration of the parties' respective response times (or "delay") to address the contamination at issue.[87]

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[86] Williams's cited cases are factually inapposite. *Louisiana Pacific Corp. v. Beazer Materials* did not concern a court's equitable allocation but instead dealt with a constitutional issue and waiver that are not at issue here. 842 F. Supp 1243, 1249 (E.D. Cal. 1994). Williams's citation to the dissenting opinion in *McGinnes Industries Maintenance Corp. v. Phoenix Insurance Co.,* 477 S.W.3d 786 (Tex. 2015), and *Bordenkircher v. Hayes,* 434 U.S. 357 (1978), are similarly unavailing. Neither *McGinnes* nor *Bordenkircher* involved an equitable allocation, nor are they in any way factually analogous. Nothing precluded Williams from participating in remediation efforts while simultaneously defending itself in the civil actions, as Flint Hills did.

[87] To the extent Williams asserts that prior factual findings of the trial court were law of the case to preclude Flint Hills's recovery, this argument is forfeited as Williams fails to address it beyond a footnote. [Wms. Br. 59, n. 27]. It is also incorrect because this Court never addressed the issue of laches during the prior appeal between Flint Hills and Williams. *Flint Hills,* 377 P.3d at 974. Alaska courts have also consistently held that "a superior court judge's failure to follow an order of a prior superior court judge does not violate the law of the case doctrine." *Gold Dust Mines, Inc. v. Little Squaw Gold Mining Co.,* 299 P.3d 148, 158 (Alaska 2012). Regardless, the trial court considered any delay by the parties as part of its equitable allocation. [Exc. 2308]

As an initial matter, the defense of laches is not available for claims that are filed within the statute of limitations period.[88] Flint Hills filed its statutory contribution claim for offsite sulfolane within the applicable statute of limitations period.[89] Moreover, to establish laches, a defendant must show that a plaintiff slept on its rights for an unreasonable period of time, which prejudiced the defendant.[90] Flint Hills's .822(j) claim for offsite sulfolane seeks costs that Flint Hills first incurred in 2009 to respond to DEC's directives for addressing offsite sulfolane contamination. Williams was aware of these offsite costs and its potential liability from the outset, having been notified by Flint Hills and the State of Alaska within months of the discovery of the offsite plume. Moreover, Williams knew that these offsite costs were still being incurred *while the litigation was ongoing* [Exc. 3107-10, 3111; Tr. 1777-80] Given its knowledge of the claims and response costs, there was no basis for concluding Williams had been prejudiced by any claimed delay in making claims. The court properly considered the parties' conduct and did not abuse its discretion.

E. The Trial Court Did Not Abuse Its Discretion By Excluding Evidence Regarding The City of North Pole's Alleged Contributions or By Failing to Allocate Costs to the City of North Pole.

Williams claims the trial court erred by excluding evidence of purported

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88 *Moffitt v. Moffitt*, 341 P.3d 1102, 1105 (Alaska 2014) (recognizing a laches defense does not apply to "claim[s] governed by a statute of limitations"); *see also United States v. Milstein*, 401 F.3d 53, 63 (2d Cir. 2005) ("[I]t is well established that, as a general rule, laches is not a defense to an action filed within the applicable statute of limitations . . . ." (citation omitted)).

89 *Flint Hills*, 377 P.3d at 973.

90 *Moffitt,* 341 P.3d at 1105.

contributions to the sulfolane plume by The City of North Pole ("City"), a nonparty, and by failing to allocate costs to that nonparty in this case. [Wms. Br. 60] The court's exclusion of evidence is reviewed for abuse of discretion.[91]

1. Williams never sought statutory contribution from The City of North Pole, a nonparty to the action, to compel an allocation.

Williams's inability to pursue a contribution theory against the City was a problem of its own making, and not the result of any error by the trial court. In this lawsuit, the State sued Flint Hills and Williams—not the City. Williams never asserted a contribution claim against the City in this case. [*See* Exc. 1194-265] If Williams wanted to seek contribution *from the City for the State's claims* (or even for Flint Hills's cross-claims), Williams could have filed a third-party complaint against the City. Williams never did so. As a result, the City never became a party in this case, and never faced contribution claims from Williams.

In a separate action, the City sued Flint Hills and Williams. Again, Williams chose not to assert counterclaims or cross-claims against the City seeking contribution. [Exc. 1126-326]

In June 2019, the Court deconsolidated the State's case from the other cases for purposes of trial. Williams did not raise any objection to deconsolidation at that time. [Exc. 3386-403] With respect to any claims by Williams against the City for .822(j) contribution, the trial court's deconsolidation order left Williams in exactly the same position it occupied prior to deconsolidation: (1) in the State's case, Williams had no claim against the City for contribution for the State's claims (or for Flint Hills's related cross-claims), and 2) in the

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91 *Oakly,* 354 P.3d at 1078.

City case, Williams likewise had no contribution claim against the City.

Viewed within this procedural context, Williams's arguments challenging the trial court's refusal to allocate liability to a nonparty, or the deconsolidation itself, are meritless.[92] Moreover, the trial court's deconsolidation order did not limit any defenses or claims that Williams could potentially make in the separate, future trial slated to address the City's claims.

Williams argues that even though it did not have any claim against the City for contribution under section .822(j) in the State case, evidence concerning the City's conduct should have been admissible, contending without explanation that the court's exclusion contradicted *FDIC v. Laidlaw Transit, Inc.*[93] [Wms. Br. 61] *Laidlaw* does not support the conclusion Williams attempts to draw from it.[94] Only the *named* parties in *Laidlaw* were allocated liability, which included liability attributable to non-party, "orphan" shares.[95] The

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92 In addition, Williams fails to address any error related to the deconsolidation order, despite identifying it as an "Issue Presented for Review." [Wms. Br. 3] Williams's failure to object at the time and its failure to develop the argument on appeal both constitute waiver.

93 21 P.3d 344 (Alaska 2001).

94 In response to Williams' efforts to introduce evidence concerning the City's responsibility at trial, the Court reviewed and considered *Laidlaw* and correctly concluded that it does not say that nonparties are subject to allocation. Tr. at 3741-45.

95 21 P.3d at 349-350.

other cases Williams cites do not hold otherwise.[96]

The liability issue in this case was whether Williams released hazardous substances into the environment. The damages issue was whether the State and Flint Hills incurred response costs for such releases. At trial, it was undisputed that Williams's releases caused a substantial sulfolane plume. [Tr. 3556-57] There was no contention that the sulfolane plume was divisible. [*Id.*; Tr. 1221] While Williams proffered evidence that the City *also* allegedly released sulfolane, that evidence was not probative of the issue at trial in *this* case. Under the joint and several liability scheme of section .822, the *only* potential relevance of evidence of the City's alleged contribution to the groundwater pollution would be for the purpose of an equitable allocation among responsible parties under section .822(j). But as previously discussed, allocation to the City was not an issue in this case, because Williams made no claim for contribution against the City in this case. The trial court did not abuse its discretion by excluding Williams's purported evidence of the City's responsibility for sulfolane contamination, or by refusing to allocate costs to a non-party to the action.[97]

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[96] In *Consolidated Coal*, the 74 PRPs had been previously named as either third-party plaintiffs or third-party defendants for contribution cross-claims. 345 F.3d at 414. In *Trinity,* the court noted it "may equitably allocate among *the parties before it*[.]" 903 F.3d at 347, n.6. In *FMC Corp. v. Aero Industries, Inc.,* the appellate court merely recognized, without explanation or detail, that the lower court "considered the liability of nonparties" but ultimately disregarded it. 998 F.2d 842, 847 (10th Cir. 1993). *Cooper v. Thompson,* 353 P.3d 782 (Alaska 2015) and *Pouzanova v. Morton*, 327 P.3d 865 (Alaska 2014) are similarly unavailing, as they concern personal injury and tort apportionment statutes that are not analogous to the court's equitable allocation.

[97] Allocating liability to a nonparty who was never on notice of contribution claims nor present to defend itself at trial would also invoke due process concerns and invite prejudice to that nonparty's separate, ongoing lawsuit with Williams.

III. THE TRIAL COURT'S AWARD OF FLINT HILLS'S RESPONSE COSTS WAS PROPER AND AMPLY SUPPORTED BY THE RECORD.

The trial court's findings of fact regarding the reasonableness and necessity of Flint Hills's costs, incurred in response to DEC's directives, were not clearly erroneous but were appropriate and supported by substantial record evidence.[98]

First, Williams's contention that the piped water system was not "reasonable" and not "cost-effective" is directly belied by the record and undermined by its own recalcitrance. [Wms. Br. 49-50] Williams has been on notice since at least 2014 that the State was considering an expansion of the City of North Pole's piped water system as a potential remedy.[99] Williams opted not to participate in the related administrative process nor did it propose alternatives, despite being offered and provided every opportunity to submit its own feasibility study and even conduct its own remediation activities. [Exc. 3216; Tr. 4111-13; Exc. 2238 (¶453)] Williams refused to be involved despite DEC's express warning in 2013 that Williams would need to be prepared to accept the results if it failed to participate. [*Id.*]

Witness testimony also made clear that *multiple* piped water system options were evaluated before the current system was chosen, which was indeed determined to be "the

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98 *See, e.g.,* Tr. 1510-11; Tr. 1585-86; *see also, e.g.,* Tr. 1571-73; Exc. 2251-55 (finding Flint Hills's costs reasonable and necessary to comply with DEC directives and respond to the contamination at issue).

99 *See, e.g.,* Exc. 775 (State of Alaska's Mar. 6, 2014 Compl. at ¶83) (identifying Williams's potential liability for the "cost of expanding the existing City of North Pole's piped water system to serve affected properties[.]")

most cost-effective" of the options.[100] Even Williams's expert, Howard Woods, could not criticize its costs. [Tr. 3724-25] In fact, the evidence indicated that the State's and Flint Hills's remediation efforts were indeed cost-effective, as construction was ahead of schedule and under budget when trial began. [Tr. 1575-84]

Evidence and testimony from multiple witnesses further identified that other interim remedies had been previously pursued since 2009 before opting to construct the piped water system. Those interim measures included Flint Hills's provision of alternative, potable water to affected properties and Flint Hills's installation of extensive filtration systems at other affected properties, all of which required significant costs and required ongoing resources and maintenance needs.[101]

Second, Williams's separate claim that Flint Hills failed to establish the need for its interim provision of alternative water—indeed "that ***any*** kind of alternative water was necessary" [Wms. Br. 52 (emphasis in original)]— is also undermined by the evidence at trial and Williams's own experts. Trial testimony, for example, indicated that the discovery of sulfolane in North Pole residents' wells clearly constituted a public health emergency, requiring immediate response and regulatory involvement. [Tr. 1506-07; Tr. 1544] Both Mr. Woods and William Desvousges, Williams's expert witnesses on the pipeline's construction and natural resource damages, testified that Flint Hills's provision of alternative water was "very reasonable" and entirely appropriate given the

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100 Tr. 1576-77 (evaluating multiple systems, and decision to go with the "most cost-effective" option.); *see also* Tr. 428-30, 1571-73, 2643-44; Exc. 3262.

101 Tr. 1547-50 (identifying over $27 million in past alternative water costs); Exc. 3427.

circumstances.[102] Mr. Desvousges further noted that Flint Hills's "extensive actions" at the outset of the emergency mitigated natural resource damages that residents may have suffered. [Tr. 3053-57]

Moreover, the specific remedies that Williams disputes—the piped water system, the replacement of city wells, and the provision of alternate water—were all regulatory directives.[103] To that end, Williams's challenge to the response costs are necessarily targeted at the State and its decisions—not Flint Hills. In that regard, Williams possessed the burden of proof to show that the State's chosen remedies were improper—a burden it failed to meet at trial. [Exc. 2250, 2289-90]

The appropriateness of the *State's* chosen remedies or the amount of the *State's* recoverable costs do not, however, change the costs that Flint Hills incurred to comply with its regulatory directives, nor does it alter the amounts subject to contribution from Williams. [*E.g.*, Exc. 3427; Exc. 2255 (¶542)] To hold otherwise, or to somehow preclude Flint Hills from recovering its past compliance costs for a process Williams refused to participate in, would effectively fault Flint Hills for fulfilling its statutory obligation to provide prompt response and cooperation. Moreover, the purported "standard" Williams advocates—compelling a cleanup level to determine recoverable costs—is nowhere within AS 46.03.822(a) and (j), which provide recovery for a broad array of "damages and

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102 Tr. 3057-58; Tr. 3702 ("At that point in time, I think it is very reasonable to provide an interim solution in the form of bottled water or something of that nature that would allow people to have a known safe drinking water source[.]")

103 Tr. 1571-76 (piped water system); Tr. 1542-45 (city wells); Tr. 1546-50 (water solutions).

costs."[104] Williams's approach would also effectively allow polluters of unknown or new chemicals to dump them into the environment and sit back for years while toxicology testing occurs.

IV. THE TRIAL COURT'S FINAL JUDGMENT PROPERLY AWARDED DECLARATORY RELIEF FOR THE PFAS CONTAMINATION AT THE REFINERY PROPERTY.

Williams's attack on the Final Judgment's declaratory relief, finding Williams statutorily and contractually liable for the PFAS contamination at the Refinery Property, is wholly without merit.[105] The unrebutted evidence from trial showed that Williams was the ***only*** party that released perfluorochemicals, or "PFAS," at the Refinery site. [Exc. 2246-48] Williams admitted as much, and its admissions were never limited to specific PFAS-compounds (*i.e.*, PFOA and PFOS) nor otherwise circumscribed. [Exc. 1774 (¶15), 1789 (¶14)] Williams fails to challenge the trial court's factual findings as "clearly erroneous," and instead only disputes the relief awarded pursuant to the Final Judgment. [Wms. Br. 66.] Williams's present effort to cabin its existing and future liability, or suggest Flint Hills was responsible for the Refinery's PFAS contamination, is devoid of evidentiary support.

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104 *Oakly,* 354 P.3d at 1083 & n.37 (holding that "[t]he 'damages and costs' that may be allocated under subsection .822(j) are not defined any differently than they are in subsection .822(a)" and noting that "[n]othing in the wording or legislative history . . . hints that subsection .822(a)[]. . . w[as] meant to exclude other claims . . . or to constrict the universe of future recovery." (first alteration in original) (citation omitted)).

105 The decision to grant declaratory relief is reviewed for an abuse of discretion, unless underlying legal issues are present that are reviewed *de novo*. *Hahn v. GEICO Choice Ins. Co.*, 420 P.3d 1160, 1165 (Alaska 2018).

A. Williams Released the Perfluorochemicals ("PFAS") Contaminating the Refinery Property.

Williams admitted that "during the time that it owned and operated the North Pole refinery, releases of sulfolane and perfluorochemicals occurred." [Exc. 1774 (¶15), 1789 (¶14)] Williams's admissions were not limited to PFOA and PFOS compounds, which are two types of perfluorochemical, or "PFAS," compounds.[106] At trial, Williams's corporate witness likewise admitted that the fire-fighting foams Williams used at the Refinery "contained perfluoroalkyl substances."[107] While Williams conceded those substances included at least PFOS, such testimony did not limit it to only PFOS. [Tr. 2340] Williams further admitted it released such PFAS-containing substances, and sprayed them directly into the sumps and wastewater stream at the Refinery during its tenure—sumps and streams that Williams allowed to fall into severe disrepair and were major sources of environmental releases during Williams's tenure.[108] No evidence was presented that any of the other named parties (*i.e.*, Flint Hills or the State of Alaska) released PFAS into the environment at the Refinery. [Exc. 2247] Indeed, to the extent Williams sought to cast blame on others, its allegations at trial were targeted towards non-party, neighboring properties, which if correct, can be pursued by Williams in a separate contribution action.[109]

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106 *Id.*; *see also, e.g.,* Exc. 2146 (¶45) (defining "PFAS" to be "perfluorochemicals").

107 Tr. 2340:13-16 (Q: So, Williams now admits that its aqueous film forming foams contains perfluoroalkyl substances, correct? A: Yes.").

108 Tr. 2332-35, 2342-44, 2368; Exc. 2189-98, 2201-202, 2246-47.

109 Tr. 2623-25; *Laidlaw,* 21 P.3d at 355.

B. Williams's Liability Is Not Limited to Two Specific PFAS Compounds (PFOS and PFOA).

In 2013, when Flint Hills discovered PFAS compounds in the soil at the refinery, Flint Hills notified Williams of its liability. [Exc. 3211-15; Tr. 1512-14; Exc. 2247] Flint Hills's demand (directing Williams to address its contamination and indemnify Flint Hills for its costs at the time) encompassed the "PFC contamination at the refinery," and included the PFC compounds found in "soil samples." [Exc. 3213-3214] Evidence admitted at trial indicated those samples included PFC compounds beyond PFOS or PFOA. [Exc. 3315-16; *see also* R.060797] Flint Hills's cross-claims against Williams were not restricted to PFOS and PFOA compounds, but broadly included Williams's releases of "perfluorochemicals" (which Williams subsequently admitted releasing in its Answer). [Exc. 1498, 1503] Nor was the trial court's use of the "PFAS" acronym so limited in its Memorandum of Decision.[110] The court's findings that Williams was "the sole purchaser and user of PFC-containing products at the NPR" and that "[n]o evidence that PFAS-related products were used or PFAS releases occurred during Flint Hills's tenure at the NPR," accurately reflects the record. [Exc. 2247 (¶¶ 493, 497)] Faced with the evidence of existing PFAS

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[110] While the court acknowledged the sub-compounds "PFOA" and "PFOS" are "encompassed" within the family of PFAS chemicals, it did so recognizing that PFOS and PFOA already possess default clean up levels under Alaska's regulations. The court's Decision does not, however, *define* its use of "PFAS" as "PFOA and PFOS," as Williams erroneously claims. Wms. Br. 66; *Compare* Exc. 2139 (¶11) ("Williams also released perfluorochemicals (PFAS) into the ground and groundwater at the refinery."); Exc. 2146 (¶45) (referencing "perfluorochemicals (PFAS)"); Exc. 2147 (¶49) (same). Moreover, during post-trial proceedings, Justice Matthews rejected Williams's attempts to restrict the judgment to PFOS and PFOA. [Exc. 3431-35]

contamination at the refinery, the trial court properly awarded the State and Flint Hills their respective relief. [Exc. 2248, 2305-06, 2297, 2318-21]

Although Williams suggests that this Court's prior decision affirming the dismissal of Flint Hills's declaratory-judgment and specific-performance claims bars an award of declaratory relief in connection with Flint Hills's surviving contract claim, Williams is mistaken. [Wms. Br. 66] Williams conflates a declaratory judgment *action* with the *remedy* of declaratory relief, which "can be awarded for success on a wide variety of claims and causes of action."[111] It is well-established that declaratory relief is a proper remedy for a contract claim.[112] This Court's decision in *Flint Hills* dismissed Flint Hills's declaratory judgment *claim* precisely because it sought "identical relief" to the remedies available under Flint Hills's other claims, *e.g.*, a declaration of Flint Hills's rights under the contract.[113] The trial court was not precluded from granting—and did not err in granting—appropriate declaratory relief as a contract remedy.

C. The Court Recognized That Future Remediation May Be Necessary for PFAS Contamination Onsite.

Williams's conclusory assertion that "neither the State nor Flint Hills presented any evidence of future remediation costs with respect to any PFOS or PFOA" [Wms. Br. 67] is belied by the trial court's Memorandum of Decision and the evidentiary record. The court

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111 *City of Wyoming v. Procter & Gamble Co.*, 210 F. Supp. 3d 1137, 1155 (D. Minn. 2016); *Anchorage Chrysler Center, Inc. v. DaimlerChrysler Corp.*, 129 P.3d 905, 910-912 (Alaska 2006).

112 Restatement (Second) of Contracts § 345; *see also id.*, cmt. d (explaining that courts "may also render declaratory judgment in connection with other relief).

113 377 P.3d at 974.

specifically found that after Flint Hills's remediation efforts to excavate and remove soil, there remained "between 1500 and 6000 ppb of PFAS compounds in the soil at the fire training area," and cited to documentary support. [Exc. 2247 (¶495); Exc. 3303-34]

D. There is No Evidence that Flint Hills Caused or Released PFAS Contamination.

Williams's attempt on appeal to cast blame on Flint Hills, claiming Flint Hills "used substantial amounts of 'PFAS' in fire-training exercises and in 'hot work' at the refinery [Wms. Br. 67], is not supported by evidence. Williams's citation to a 2018 presentation [Wms. Br. 67], for example, simply identifies product inventory that had been present at various points during Flint Hills's tenure. [*See* Exc. 1999-2002] No evidence was presented that Flint Hills *released* those products into the environment, much less that those products even *contained* PFAS compounds.[114] Further undermining Williams's latest efforts is the evidentiary record, which made clear that Flint Hills's environmental practices at the Refinery terminated Williams's derelict practices and otherwise far exceeded the other practices that Williams implemented throughout its tenure.[115]

CONCLUSION

For these reasons, the trial court's judgment should be affirmed in all respects.

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114 Williams makes cursory reference to the trial court's exclusion of evidence in footnote 32 of its opening brief, claiming error. Because Williams fails to develop its argument, it is forfeited. Moreover, Williams failed to establish any foundation for the exhibit at trial. [Tr. 2374-78] No abuse of discretion occurred by its exclusion.

115 *Compare, e.g.,* Tr. 2331-2335, 2368-2371 (Williams practice of using sumps for contaminated wastewater) and Tr. 1836-37, 1931-32, 2516-17 (Flint Hills's improved practices terminating sumps as repositories).

Dated: June 1, 2021

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