

No. 1-14-3788

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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SCOTT TOTH,	)	Appeal from the
Plaintiff,	)	Circuit Court of
	)	Cook County.
v.	)	
	)	
GIERCZYK, INC., an Illinois corporation, f/k/a	)	
and d/b/a GIERCZYK DEVELOPMENT, INC., an	)	
Illinois corporation, PLAID PAISLEY ENTERPRISES,	)	
INC., a foreign corporation, BRAD PAISLEY,	)	
BRENT LONG, KEVIN FREEMAN and BILL FERRIS,	)	
Defendants	)	No. 11 L 660508
	)	
(Plaid Paisley Enterprises, Inc., Brad Paisley,	)	
Brent Long, Kevin Freeman and Bill Ferris,	)	
Third-Party Plaintiffs-Appellants,	)	
	)	
v.	)	
	)	
Live Nation Worldwide, Inc.,	)	Honorable
Third-Party Defendant-Appellee).	)	Camille E. Willis,
	)	Judge Presiding.

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JUSTICE CUNNINGHAM delivered the judgment of the court.  
Justices Connors and Harris concurred in the judgment.

**ORDER**

¶ 1 *Held:* In a third-party action by a touring production company against a concert promoter arising from a stagehand's underlying personal injury claim, the trial court erred in granting summary judgment dismissing the production company's contribution claim, as there was a factual issue as to whether the promoter breached its duty of care to provide a reasonably safe workplace for the stagehand, its admitted employee, notwithstanding the production company's control over the stagehand's work. Summary judgment also should not have been granted with respect to the production company's breach of contract claim arising from the promoter's failure to defend and indemnify the personal injury lawsuit. An issue of fact was presented by the clear conflict between the parties' 2009 agreement and a 2010 rider to that agreement as to the scope of the promoter's indemnity obligation. Especially as the promoter's answer admitted that the broader 2010 indemnity provision was part of the parties' agreement, an issue of fact existed notwithstanding a clause in the 2009 agreement that its terms would govern in the event of any inconsistency with the subsequent rider.

¶ 2 Third-party plaintiffs-appellants Plaid Paisley Enterprises, Inc., Brad Paisley, Brent Long, Kevin Freeman, and Bill Ferris (collectively, Plaid Paisley) appeal from the trial court's order granting summary judgment in favor of third-party defendant-appellee Live Nation Worldwide, Inc. (Live Nation), which dismissed Plaid Paisley's contribution and breach of contract claims against Live Nation. For the reasons set forth below, we reverse the entry of summary judgment with respect to both Plaid Paisley's contribution claim and the breach of contract claim.

¶ 3 **BACKGROUND**

¶ 4 A stagehand's personal injury lawsuit arising from a July 2010 concert by country music artist Brad Paisley at the First Midwest Bank Amphitheatre (the venue) lead to this dispute, between the concert's promoter and the venue's owner, Live Nation, and the Plaid Paisley parties, which include Brad Paisley's touring production company, Plaid Paisley Enterprises, and certain of its employees.

¶ 5 In May 2009, Live Nation and Plaid Paisley Enterprises entered into a "Live Nation Tour Agreement" (the tour agreement) in which Plaid Paisley granted to Live Nation exclusive rights to promote and sell tickets for concert performances by Brad Paisley during tours to be

completed between 2010 and 2013. Under that agreement, Plaid Paisley agreed to "provide all of the production elements of the Tour (including staging, sound, lighting, special effects, video screens (if any) and band equipment" and "all other customary production expenses of a first class touring production."

¶ 6 The agreement also specified that "Promoter [Live Nation] will be responsible for overseeing, directing and implementing in a first class professional manner all venue based logistics for each Tour Event, such as load-in and load-out arrangements, local staffing for installation and set up of the production \*\*\* and other necessary venue operations." The same clause specified that Live Nation would be "responsible for providing \*\*\* all necessary personnel, services and operations which are customarily furnished by promoters of first class live events."

¶ 7 Under the heading "Indemnities and Insurance," Live Nation agreed to indemnify Plaid Paisley Enterprises, referred to as the "Company," for claims arising from Live Nation's negligence, willful acts, or breach of the tour agreement:

"Promoter hereby indemnifies and holds harmless Company and Artist (and their respective directors, officers, shareholders, employees and representatives) (collectively, the 'Company Indemnified Parties') from and against any and all third party claims, liabilities, suits, damages and expenses \*\*\* suffered or incurred by the Company Indemnified Parties as a result of the negligence, willful actions or omissions of the 'Promoter Indemnified Parties' (as defined herein); Promoter's breach of this Agreement or of Promoter's representations and warranties made

herein (except to the extent same result from the negligence or willful actions or omissions of the Company Indemnified Parties or breach by Company of this Agreement.)"

¶ 8 A separate provision of the tour agreement contemplates the subsequent execution of a "Tour Rider" to contain additional terms:

"Promoter acknowledges that Company/Artist has a tour rider specifying the technical production and hospitality requirements for each Tour Event (the 'Tour Rider'). It is understood that the economic model for this Agreement and the Guarantee is based on Promoter's reasonable projections regarding Show Expenses which have been or will be approved by Promoter and Company. Accordingly, the Tour Rider to be proposed by the Company must be consistent with such projections and estimates and based upon the customary requirements for Artist's performances. If upon completion of the production, there are material changes in the production that were not previously approved by Company and Promoter, resulting in increases to Show Expenses, Promoter shall be entitled to an appropriate reduction to the Guarantee. *To the extent there is any inconsistency between the terms of this Agreement and the Tour Rider, the terms of this Agreement shall govern.*" (Emphasis added.)

¶ 9 Subsequently, the parties entered into a "2010 Tour Contract Rider" (the rider) setting forth additional terms of Plaid Paisley and Live Nation's agreement. The rider specifies that it is "attached to and made part of the contract ('Contract') between Plaid Paisley Enterprises, Inc. ('Producer') furnishing the services of Brad Paisley ('Artist') and the purchaser of said services ('Purchaser') as defined on the face of the Contract in connection with Artist's Performance(s) at the venue(s) described therein (the 'Venue' or 'Engagement')." The rider recites that "Producer and Purchaser hereby agree to the following additional terms and conditions, which are necessary in order to provide the best possible show for the Purchaser." Notably, the rider does not explicitly identify Live Nation as the "Purchaser," and does not include any signature. However, as discussed below, Live Nation's pleading subsequently admitted that the rider was part of the parties' agreement, indicating that Live Nation was the "Purchaser."

¶ 10 The rider set forth additional terms and conditions for the performance with respect to topics such as advertising and promotions, staging, and Plaid Paisley's "exclusive control over all creative elements of the Engagement." The rider also set forth terms that were later relied on in Plaid Paisley's breach of contract claim. Among these, section VIII of the rider, entitled "Liability," states that "Except as otherwise specifically provided herein, Purchaser assumes full responsibility and liability for the payment of any and all costs, expenses, charges, claims, losses, liabilities and/or damages related to or based upon the presentation or production of the Engagement." Section XIV of the rider contained an "Insurance" provision requiring the "Purchaser" to provide "Commercial General Liability insurance covering all claims, liabilities or losses directly or indirectly resulting from injuries to any person \*\*\* in connection with the Engagement" and to list Plaid Paisley and its employees as additional insureds.

¶ 11 Significant for this appeal, Section XV of the rider, entitled "Indemnification," included language regarding Live Nation's indemnity obligation that differed from that of the initial tour agreement. The rider states:

"Purchaser agrees to indemnify and hold harmless Producer, Artist, each of their respective employees, contractors and agents from and against any claims, costs (including, without limitation, reasonable attorneys' fees and court costs), expenses, damages, liabilities, losses and/or judgments arising out of, or in connection with, any claim, demand or action made by any party if such are (or are alleged to be) a direct or indirect consequence of (i) the Engagement; or (ii) any breach or alleged breach of any warranty, representation, agreement or covenant made by Purchaser herein."

Thus, unlike the tour agreement, the rider indicated an indemnification obligation for any claims that were "a direct or indirect consequence" of the performance, rather than only claims arising from Live Nation's conduct.

¶ 12 The immediate controversy arose from a personal injury action initiated by an employee of Live Nation, Scott Toth, who is not a party to this appeal, against Plaid Paisley Enterprises, Brad Paisley, and three other employees of Plaid Paisley Enterprises. On the morning of July 16, 2010, Toth was working as a stagehand in preparation for a concert performance by Brad Paisley at the venue. It is undisputed that, in the course of moving a large "set cart" carrying equipment to set up the stage for the concert, Toth stepped into an uncovered "wire trench" or "trough" used to run cables within the venue, causing him to fall backwards and suffer a leg injury.

¶ 13 In August 2011, Toth filed a complaint against several defendants, including Plaid Paisley Enterprises and Brad Paisley. Also named as individual defendants were Brent Long, Kevin Freeman and Bill Ferris, who were employed by Plaid Paisley as "road manager," "production manager," and "stage manager," respectively. Toth's complaint alleged that he was "employed as a stagehand by Live Nation" but that his work was "under the direct supervision, direction and control of Plaid Paisley, Long, Freeman and Ferris."

¶ 14 Toth alleged that Plaid Paisley owed him a duty to provide a safe work environment and to use reasonable care in supervising his work, and that Plaid Paisley breached their duties by *inter alia*, negligently supervising Toth, failing to inspect for dangerous conditions at the worksite, and failing to warn him of a dangerous condition. Toth alleged that as a result of Plaid Paisley's negligence "he was caused to violently fall into an open, unprotected and unidentified hole/trench, that was left open on the worksite/project in the area where [Toth] and other workers were directed to perform their work related activities, and was subsequently struck by a large heavy crate that he was hauling at the time of the fall."

¶ 15 In a separate count, Toth also alleged negligence on the part of Gierczyk, Inc., the builder and designer of the venue; however, those claims are not at issue in this appeal. Toth's complaint did not make any allegations of negligence by Live Nation, his employer.

¶ 16 On April 18, 2012, Plaid Paisley filed a "Counterclaim for Contribution and Breach of Contract" (the third-party complaint) against Live Nation as a third-party defendant. The third-party complaint first pleaded a claim for contribution against Live Nation, premised upon alleged breaches of duty owed by Live Nation to Toth in its capacity as Toth's employer. Plaid Paisley alleged that Live Nation breached "a duty to exercise due care and caution for the safety of its workers, including [Toth]" by *inter alia*, failing to properly instruct and supervise him; failing to

ensure a safe place to work; failing to properly inspect the "hole/trench" identified in Toth's complaint; and failing to warn him of dangerous conditions at the worksite.

¶ 17 In addition to the negligence-based contribution claim, Plaid Paisley's third-party complaint also pleaded a breach of contract count against Live Nation. Plaid Paisley's breach of contract claim first recited the tour agreement provision that Live Nation would be responsible for "all venue based logistics" including "load-in and load-out arrangements" and "local staffing for installation and set up." The third-party complaint also recited provisions from the rider including section VIII regarding liability and the insurance provision of section XIV. Significantly, Plaid Paisley's third-party complaint also recited the rider's indemnification provision referring to any claim that was a "direct or indirect consequence of" "the Engagement" or breach of the agreement. Plaid Paisley alleged that Live Nation had breached the parties' contract by refusing to defend and indemnify Plaid Paisley for Toth's lawsuit.

¶ 18 Live Nation filed its answer to the third-party complaint on May 16, 2012. With respect to the contribution claim, Live Nation admitted that Toth "was employed by" Live Nation, but denied that it had breached any duty to Toth.

¶ 19 Answering the claim for breach of contract, Live Nation specifically admitted the existence of each of the contractual terms recited in the third-party complaint, including the provision of the 2010 rider regarding indemnification. With respect to each pleaded provision, Live Nation answered: "This Third Party Defendant admits the existence of said Agreement, which speaks for itself." However, Live Nation's answer denied that it had refused an indemnification demand for Toth's lawsuit, or that such action breached the parties' agreement.

¶ 20 With its answer, Live Nation asserted affirmative defenses stating that Toth was Live Nation's employee at the time of the alleged injury; that Live Nation had already paid a workers'



compensation claim to Toth arising from the July 16, 2010 incident; and that Live Nation's liability was limited to its workers' compensation liability to Toth. Plaid Paisley filed a reply in which they admitted that Toth was Live Nation's employer but indicated they lacked knowledge as to whether Live Nation had paid a workers' compensation claim.

¶ 21 The parties engaged in discovery, including numerous depositions. In his deposition, Toth testified that for many years he had been a member of Local Union 125, a stagehands' union that provided laborers to set up staging for concert performances at the First Midwest Bank Amphitheater and other venues.

¶ 22 Although he had been contacted by the union to work at the venue in connection with the July 2010 Brad Paisley concert, he testified that at the venue he took direction from Plaid Paisley's "production crew," including Ferris. Toth acknowledged that he had been paid by Live Nation, but he answered negatively when asked if he had taken direction from anyone other than "the tour," *i.e.*, Plaid Paisley.

¶ 23 Toth testified that on the day of the incident he arrived at the venue shortly before 8:00 a.m., and that he was injured a short time later. He recalled that after he arrived on site, the union "steward," Joe Mancini, introduced the stagehands to Plaid Paisley's stage manager and told the stagehands to take direction from Plaid Paisley. Toth testified that he was told by Mancini: "If you have any issues, see the stage manager. If you still have issues, then you come and see me. But we do what the tour says. We answer to them."

¶ 24 Toth testified that after members of a separate union (the Teamsters) unloaded staging equipment from Plaid Paisley's trucks, Plaid Paisley personnel directed the stagehands where to take the equipment. Toth recalled seeing Ferris and agreed that Ferris was "in charge" of the set-up process.

¶ 25 Toth testified that he was injured as he and three other stagehands were in the process of moving a very heavy wheeled metal "set cart." Toth agreed that Plaid Paisley personnel instructed the stagehands as to the route by which they were to transport the cart; he testified that someone from "the tour" directed them to take the set cart "down the ramp, stage left into the pit" near the stage. After the cart was down the ramp, he was "walking backwards" with the other stagehands attempting to move the cart to "the pit in front of the stage." Toth stepped into a "trough," causing him to fall backwards while "the set cart just continued moving and just went right up my shin, my leg."

¶ 26 Toth described the wire trench as "a trough in concrete that cable is run from the stage to front of house." Toth testified that, in his experience, typically such troughs are covered during the unloading of equipment, and that they are only uncovered to run wiring. Toth testified that in his past experience as a stagehand, the touring company (in this case Plaid Paisley) would make the decision as to when to remove the trough covers. Toth did not know why this particular trough was uncovered, or who uncovered it.

¶ 27 Toth acknowledged that Live Nation paid him but testified that the union and the tour directed his work. Asked who his employer was, Toth answered (over objection): "I was working for the local [union]. But I guess technically, it would have been Live Nation since they signed the check, but, you know, that's all they do until we're told what to do when the show arrives and do what the tour tells us."

¶ 28 The parties also deposed the three stagehands (Lora Ross, Anthony Bradshaw, and Monique Hunt) who were attempting to move the set cart with Toth when he was injured. Like Toth, they similarly testified that they were contacted through the union and were paid by Live Nation but that they received specific work instructions from the stage manager or other Plaid

Paisley personnel. The stagehands testified that Plaid Paisley personnel (and not Live Nation) had instructed them to move the set cart to the "pit" area of the stage.

¶ 29 Joe Mancini, steward of the stagehand's union, was deposed. Mancini testified that Chris Weathers, an employee of Live Nation, had told him the number of stagehands needed to set up the show, and that Mancini was responsible for ensuring that the stagehands arrived. Mancini acknowledged that he typically makes a safety announcement to the stagehands before they begin the unloading work: "I tell them about watch where they walk, be aware of their surroundings, be careful where you're walking, make sure you got enough help on all your boxes or carts so you don't get injured, watch the edge of the stage. That's our safety meeting." Mancini testified that on the morning of July 16, 2010, he introduced the stagehands to Ferris, and that Plaid Paisley directed the stagehands regarding the unloading of equipment. With respect to wire troughs, Mancini testified that union workers will uncover the troughs "[w]hen the road crew tells them they have to run the cable," and that union workers will cover the troughs after the show "[w]henever the road crew tells them to move the cable."

¶ 30 Chris Weathers, a production manager for Live Nation, testified that he contacted the Teamsters and stagehands unions to obtain labor to set up the venue, based on instructions from Plaid Paisley as to the number of laborers needed. Weathers testified that his usual practice on the morning of a show was to arrive at the venue before the touring company's trucks arrived to conduct "a general observation first thing in the morning that the venue is prepared and ready" for the tour's arrival. However, he denied that it was his practice to inspect the work areas of the venue, and did not recall doing so on July 16, 2010.<sup>1</sup>

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<sup>1</sup>Perhaps it should have been his practice, and we cannot say, as a matter of law, that he had no duty to do so.

¶ 31 Weathers stated that he had introduced the union stagehands to Plaid Paisley's production manager and stage manager, but otherwise had no involvement in directing the unloading or set-up of the tour's equipment. Instead, he testified that the union stagehands were expected to follow the directions of Plaid Paisley, and agreed that the work areas were under Plaid Paisley's control. However, Weathers also agreed that any safety hazards noticed by tour personnel could be brought to Live Nation's attention, and that he would expect Mancini to notify him of any reported issues. Weathers did not recall any safety issues raised on the date of Toth's injury.

¶ 32 Weathers agreed that wire trenches are normally covered when the venue is turned over to the tour and that, to his knowledge, the trenches were covered prior to the incident. However, he admitted that Live Nation had "no specific guideline" to check whether trenches were covered. Weathers agreed that Toth had stepped into a partially uncovered trench, but he did not know who had removed the cover of the trench, or when it was removed.

¶ 33 Courtney Rourke, operations manager for the First Midwest Bank Amphitheater, also testified on behalf of Live Nation pursuant to Supreme Court Rule 206(a)(1).<sup>2</sup> She acknowledged that Live Nation owns the venue, and admitted that Toth was "an employee of Live Nation." However, she testified that Live Nation gave no direction with respect to unloading or moving the tour's equipment at the venue.

¶ 34 Rourke explained that Live Nation will contact unions, but that union workers take instructions from the touring company for the unloading and set-up of equipment. She

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<sup>2</sup> Rule 206 (a)(1) allows for litigants to examine a corporation's "representative deponent," and allows a corporation to designate an individual to testify on its behalf "as to matters known or reasonably available to the organization." Ill. S. Ct. R. 206(a)(1) (eff. Feb. 16, 2011).

acknowledged that the union steward, Mancini, has an office at the venue, and she also agreed that Mancini "would see that the union employees were working safely."

¶ 35 Rourke testified that Plaid Paisley had "control" of the staging area "[b]ecause it's their equipment that's being set up and it's their – the production of their show. \*\*\* so we basically hand them the stage and the area and let them set it up how they need to set it up." However, Rourke agreed that Live Nation should be notified if any safety issues were discovered at the venue. Rourke testified that it is Live Nation's practice to make sure that there are covers for the wire trenches in place before the tour begins to set up and that, to Live Nation's knowledge, they were covered before Plaid Paisley took control of the staging area on the morning of July 16, 2010. Rourke testified that once control of the area was turned over to the tour, only individuals associated with or directed by Plaid Paisley could have removed the trench covers.

¶ 36 The parties also deposed Ferris, Freeman, and Long, Plaid Paisley's stage manager, production manager, and tour manager. Of these three individuals, only Ferris testified on behalf of Plaid Paisley pursuant to Supreme Court Rule 206(a).

¶ 37 Ferris testified that his role as stage manager was "To coordinate the load-in and out of the show day and be the \*\*\* intermediary between the venue and the labor that has been hired." Ferris agreed that Plaid Paisley personnel would direct the union stagehands where equipment should be moved, and that he would be present during the unloading period. Ferris testified that, prior to the unloading he would usually meet with a representative of the venue or the promoter (in this case Live Nation) to make sure there was sufficient labor present. He recalled that on the morning of July 16, 2010, he did a "walk-around" at the venue to make sure the stage was set up correctly prior to the unloading of equipment. He initially testified that Weathers from Live

Nation may have been with him at that time, but later admitted that he did not have a specific recollection that Weathers was present.

¶ 38 Ferris agreed that it is common at amphitheatres to have wire trenches in the "pit" areas of the stage, and that the venue had two wire trenches for audio wiring and lighting. He testified that Plaid Paisley usually checked to see whether such wire trenches were uncovered: "we do note if the covers are off in the morning, we show up sometimes from the night before, there might have been a show and they were left uncovered. And before we begin work or our guys are working, we have to cover them back up to roll the items into the pit." Ferris agreed he would have specifically checked to ensure whether the wire trenches were covered before equipment was moved down into the pit area.

¶ 39 Ferris agreed that it would be uncommon for the wire trenches to be uncovered prior to unloading the tour's equipment and that it would be unsafe for workers to move equipment into the pit area with an uncovered trench. Ferris agreed that if he had seen cable trenches left uncovered, he would not allow workers to move equipment into the area.

¶ 40 Ferris specifically recalled that the trenches were covered on the morning of July 10, 2016 when he did a "walk-through." He estimated about 30 minutes passed after the time he noticed that the trenches were covered before the unloading of the tour's equipment began. Ferris had observed Toth lying on his back after the incident; he saw that Toth's leg was in the wire trench and agreed that "the cover was off." However, Ferris did not see anyone remove any wire trench covers.

¶ 41 Ferris did not recall seeing anyone from Live Nation other than Weathers the morning of Toth's injury. Ferris agreed that Toth's work was directed by Plaid Paisley employees and the

union, and not by Live Nation. Ferris agreed that instructions to move the cart into the pit area would have come from someone associated with Plaid Paisley.

¶ 42 In his deposition, Kevin Freeman, Plaid Paisley's production manager, testified that he helped determine how many union laborers were needed for each show, and that he passed that information to Live Nation. Freeman explained that in addition to himself and Ferris, the tour had a number of department heads that supervised the stagehands' work. He explained that a "department representative" would direct the stagehands where equipment should be moved. Freeman was not personally involved in directing the stagehands on the morning of Toth's injury but agreed that someone from Plaid Paisley, and not Live Nation, would have directed his work.

¶ 43 Freeman indicated that he and Ferris "did a walk-through" of the venue before any of the work started, but could not recall if the wire trenches were covered at that time. Freeman testified that the purpose of the "walk-through" is not solely for safety, but agreed that he would "be keeping an eye out" for any hazardous condition. He also agreed when asked if he would expect Plaid Paisley employees to attempt to "ensure that the areas they are sending people were safe." Freeman also agreed that generally, stagehands are not allowed to touch or remove wire trough covers unless they are directed by Plaid Paisley.

¶ 44 Brent Long, Plaid Paisley's tour manager, testified that he was not involved with the production or set-up of the stage, was not present in the stage area at the time of Toth's injury, and did not recall an inspection of the venue. However, he testified that Ferris would be responsible to do a visual inspection of the work areas at the venue. Long agreed that generally wire trenches should be covered when workers are in the area, but he did not know whether the wire trench was covered or uncovered at the time of Toth's incident.

¶ 45 The parties also deposed Toth's safety expert witness, Frank Burg. Burg opined that Plaid Paisley was responsible for Toth's injury because Plaid Paisley "controlled the stagehands" and the worksite. He opined that the cause of Toth's injury was Plaid Paisley's lack of safety programs and procedures, that it was a "bad practice" to move heavy carts down ramps using manual labor, and that the wire trench should have been covered or barricaded. He opined that this was Plaid Paisley's responsibility and denied that Live Nation controlled Toth's work.

¶ 46 On August 20, 2014, Live Nation moved for summary judgment. With respect to Plaid Paisley's contribution claim, Live Nation argued that it did not have control over or owe a duty of care to Toth. Live Nation argued that the deposition testimony established that Toth "received all of his instructions and supervision from the tour" and that the stagehands' work was under the sole control of Plaid Paisley. Live Nation argued that "the tour was responsible for the stagehands' safety," that the wire trench "could only be opened at the direction of [Plaid Paisley]" and that Plaid Paisley had a duty to warn stagehands about the uncovered trench. Live Nation contended that it was "only [Toth]'s employer in the sense that it issued his paycheck" but did not control Toth's work. Thus, Live Nation argued that Plaid Paisley, not Live Nation, had a duty to provide Toth with a safe workplace.

¶ 47 With respect to Plaid Paisley's breach of contract claim, Live Nation's summary judgment motion relied only on the indemnification provision of the original 2009 tour agreement to argue that it had no duty to defend or indemnify Toth's lawsuit. Live Nation argued that "The Tour Agreement states Live Nation indemnifies and holds harmless [Plaid Paisley] from and against any suits resulting from the negligence, willful actions, or omissions" of Live Nation. Live Nation urged that since Toth's complaint did not include any allegations against Live Nation, "Live Nation has no duty to defend the Paisley Defendant in the underlying lawsuit because the



suit did not result from any alleged action or omission by Live Nation." Notably, Live Nation's motion for summary judgment made no mention of the indemnity provision in the rider.

¶ 48 Plaid Paisley responded to the motion for summary judgment on September 24, 2014. With respect to the contribution claim, Plaid Paisley argued that Live Nation, as the landowner of the venue and as Toth's "employer," owed duties to Toth to provide a safe worksite. Plaid Paisley contended that Live Nation had control over the venue and that "it can be inferred that the trough was not covered or that the cover was missing when the Tour arrived to the venue." Plaid Paisley argued that Live Nation breached its duty to provide a safe workplace because it "knew that the trough should be covered," that an injury from stepping into the trench was reasonably foreseeable, and that Live Nation could have prevented Toth's injury by inspecting, covering or barricading the trench.

¶ 49 With respect to the breach of contract claim, Plaid Paisley's response to Live Nation's motion for summary judgment did not discuss any relationship between the indemnification provisions of the original 2009 tour agreement and the 2010 rider. Rather, Plaid Paisley stated that "The crux of [Plaid Paisley's] claim is that Live Nation breached the Tour Agreement because its insurer refused to defend them under Live Nation's policy because Live Nation had not reached its deductible." Plaid Paisley's response suggested that "Live Nation may have misconstrued" the breach of contract claim and noted that Plaid Paisley sought leave to amend the claim "to include allegations that Live Nation breached the Tour Agreement by failing to provide the insurance required by the policy."

¶ 50 Live Nation's reply, filed October 6, 2014, argued that summary judgment could not be denied on the basis of any alleged duties that Live Nation owed to Toth as the owner of the venue, since the third-party complaint had not pleaded any premises liability claim. Live Nation

argued that Plaid Paisley "cannot raise a theory of liability for the first time in a response brief to a motion for summary judgment."

¶ 51 Live Nation argued that only Plaid Paisley had a duty to ensure the safety of the worksite, since Plaid Paisley controlled the work and "everyone at the venue expected the Tour to ensure the safety of the stagehands." Live Nation urged that this duty should fall on Plaid Paisley because they "were in a superior position to inspect the venue because they were the only ones who knew their concert set-up process and its potential hazards."

¶ 52 With respect to the breach of contract count, Live Nation's reply maintained that the tour agreement only required Live Nation to defend any claims resulting from Live Nation's negligence. Live Nation maintained it had no duty to indemnify because Toth had only alleged negligence by Plaid Paisley.

¶ 53 On October 14, 2014, Plaid Paisley moved for leave to file an amended third-party complaint containing: (1) premises liability allegations that Live Nation owned the venue and had breached its duty to maintain the venue in a safe condition; (2) a count that Live Nation breached the tour agreement "by failing to oversee, direct and implement the venue based logistics relating to the set-up of the Tour's production" by, *inter alia*, failing to provide a safe workplace; (3) an independent count of "contractual indemnification" alleging that Live Nation's negligence with respect to Toth triggered its obligation to indemnify under the tour agreement,<sup>3</sup> and (4) a separate count for breach of contract alleging Live Nation's failure to procure insurance coverage for Plaid Paisley.

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<sup>3</sup> Notably, the proposed amended complaint's count for indemnification did *not* reference the indemnification provision of the 2010 rider.

¶ 54 On October 14, 2014, the trial court entered an order granting Live Nation's motion for summary judgment. Notably, the record on appeal contains no hearing transcript, record of proceedings, bystander's report, or agreed statement of facts from the proceedings on that date. The October 14 order did not specify the court's grounds for granting summary judgment.

¶ 55 On October 20, the trial court entered an order denying Plaid Paisley's motion for leave to file an amended third-party complaint. Significantly, the October 20, 2014 order also set forth findings regarding Live Nation's motion for summary judgment, which it had technically granted six days earlier. With respect to Plaid Paisley's contribution count against Live Nation, the court found that "there is no question of material facts as to the following: 1) Live Nation did not owe a duty nor undertake a duty to [Toth] with regard to [Toth's] work and that Live Nation did not control or direct [Toth's] work at the time of the alleged incident and that Live Nation did not owe [Toth] a duty as the owner of the premise[s]." With respect to Plaid Paisley's breach of contract count, the court's order stated "there is no question of material fact, finding that Live Nation did not have a duty to defend and that Live Nation did not have a duty to indemnify the Paisley Defendants." The October 20, 2014 order concluded: "With Live Nation's Motion for Summary Judgment having been granted \*\*\*, there is no just reason for delaying either enforcement or appeal pursuant to Illinois Supreme Court Rule 304(a)."

¶ 56 Plaid Paisley moved for an extension of time to file a notice of appeal pursuant to Supreme Court Rule 303(d). This court granted the motion, allowing leave to file the notice of appeal on or before December 29, 2014. On December 23, 2014, Plaid Paisley filed a notice of appeal from the October 14 and October 20 orders granting summary judgment in favor of Live Nation. Plaid Paisley did not appeal from the denial of its motion to amend its third-party complaint.

¶ 57

ANALYSIS

¶ 58 We have jurisdiction to review the entry of summary judgment, notwithstanding that this did not resolve the claims of all parties to this litigation, as the trial court made a specific and appropriate finding that there was no just reason to delay appeal pursuant to Supreme Court Rule 304(a) (eff. Feb. 26, 2010).

¶ 59 On appeal, Plaid Paisley asserts that the trial court erred by granting summary judgment to Live Nation with respect to (1) Plaid Paisley's negligence-based contribution claim and (2) the breach of contract claim.

¶ 60 Before addressing the merits, we first acknowledge that the record on appeal does not include a transcript or record of proceedings from the hearings corresponding to the court's entry of summary judgment. We recognize that "an appellant has the burden to present a sufficiently complete record of the proceedings at trial to support a claim of error, and in the absence of such a record on appeal it will be presumed that the order entered by the trial court was in conformity with law and had a sufficient factual basis." *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391 (1984). "Any doubts which may arise from the incompleteness of the record will be resolved against the appellant." *Id.* at 392. Thus, gaps in the record are construed against Plaid Paisley and in favor of affirming the trial court.

¶ 61 Summary judgment is proper where "the pleadings, depositions, admissions and affidavits on file, viewed in the light most favorable to the nonmovant, show that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law." *Joyce v. Mastri*, 371 Ill. App. 3d 64, 73 (2007). If the undisputed facts fail to establish a necessary element of a plaintiff's cause of action, summary judgment is appropriate. *Williams v.*

*Manchester*, 228 Ill. 2d 404, 417 (2008). We review a circuit court's grant of summary judgment *de novo*. *Joyce*, 371 Ill. App. 3d at 73.

¶ 62 We first address the grant of summary judgment with respect to Plaid Paisley's contribution claim against Live Nation, which was premised on alleged negligence with respect to Toth. Negligence "requires [the] plaintiff to prove the existence of a duty owed by the defendant to the plaintiff, the breach of that duty, and the injury proximately caused by that breach. [Citation.] Whether a duty exists is a question of law to be determined by the court." (Internal quotation marks omitted). *Lederer v. Executive Construction, Inc.*, 2014 IL App (1st) 123170, ¶ 48.

¶ 63 "The question of whether a duty exists in a particular case and the scope or range of protection of such duty [is a] question[] of law. [Citation.] The determination of whether a duty exists, and the scope of that duty, depends not only on the foreseeability of harm, but also on such policy considerations as the magnitude of the risk involved, the burden of requiring the employer to guard against that risk, and the consequences of placing that burden on the employer." *Taake v. WHGK, Inc.*, 228 Ill. App. 3d 692, 712 (1992).

¶ 64 The trial court found that Live Nation owed no duty with respect to Toth's workplace, as "Live Nation did not control or direct [Toth's] work at the time of the alleged incident" and also specifically found that Live Nation owed no duty to Toth in its capacity as the owner of the premises, implicitly including no duty to provide a safe workplace. Plaid Paisley argues that the court erred, urging that Live Nation "owed a multi-faceted duty of reasonable care to Toth" as the owner of the venue, the promoter of the tour, and as Toth's employer.

¶ 65 We first find that, to the extent Plaid Paisley alleges duties owed by Live Nation due to its role *as owner* of the venue, those arguments were not properly before the court. Plaid

Paisley's third-party complaint simply did not plead any duties owed by Live Nation as landowner. Indeed, Plaid Paisley's complaint did not even allege that Live Nation owned the venue.<sup>4</sup>

¶ 66 Plaid Paisley chose to oppose Live Nation's motion for summary judgment by asserting a negligence theory that it had not expressly pleaded. "When ruling on a motion for summary judgment, the trial court looks to the pleadings to determine the issues in controversy." *Filliung v. Adams*, 387 Ill. App. 3d 40, 51 (2008). Our court has held that a plaintiff may not seek summary judgment on facts that it failed to plead. *See id.* ("If a plaintiff desires to place issues in controversy that were not named in the complaint, the proper course of action is to move to amend the complaint. [Citations.] If the plaintiff does not seek to amend, then it cannot move for summary judgment on those issues."). By the same token, it is inappropriate to attempt to oppose summary judgment through an unpleaded theory.

¶ 67 Although Live Nation has acknowledged its ownership of the venue, Plaid Paisley's third-party complaint failed to allege that fact or any corresponding duties owed to Toth by Live Nation. Plaid Paisley belatedly sought to amend its contribution claim to plead such duties only *after* Live Nation moved for summary judgment. The trial court exercised its discretion to deny the motion to amend, and we have not been asked to review the court's action on that point. As the premises liability theory was not properly before the trial court, we will not review the entry of summary judgment on the contribution claim under that theory of liability.

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<sup>4</sup>As we have noted, the trial court denied Plaid Paisley's motion to amend its original third-party complaint, which sought to include premises liability allegations against Live Nation in its capacity as the venue's owner. However, Plaid Paisley did not appeal that ruling, so that question is not before us now.

¶ 68 However, we will review the summary judgment order on Plaid Paisley's contribution claim with respect to the duties actually pleaded in Plaid Paisley's complaint. Specifically, Plaid Paisley pleaded that Live Nation had breached duties to Toth in its capacity as his employer.

¶ 69 "While an employer is not a guarantor of the safety of its employees, an employer does have a duty to provide its employees with a reasonably safe place in which to work. [Citation.] The employer must use reasonable care to provide for the safety of its employees. [Citations.] Put another way, an employer has a duty to use ordinary care to provide its employees with a reasonably safe workplace." *Taake*, 228 Ill. App. 3d at 712. Indeed, our court has described as "nondelegable" an employer's "duty of care \*\*\* to provide [an employee] with a reasonably safe place to work." *Pempek v. Silliker Laboratories, Inc.*, 309 Ill. App. 3d 972, 982 (1999); see also *Dickey v. Commonwealth Edison Co.*, 149 Ill. App. 3d 242, 244 (1986) (employer's "non-delegable duty to use ordinary care to provide [employee] with a reasonably safe workplace" included "the duty to exercise ordinary care to ascertain that customary passageways used by employees \*\*\* in the course of employment are reasonably safe.") However, we are mindful that the scope of an employer's duty depends on the particular facts of the case and policy considerations, including "the burden of requiring the employer to guard against th[e] risk, and the consequences of placing that burden on the employer." *Taake*, 228 Ill. App. 3d at 712.

¶ 70 Live Nation's answer to the third-party complaint admitted that it "employed" Toth. However, Live Nation argued that it owed no duty because it had not controlled Toth's work at the time of his injury. In granting summary judgment, the trial court found that "Live Nation did not owe a duty \*\*\* with regard to the Plaintiff's work and that Live Nation did not control or direct the Plaintiff's work at the time of the alleged incident."

¶ 71 Based on our *de novo* review of the record, we disagree with the trial court's conclusion. Notwithstanding the testimony describing Plaid Paisley's involvement in directing the stagehands' work, we cannot say that, as a matter of law, Live Nation lacked control of the venue (which it owned) to such an extent that it was relieved of *any* duty with respect to the safety of the workplace for its employees, including Toth. Despite the evidence of Plaid Paisley's significant role in directing the stagehands, we find sufficient evidence of Live Nation's duty such that a material issue of fact remained as to whether Live Nation breached its continuing duty to ensure the safety of the workplace in which Toth, its employee, performed his work.

¶ 72 In deciding Live Nation's duty with respect to Toth, we believe the relevant inquiry is the extent to which Live Nation had a responsibility to provide a safe work environment for its employee, Toth, at the time of his injury. Although Plaid Paisley undoubtedly exercised duty over the details of the stagehands' work, the evidence described below, as well as established principles of law, indicate that Live Nation also maintained a responsibility over the physical worksite such that it was required to ensure that the worksite was safe. Accordingly, it retained its duty of ordinary care, potentially exposing it to liability. Thus, summary judgment should not have been granted on Plaid Paisley's contribution claim under these facts.

¶ 73 Significantly, there is no dispute regarding the manner of Toth's injury—that he stepped into an uncovered wire trench, while he and other stagehands attempted to transport a set cart at the direction of Plaid Paisley personnel. Thus, Plaid Paisley's negligence claim boils down to whether Live Nation breached a duty to its employee, Toth, by failing to have in place procedures to ensure that the wire trench was covered or barricaded at that time, or otherwise failed to warn Toth that the hazard existed.



¶ 74 We acknowledge the ample testimony (including that of Plaid Paisley's witnesses) indicating that Plaid Paisley exercised immediate control in "directing" the stagehands' work. Nevertheless, we find that there is no dispute that Live Nation owned the venue and employed Toth, such that it was obligated to provide a safe environment in which the work was performed, including the wire trench area where Toth's injury occurred. We also find ample evidence in the record acknowledging Live Nation's continued responsibility for safety of the worksite—including the wire trench area where Toth was injured—which raises a genuine issue of fact as to whether Live Nation took sufficient steps to satisfy its duty to ensure the safety of the worksite. See, e.g., *Jones v. DHR Cambridge Homes, Inc.*, 381 Ill. App. 3d 18, 39 (2008) (where contractor asserted contribution claim against plaintiff's employer arising from employee's injury from "walking on a sill plate without fall protection," employer was not entitled to directed verdict where the "responsibility for providing the fall protection was disputed," and the contractor presented expert opinion that the employer "was responsible for the means and methods of performing the work on the project and for providing a safe work place for the plaintiff"); *Pempek*, 309 Ill. App. 3d at 982 (employer was not entitled to new trial or judgment n.o.v. with respect to contractor's contribution claim for employee's injury where, "[f]rom the facts presented, the jury could have reasonably concluded that the failure of [employer] to train [employee] in evaluating the dangers of using the ladder from which he fell, \*\*\* or failure to require him to use the metal ladder that was provided \*\*\*, was a contributing factor in causing his accident").

¶ 75 The existence of a factual dispute as to Live Nation's potential breach of its duty to provide a safe workplace is especially apparent, given the ample testimony (including from Live Nation's witnesses) acknowledging the danger of an uncovered trench, the very hazard that

caused Toth's injury. The union steward, Mancini,<sup>5</sup> as well as Live Nation's witnesses, Rourke and Weathers, indicated that Live Nation recognized and maintained a duty to ensure the safety of the work conditions at the site, including the wire trenches. All three acknowledged that safety issues would be brought to Live Nation's attention; this testimony obviously tacitly acknowledged some duty on the part of Live Nation for the safety of the work site.

¶ 76 More specifically, Weathers, Live Nation's production manager, acknowledged that safety issues would be brought to Live Nation's attention by tour personnel or Mancini. Weathers also testified that he usually conducts a "general observation" of the venue before the tour's arrival and that the trenches are normally covered; however, Weathers admitted Live Nation had "no specific guideline" to ensure whether they were covered. A fact finder could certainly conclude that the lack of a "specific guideline" or safety procedure with respect to this acknowledged hazard might constitute a breach of duty.

¶ 77 Furthermore, Rourke, testifying as Live Nation's corporate representative, also agreed that Live Nation would be notified of any safety issues and thus acknowledged that Live Nation had at least some responsibility for workplace safety. In addition, Rourke (like Weathers) acknowledged that it was Live Nation's practice to ensure that the wire trenches are covered prior to the tour's unloading work. As it is undisputed that Toth stepped into an uncovered wire trench—and given the lack of any specific evidence as to when this particular cover was

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<sup>5</sup>We note that the extent to which Live Nation controlled Mancini, the union steward, is far from clear in the record. This is particularly important, since Mancini acknowledged that he typically led a brief "safety meeting" with the union stagehands before they began the unloading work. Further, multiple witnesses testified that safety issues at the worksite would be brought to Mancini's attention.

removed, or who removed it—one could reasonably argue that a question of fact remained as to whether Live Nation had indeed ensured that its practice was followed on this occasion.<sup>6</sup>

¶ 78 Although Live Nation's witnesses testified that control of the worksite was "turned over" to Plaid Paisley, we do not find, as a matter of law, that Live Nation's duty to provide a safe work environment for its employees necessarily ceased at that point. We acknowledge that numerous witnesses (including from Plaid Paisley) testified that Plaid Paisley directed the stagehands; such control could certainly give rise to corresponding duties owed to the stagehands by Plaid Paisley. However, Plaid Paisley's role in directing the work does not serve to absolve Live Nation of *any and all duties* of care with respect to ensuring a safe workplace for Toth, its admitted employee. Rather, *both* Live Nation and Plaid Paisley could have retained simultaneous duties with respect to Toth and his fellow stagehands in terms of ensuring the safety of the worksite. It is for a factfinder to determine if such duties were breached, and if so, whether such breach proximately caused Toth's injury.

¶ 79 Thus, we reject Live Nation's argument that, notwithstanding its admitted role as Toth's employer, *only* Plaid Paisley had a duty to ensure the safety of the worksite because Plaid Paisley directed the details of the work. Rather, there is at least a factual issue as to whether Live Nation breached its continuing duty to provide a safe workplace to the extent that it could have prevented Toth's injury.

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<sup>6</sup>We acknowledge that Ferris testified that Plaid Paisley customarily checked to see whether wire trenches were uncovered, and that Ferris claimed he saw that the trenches were covered about 30 minutes before the unloading work began on the morning of Toth's injury. However, we decline to hold that, as a matter of law, Plaid Paisley's efforts with respect to this potential hazard necessarily relieved Live Nation of any duty to protect its employees from the same risk.

¶ 80 In order for summary judgment to be granted to Live Nation, we would be required to find that as a matter of law, Live Nation had no duty to ensure the safety of its worksite because its employees' actual work was being directed by Plaid Paisley. We reject that premise. Unlike the trial court, we do not find the evidence so compelling as to completely eliminate Live Nation's duty; thus, we find a material question of fact remained as to whether Live Nation fulfilled its duty as Toth's employer to provide a reasonably safe workplace.

¶ 81 In sum, we disagree with the trial court's conclusion that Live Nation did not owe *any* duty of care to Toth, and we find that a genuine factual issue remained as to whether Live Nation breached such a duty. Accordingly, summary judgment was improper. Thus, we reverse the trial court's entry of summary judgment with respect to Plaid Paisley's negligence-based contribution claim.

¶ 82 We also reverse the trial court's judgment with respect to Plaid Paisley's breach of contract claim against Live Nation. The trial court determined that there was no material issue of fact that Live Nation did *not* have a duty to defend or indemnify Plaid Paisley for Toth's personal injury lawsuit. We disagree. Reviewing the pleadings and evidence *de novo*, we find a genuine issue of material fact with respect to whether Live Nation was obligated to indemnify Plaid Paisley for the Toth lawsuit, given the apparently conflicting language of the indemnification provisions of the 2009 tour agreement and the 2010 rider. Thus, we reverse the court's entry of summary judgment on Plaid Paisley's breach of contract claim.

¶ 83 "To establish a breach of contract claim, a plaintiff must prove the existence of a valid and enforceable contract, performance by the plaintiff, breach of the contract by the defendant, and damages or injury to the plaintiff resulting from the breach." *Carlson v. Rehabilitation*

*Institute of Chicago*, 2016 IL App (1st) 143853, ¶ 13. The plaintiff must plead "definite and certain terms" of the contract. *DiCosola v. Ryan*, 2015 IL App (1st) 150007, ¶ 11.

¶ 84 Summary judgment is not appropriate on a breach of contract claim if a question remains as to the contract terms intended by the parties. "When a contract is the subject of a summary judgment motion, the appropriateness of summary judgment will turn on the clarity of the contract terms under scrutiny." (Internal quotation marks omitted.) *Zubi v. Acceptance Indemnity Insurance Co.*, 323 Ill. App. 3d 28, 33 (2001). "Summary judgment is a proper procedure where \*\*\* there is no dispute as to the language and formation of the agreement [citation]. However, it is a question of fact whether a breach of contract has occurred [citation] or whether the agreement contains an ambiguity which requires the admission of extrinsic evidence. [Citation]." *Giannetti v. Angiuli*, 263 Ill. App. 3d 305, 312-13 (1994); see also *Dudek, Inc. v. Shred Pax Corp.*, 254 Ill. App. 862, 868-69 (1993) (reversing summary judgment on breach of contract claim where there were "two entirely different sets of payment terms" and "conflicting evidence as to what the parties intended").

¶ 85 In this case, the record contains *two* contractual provisions, each purporting to define the scope of Live Nation's indemnity obligation. Those provisions appear to conflict. This creates an issue of fact as to the scope of indemnification to which the parties intended to agree and, in turn, whether Live Nation's alleged refusal to indemnify Plaid Paisley against Toth's lawsuit breached such agreement.

¶ 86 The indemnity provision set forth in the original 2009 tour agreement indicates Live Nation's obligation to indemnify Plaid Paisley "from and against any and all third party claims \*\*\* suffered or incurred by [Plaid Paisley] as a result of the negligence, willful actions or omissions of" Live Nation, or arising from Live Nation's breach of the agreement. In contrast,

the indemnification clause of the 2010 rider suggests a much larger scope of Live Nation's obligation, arguably extending to *any claims arising from Brad Paisley's performance at the venue* or breach of any agreement:

"Purchaser [Live Nation] agrees to indemnify and hold harmless [Plaid Paisley] from and against any claims, costs \*\*\*, expenses, damages, liabilities, losses and/or judgments arising out of, or in connection with, any claim, demand or action made by any party *if such are (or are alleged to be) a direct or indirect consequence of (i) the Engagement; or (ii) any breach or alleged breach of any warranty, representation, agreement or covenant made by Purchaser herein.*" (Emphasis added.)

¶ 87 Notably, the breach of contract count in Plaid Paisley's third-party complaint *specifically* recited the rider's indemnity clause. Furthermore, Live Nation's answer to the third-party complaint did not deny that this provision of the rider was a part of the parties' contract, but pleaded that Live Nation "admits the existence of said Agreement, which speaks for itself."

¶ 88 Despite having admitted the existence of the indemnity provision in the 2010 rider, it does not appear that Live Nation discussed the provision in its trial court briefing. Live Nation's appellate brief also fails to discuss the relationship between the indemnification provisions of the original tour agreement executed in 2009 and the 2010 rider, which is arguably more expansive. Rather, Live Nation has relied solely on the indemnity language in the original 2009 tour agreement to argue that, since Toth's underlying complaint did not allege negligence by Live Nation, it had no indemnity obligation. Thus, Live Nation's argument has not addressed the

potential application of the rider term calling for indemnity of *any* claim that is "a direct or indirect consequence of" "the Engagement."

¶ 89 For its part, Plaid Paisley—despite pleading the rider's indemnity clause in its third-party complaint—appears not to have raised the issue of the potential difference between the 2009 tour agreement and the 2010 rider and which of the two the parties intended to govern their agreement. Plaid Paisley has not suggested that there is any conflict between the provisions. In fact, Plaid Paisley's appellate brief recites *both* the indemnity language in the 2009 tour agreement as well as the provision in the 2010 rider. Plaid Paisley argues that both indemnity provisions support Live Nation's obligation to indemnify in this case, since both provisions call for Live Nation to indemnify claims arising from Live Nation's breach of the tour agreement. Plaid Paisley argues that Live Nation's alleged failure to ensure a safe work area for Toth breached its obligation under the tour agreement to oversee, direct and implement "venue based logistics" for the July 16, 2010 concert. In turn, Plaid Paisley argues, this breach of the tour agreement triggers Live Nation's indemnity obligation.

¶ 90 It is puzzling that Plaid Paisley did not rely on the broader language of the indemnity provision of the 2010 rider to make a more straightforward argument for Live Nation's obligation to indemnify. That is, Plaid Paisley could simply have argued that Live Nation was obligated to defend and indemnify Toth's lawsuit, because Toth's injury in setting up for the concert was a "direct or indirect consequence" of the "Engagement" under the terms of the rider.

¶ 91 We also note that, in finding a factual issue as to whether the parties intended the narrower indemnity provision of the 2009 tour agreement or the broader provision of the 2010 rider to apply, we have also considered the provision of the tour agreement (not specifically discussed in the parties' appellate briefs) which states that: "To the extent there is any

inconsistency between the terms of this Agreement and the Tour Rider, the terms of this Agreement shall govern." However, to the extent Live Nation could argue that this "inconsistency" provision establishes that the tour agreement's indemnity provision must control, we would still find a genuine issue of fact as to the intended scope of Live Nation's indemnity obligation. In this regard, we find it significant that Live Nation's answer to Plaid Paisley's third-party complaint effectively admitted that the broader indemnification provision of the rider was part of the parties' contract. Given that admission, it would be incongruous for Live Nation to argue that the rider's indemnification term was rendered ineffective by the tour agreement's clause that its terms would govern in case of any "inconsistency."

¶ 92 Apart from that admission, this tour agreement's "inconsistency" clause does not merely state that it supersedes *prior* agreements, as in the case of a merger or integration clause. See *Magnus v. Lutheran General HealthCare System*, 235 Ill. App. 3d 173, 182 (1992). Rather, this provision purports to limit the parties' ability to amend their agreement. However, the rider explicitly purports to amend the contract, as it states that it is "made part of the contract" and includes "additional terms and conditions, which are necessary in order to provide the best possible show." If the "inconsistency" clause of the tour agreement was enforced to render the rider's indemnification provision meaningless, such a result would arguably conflict with the principle that "[o]ur role is to assume that every contract provision was intended to serve a purpose and to apply the parties' agreement as it was written." *MHM Services, Inc. v. Assurance Co. of America*, 2012 IL App (1st) 11217, ¶ 59. In short, we do not find that the "inconsistency" clause of the tour agreement resolves the conflict between the two indemnification provisions.

¶ 93 Notwithstanding the parties' failure to address this obvious issue, we find that the conflicting terms of the indemnity provisions in the original tour agreement and the 2010 rider



present a genuine issue of material fact regarding the scope of Live Nation's indemnity obligation that precludes summary judgment.

¶ 94 A different outcome on Plaid Paisley's claim for indemnification could result, depending on whether the parties intended to limit the scope of Live Nation's indemnity obligation to claims arising from its own conduct (as stated in the original indemnity provision), or if the 2010 rider broadened Live Nation's obligation to claims that were "a direct or indirect consequence of" the July 16, 2010 concert performance. Without clarity as to which terms applied, factual issues exist as to the terms of the parties' contract and, in turn, whether Live Nation's alleged refusal to indemnify Plaid Paisley breached the agreement.

¶ 95 We acknowledge, as emphasized by Live Nation's brief, that the appellate record does not contain a transcript or record of proceedings reflecting the contents of the argument on the summary judgment motion. As a result, we do not know if the court heard any oral argument on the relationship between the indemnity provisions in the 2009 tour agreement and the 2010 rider.

¶ 96 Generally, gaps in the record will be construed against the appellant. See *Midwest Builder Distributing, Inc. v. Lord and Essex, Inc.*, 383 Ill. App. 3d 645, 655 (2007). "However, in instances where the court has all the evidence it needs to make a proper decision on the merits under the appropriate standard of review the court may undertake substantive analysis of the case even if the record is not fully complete." *Id.* In this case, we conclude that the available record—namely, the obviously contradictory indemnity language of the 2009 tour agreement and the 2010 rider, and related pleadings—is sufficient for us to determine that an issue of material fact remained as to which indemnity provision applied, thereby precluding summary judgment.

¶ 97 Having determined that the inconsistent indemnity language presented a genuine issue of material fact which precluded summary judgment, we need not address the other arguments

raised by Plaid Paisley with respect to its breach of contract claim, including its contention that Live Nation breached the tour agreement by "fail[ing] to oversee, direct and implement logistics" at the venue.

¶ 98 In summary, we reverse the trial court's grant of summary judgment in favor of Live Nation, both with respect to the contribution claim and the breach of contract claim pleaded by Plaid Paisley. Thus, we remand for further proceedings with respect to both counts of the third-party complaint.

¶ 99 Reversed and remanded.