SUPREME COURT NO. 91960-7

COURT OF APPEALS NO. 31687-4-III and 32122-3-III

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

DANA WIDRIG,
Plaintiff,

v.

HSC REAL ESTATE, INC., a Washington corporation,
Defendant/Cross-claimant/Respondent,

and

VMSI, LLC, a Washington limited liability company,
Defendant/Cross-Claim Defendant/Petitioner.

VMSI, LLC'S PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

The Petitioner, VMSI, LLC, asks the court to accept review of the decision designated in Part B of this Motion.

B. COURT OF APPEALS' DECISION

The Court of Appeals decided *Widrig v. Village at Meadow Springs*, Nos. 31687-4-III and 32122-3-III on March 26, 2015, and granted HSC its costs of defending against Widrig's claims and reasonable attorneys' fees against VMSI "to the extent of available insurance coverage." The Court awarded attorneys' fees on appeal even though there was no prevailing party.

A copy of the decision is in the Appendix 1-12. A motion for reconsideration was denied on June 16, 2014. App. 13.

C. ISSUE PRESENTED FOR REVIEW

Whether this Court should accept review pursuant to RAP 13.4(b)(4), where:

1. The trial court, following long standing precedence, held that indemnity agreements that include disfavored provisions exculpating an indemnitee from liability for losses flowing from its own wrongful acts or omissions and limited "to the extent of available insurance" must be strictly construed to protect the indemnitor from uninsured exposure. Did the two-judge majority of the Court of Appeals error in reversing the trial court?

2. Even though there has yet to be a prevailing party, the Court of Appeals awarded HSC attorneys' fees on appeal. Did the Court of Appeals error in awarding attorneys' fees to a non-prevailing party?

D. STATEMENT OF THE CASE

VMSI, LLC owned the Villas at Meadow Springs, and HSC managed the apartments under a Management Agreement. App. 14-19. In December 2009, an employee of HSC assaulted Dana Widrig in her apartment at The Villas. Widrig's complaint alleged that VMSI and HSC's negligent hiring, negligent supervision, negligent management, and negligent security were the cause of the assault and her injuries. Both defended separately. Widrig's claims were settled in early 2013. CP 7, 13

HSC continued to pursue a cross claim against VMSI for indemnification under § 11 of the Agreement even though both had been defended by insurance carriers – HSC was defended by Chartis and later Farman's Fund and VMSI by Fireman's. *Widrig*, p. 2, *supra*, App. 3, 17. VMSI contested HSC's motion for summary judgment, requested dismissal of HSC's cross claim and requested attorneys' fees for defending against HSC's cross claim. The trial court granted VMSI summary judgment, determined that VMSI was the prevailing party and awarded VMSI attorney fees under the Agreement. The trial court correctly noted:

> To accept HSC's position would require the court to ignore and give no meaning to the plain language in § 11 of the

> contract that states that "Except in cases of negligence or Agent's intentional misconduct, Owner is required to "release, indemnify, *defend,* and save Agent harmless from all suits, claims, assessments and charges." Since this is clearly a claim of negligence on the part of the Agent, HSC, this court finds that to accept HSC's position would be contrary to the plain language of the contract.

Widrig, p. 4, *supra*, App. 5. The Court of Appeals reversed and remanded to determine if there was available insurance and to award HSC its attorneys' fees on appeal. *Widrig v. Villas at Meadow Springs*, *supra*, App. 1-12.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

This Court should accept review under RAP 13.4(b)(1), (2), and (4). Under RAP 13.4(b)(1) and (2), Division 3's decision conflicts with decisions by the Supreme Court and the Court of Appeals. Under RAP 13.4(b)(4), this case contains issues of substantial public importance that should be considered by the Supreme Court. The imposition of attorneys' fees under the American Rule is a recurring and important matter of concern.

Recently the United States Supreme Court ruled, "'Our basic point of reference when considering the award of attorney's fees is the bedrock principle known as the American Rule: Each litigant pays his own attorney's fees, win or lose, unless a statute or contract provides otherwise.'" *Baker Botts L.L.P. v. ASARCO LLC*, __U.S.__, 135 S. Ct. 2158, __L. Ed. __

(2015) *citing, Hardt v. Reliance Standard Life Ins. Co.,* 560 U.S. 242, 252–253, 130 S. Ct. 2149, 176 L. Ed. 2d 998 (2010). The Court denied a $4,100,000 claim for fees generated defending a successful fee application of $120,000,000. The court concluded its argument by noting:

> As we long ago observed, "The general practice of the United States is in opposition" to forcing one side to pay the other's attorney's fees, and "even if that practice [is] not strictly correct in principle, it is entitled to the respect of the court, till it is changed, or modified, by statute." *Arcambel* [*v. Wiseman,* 3 Dall. 306 (1796)] (emphasis deleted). We follow that approach today. Because [11 USC] § 330(a)(1) does not explicitly override the American Rule with respect to fee-defense litigation, it does not permit bankruptcy courts to award compensation for such litigation. We therefore affirm the judgment of the Court of Appeals.

Baker, supra.

During the last year this court has applied the American Rule in reconciling two Court of Appeals decisions that applied differing and apparently conflicting standards in land use cases, *Durland v. San Juan Cnty.*, 182 Wn.2d 55, 340 P.3d 191 (2014); in a legal malpractice case, *Schmidt v. Coogan*, 181 Wn.2d 661, 335 P.3d 424 (2014); and to deny an exception under the ABC Rule. *LK Operating, LLC v. Collection Grp., LLC*, 181 Wn.2d 117, 330 P.3d 190 (2014).

Division 3's decision, unlike this Court's unbroken line of cases, stretches the contract exception to the American Rule well beyond reasonable limits. Division 3 misconstrues language intended to limit an

indemnity provisions to conform to standards approved by this Court and instead construes that language to create liability where none otherwise exists. Division 3 has imposed fees on appeal even though no party has prevailed contrary to recent precedence of this Court. *See* § E.2. *infra.*

In determining whether a case is of "substantial public interest" this Court has considered several factors in various contexts that apply here. Is the issue of a public as opposed to a private nature? Is the issue likely to recur? Is this case really adversarial? What is the quality of the advocacy of the issues? *Westerman v. Cary*, 125 Wn.2d 277, 286-87, 892 P.2d 1067 (1994); *Satomi Owners Ass'n v. Satomi, LLC*, 167 Wn.2d 781, 225 P.3d 213 (2009). This case includes standard contract provisions, and Division 3's interpretation "invites unnecessary litigation on that point and creates confusion generally." *State v. Watson*, 155 Wn.2d 574, 577, 122 P.3d 903 (2005). The merits of this controversy are detailed in the following discussion of the appellate court's departure from the holdings of this Court and the other Courts of Appeals. But this matter will recur in similar contexts given the common use of the language in the Agreement's indemnity clause.

1. The Court of Appeals' construction of the indemnity provisions of the Agreement conflicts with decisions of the Supreme Court and other divisions of the Court of Appeals.

a. The language used in the indemnity clause was intended to protect VMSI from liability not create liability.

The first sentence of § 11 obliges VMSI to "release, indemnify, defend and save [HSC] harmless," except for "negligence or [HSC's] intentional misconduct." App. 17. This exception from indemnity applies in this case, because the only claims were for negligence. Words in a contract are given their ordinary meaning, and courts do not adopt a contract interpretation that renders terms ineffective or meaningless. *Cambridge Townhomes, LLC v. Pac. Star Roofing, Inc.* 166 Wn.2d 475, 487, 209 P.3d 863 (2009). Indemnity agreements are strictly construed against the indemnitee if they appear to indemnify it for acts flowing from its own wrongs.

> Although clauses purporting to exculpate an indemnitee from liability flowing solely from its own acts or omissions are not favored and are strictly construed, *Jones* [*v. Strom Constr. Co.*, 84 Wn.2d 518, 520, 527 P.2d 1115 (1974)], we will enforce such provisions where the language of the agreement **unquestionably demonstrates** that this was the intent of the parties. *Snohomish County Pub. Transp. Benefit Area Corp. v. First Group America, Inc.*, 173 Wn.2d 829, 271 P.3d 850, 854 (2012).

Newport Yacht Basin Ass'n of Condo. Owners v. Supreme Nw., Inc., 168 Wn. App. 86, 100, 285 P.2d 79 (2012) (emphasis added). The Agreement contains a clear disclaimer of any duty to defend and indemnify for HSC's negligent or intentional conduct. To prove liability, HSC must

"unquestionably demonstrate" VMSI must indemnify HSC for its own wrongful conduct.

A sentence-by-sentence review of § 11 shows how these principles apply here. Sentence 1 provides:

> Except in cases of negligence or Agent's intentional misconduct, Owner shall release, indemnify, defend and save Agent harmless from all suits, claims, assessments and charges which pertain to the management and operation of the Project.

App. 17. The first sentence is not subject to much dispute. Because the only claims by Ms. Widrig were for negligence, the duty to "release, indemnify, defend and save harmless" did not arise. Unless HSC can show that some other language in the Agreement "unquestionably demonstrates" that VMSI is to indemnify HSC, HSC's contractual interpretation fails. *Newport, supra.* Sentence 2 provides:

> The Project's duty to indemnify shall include all litigation expenses including reasonable attorneys' fees.

Idem. "The Project" refers to the real property, the "Villas at Meadow Springs." App. 14. The sentence makes it the Property's duty, to "indemnify." This obligation omits any mention of VMSI, "release," "defend," and "save harmless." Sentence 3 provides:

> Regardless of Agent's conduct, Agent shall be indemnified to the extent of available insurance coverage.

App. 17. As in the preceding sentence, there is no mention of who is to indemnify HSC. This sentence does not mention VMSI, only HSC's right to be indemnified to the extent of "available insurance coverage." The language gives HSC protection only to the extent insurance coverage is available. The logic of this sentence is to prevent an insurer from attempting to escape liability under Sentence 1 by claiming to be a third party beneficiary and to ensure nothing is coming out of VMSI's pocket.

The phrase "to the extent of available insurance coverage" is commonly used where a direct claim is barred, but liability insurance may cover the loss. Thus, in states that recognize spousal immunity but allow recovery against the spouse to the extent that there are insurance proceeds, the language protects the insured from any personal liability. *See, e.g., Freehe v. Freehe*, 81 Wn.2d 183, 500 P.2d 771 (1972) *overruled on other grounds by Brown v. Brown*, 100 Wn.2d 729, 675 P.2d 1207 (1984); *Brooks v. Sturiano*, 497 So.2d 796 (Fl. App. 1987). Where sovereign immunity would bar the claim, this language permits the claim to the extent there is insurance coverage. *Mims v. Clanton*, 215 Ga. App. 665, 452 S.E. 2d 169 (1994). Bankruptcy courts often permit an action against an insured debtor, but only to the extent of available insurance proceeds. *Schulz v. Holmes Transportation, Inc.*, 149 B.R. 251 (D. Mass. 1993). Similarly, courts permit an action to be brought against a deceased to the extent of available

insurance proceeds, even when the non-claim statute would bar the claim. *See Callaghan v. Coberly*, 927 F. Supp. 332 (W.D. Ark. 1996); *Nelson v. Schnautz*, 141 Wn. App. 466, 170 P.3d 69 (2007). This language does not create a claim against VMSI; it protects VMSI from HSC's claims, just as it protects the bankrupt, the sovereign, the estate and the marital community. Here, this language permits HSC to recover to the extent there is insurance coverage, because it is barred from recovering against VMSI. As Judges Mitchell and Lawrence–Berrey noted, the words in the first sentence "Except in cases of negligence or Agent's intentional misconduct" would be meaningless or ineffective were HSC's interpretation accepted. App. 5, 11-12. "An interpretation of a writing which gives effect to all of its provisions is favored over one which renders some of the language meaningless or ineffective." *Wagner v. Wagner*, 95 Wn.2d 94, 101, 621 P.2d 1279 (1980). Division 3's decision is contrary to the decisions of this Court. In the construction industry, indemnity provisions are common, because work is often done by the owner, a contractor, subcontractors and others. Such agreements help clear the air of employer immunity, loaned servant questions and other issues making liability shifting agreements more desirable. *McDowell v. Austin Co.*, 105 Wn.2d 48, 710 P.2d 192 (1985). This Court noted, however, a long line of cases militated against enforcing other than the clearest of indemnity agreements.

> Decisions of this court support the *Calkins* [*v. Lorain*, 22 Wn. App. 206, 613 P.2d 143 (1980)] court's disfavor of contracts to indemnify a party against losses caused by its own negligence. *See, e.g., Griffiths v. Henry Broderick, Inc.*, 27 Wn.2d 901, 182 P.2d 18 (1947); *Jones v. Strom Constr. Co.*, 84 Wash.2d at 520–21, 527 P.2d 1115. Courts of other jurisdictions agree: "[I]t is a long-established general rule that contracts will not be construed to indemnify a person against his own negligence unless such intention is expressed in clear and unequivocal terms." Annot., *Liability of Subcontractor Upon Bond or Other Agreement Indemnifying General Contractor Against Liability for Damage to Person or Property,* 68 A.L.R.3d 7, 69 (1976). At least one court has stated that the purpose of this rule is to prevent injustice, and to insure that a contracting party has fair notice that a large and ruinous award can be assessed against it solely by reason of negligence attributable to the other contracting party. *Joe Adams & Son v. McCann Constr. Co.*, 475 S.W.2d 721, 722 (Tex.1971).
>
> Some courts also agree with *Calkins'* second basis for its holding. Because of the disfavor of indemnification of a party against its own negligence, courts have stated that they will not enforce an indemnity provision to indemnify a concurrently negligent indemnitee unless the obligation is expressed in clear and unequivocal language. Annot., *supra,* at 126. *See also Waller v. J.E. Brenneman Co.*, 307 A.2d 550 (Del.Super.Ct.1973).

McDowell, 105 Wn. 2d 52-53.

Against this backdrop of strict construction, the Court of Appeals has placed a construction on the phrase "extent of available insurance" that exposes an insured party to liability. Every court that has construed the phrase has held that it protects an insured from liability by requiring the plaintiff to look only to insurance rather than the insured. VMSI's construction of this phrase is consistent with the long line of cases cited

above and provides a rational explanation for § 11. If the words are at all ambiguous, then they must be construed against HSC as the drafter and indemnitee. Two judges have ruled each way on the ambiguity issue, making it impossible to argue that § 11 imposes liability on VMSI. Either the language supports VMSI's interpretation or the phrase is ambiguous; either way VMSI must prevail. As this court has repeatedly held, "clauses purporting to exculpate an indemnitee from liability for losses flowing from his own acts or omissions are not favored as a matter of public policy and are to be clearly drawn and strictly construed." *Dirk v. Amerco Mktg. Co. of Spokane*, 88 Wn.2d 607, 613, 565 P.2d 90 (1977).

Part of Division 3's misperception of the "available insurance" clause derives from its opinion that, "Imposing that obligation on a third party, such as an insurer, is unreasonable, since the third party is not bound by the management agreement." *Widrig*, p. 6, *supra*, App. 8. But VMSI's interpretation does not impose any obligation on the insurer, it merely limits the recovery to "available insurance." According to Division 3, "any payment by VMSI to HSC will be reimbursed to VMSI by its insurer." *Widrig*, p. 7, App. 9. If that were the case, then VMSI's insurer must be obligated to HSC because of § 11. But HSC was an additional insured, and, if Fireman's Fund did not defend as promised, HSC has a breach of contract action against Fireman's Fund. *Schwindt v. Commonwealth Ins. Co.*, 140

Wn.2d 348, 997 P.2d 353 (2000); *Hartford Ins. Co. v. Ohio Cas. Ins. Co.*, 145 Wn. App. 765, 189 P.3d 195 (2011).

Division 3 further departs from this Court's settled precedents by suggesting alternatives to the language used in the Agreement. Division 3's first suggestion would substitute,

> despite claims of negligence being exempted from the owner's duty to indemnify, an insurance company may not avoid its duty to defend HSC and pay claims based upon negligence of Agent.

Widrig, p. 8, *supra*, App. 9. The limitation on the exclusion only includes "negligence." Casualty insurance often covers not only negligence but such things as environmental cleanup, *Boeing v. Aetna Cas. & Sur. Co.*, 113 Wn.2d 869, 784 P.2d 507 (1990); "advertising injury," *Int'l Marine Underwriters v. ABCD Marine, LLC,* 179 Wn.2d 274, 313 P.3d 395 (2013); strict liability, *Weyerhaeuser Co. v. Commercial Union Ins. Co.,* 142 Wn.2d 654, 15 P.3d 115 (2000); business interruption, *Tooley v. Stevenson Co-Ply, Inc.*, 106 Wn.2d 626, 724 P.2d 368 (1986); and defective products, *Olympic S.S. Co., Inc. v. Centennial Ins. Co.,* 117 Wn.2d 37, 811 P.2d 673 (1991). Typically, policies provide coverage for loss and then specifically exclude enumerated risks. Attempting to cover just negligence would exclude a wide range of otherwise covered claims. Even in this case, Widrig was

intentionally injured by HSC's employee. Division 3's first suggestion only creates more ambiguity.

Division 3's second suggestion also is fatally flawed:

> Regardless of the Agent's conduct, Agent shall be indemnified by Owner's liability insurance company to the extent of available insurance coverage.

Widrig, p. 8, *supra*, App. 9. This language fails because it would impose a duty on a non-party to the contract, not just limit recovery to available insurance. *Madison v. La Sene*, 44 Wn.2d 546, 268 P.2d 1006 (1954). "It goes without saying that a contract cannot bind a nonparty." *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 294, 122 S. Ct. 754, 764, 151 L. Ed. 2d 755 (2002).

Attempts to compel an insurer to indemnify the "Agent" are not possible because the insurer has not agreed to them. The third sentence as correctly interpreted by VMSI deprives any insurer of any benefit under the first sentence of the indemnity agreement. "The creation of a third party beneficiary contract requires that the parties intend that the promisor assume a direct obligation to the intended beneficiary at the time they enter into the contract." *Burke & Thomas, Inc. v. Int'l Org. of Masters, Mates & Pilots, W. Coast & Pac. Region Inland Div., Branch 6*, 92 Wn.2d 762, 767, 600 P.2d 1282 (1979). Thus parties to a contract can legitimately exclude the application of their agreements to a third-party beneficiaries, because once

a third-party beneficiary is created, and "[a]fter the third person accepts, adopts, or acts upon the contract entered into for his benefit, the parties thereto cannot rescind the same without his consent so as to deprive him of his rights. *Hughes v. Gibbs*, 55 Wn. 2d 791, 793, 350 P.2d 475 (1960).

b. Division 3's decision is contrary to other decisions of the Courts of Appeals.

Without the citation of authority Division 3 concludes, "The second sentence compliments the first sentence and expands on the duty to indemnify imposed by the first sentence. Thus, the obligor under the second sentence should be the obligor under the first sentence. In addition, the owner owns the 'Project' and thus owns the obligation to indemnify." *Widrig*, p.6, *supra*, App. 7-8. The term "Project" refers to the Apartment complex, not the owner or manager. App. 14. Using the words, "The Project's duty to indemnify shall include all litigation expenses including reasonable attorneys' fees" allowed HSC to deduct these expenses from the net proceeds turned over to VMSI under § 1 of the Agreement. App. 14. This language must likewise be read in conjunction with the last sentence, "Regardless of Agent's conduct, Agent shall be indemnified to the extent of available insurance coverage." Which is connected to neither the "Project" nor the "Owner." The distinction is significant.

As a starting point, any ambiguity in an indemnity contract is construed against indemnification. *Transamerica Ins. Co. v. Parker Henry*

Glass Co., 7 Wn. App. 208, 499 P.2d 21 (1972) (Division 1); *Calkins v. Lorain Div. of Koehring Co.*, *supra* (Division 2). Despite rhetoric to the contrary, Division 3 construes agreements against the indemnitor. *N. Pac. Ry. Co. v. Sunnyside Val. Irrigation Dist.*, 11 Wn. App. 948, 527 P.2d 693 (1974) *rev'd,* 85 Wn.2d 920, 540 P.2d 1387 (1975) As Judge Munson noted in dissent, "Applying the same rules for interpretation cited by the majority, I come to a different conclusion." *Id.* at 953. The dissent in this case is on exactly the same point.

> This panel has read and reread the above italicized sentence in an attempt to construe the ambiguity created by the scrivener's use of the passive voice. The majority resolves this ambiguity by construing the last sentence to mean: "Regardless of HSC's conduct, *VMSI* shall indemnify HSC to the extent of available insurance coverage." I dissent because this ambiguity can just as easily be resolved by construing the last sentence to mean: "Regardless of HSC's conduct, *the insurer* shall indemnify HSC to the extent of available insurance coverage."

Widrig, p. 9-10, *supra,* Lawrence-Berry dissenting. App. 11-12. Division 3 tends to construe indemnity provisions in favor of the indemnitee when that is clearly not the direction of the other divisions of the Court of Appeals.

c. Division 3's decision will have far reaching effect.

Despite Division 3's not publishing this decision, it will have a substantial effect on future contracts and their construction. Because electronic publication makes the decision available to all, transactional

attorneys will scrutinize this anomalous interpretation of "available insurance" which commonly appears in commercial agreements. *E.g.* Business Transaction Solutions § 42:120. This phrase appeared in what the Minnesota Supreme Court referred to as "an industry-accepted standard subcontract agreement." *Holmes v. Watson-Forsberg Co.*, 488 N.W.2d 473, 474 (Minn. 1992). In *Holmes* a statute prohibited indemnification agreements such as in issue here, but nonetheless the contractor was entitled to whatever insurance was available even though the subcontractor was immune from liability under the agreement. Despite GR 14.1 prohibiting the citation of an unpublished case as authority, such rules are slowly changing to the contrary. *E.g.* Fed. R. App. Proc. 32.1. The practice of unpublished decisions has received the disapprobation of legal writers since it was adopted. *See, e.g.* Gardner, "N*inth Circuit's Unpublished Opinions: Denial of Equal Justice?"* 61 A.B.A.J. 1224 (1975). Appellate courts have ignored the rule. *State v. Wiggins*, 114 Wn. App. 478, 485, 57 P.3d 1199 (2002) fn.3. Administrative law judges and agencies use unpublished cases. *E.g. Forgach v. George Koch & Sons Co.*, 167 Mich. App. 50, 421 N.W.2d 568 (1988); 49 CFR § 1503.655.

The decision will cause problems for transactional attorneys, because Division 3's interpretation of "available insurance" places a direct obligation for payment on an insured when the intent of that language is to

absolve the insured of liability. Cases are often tried against an insured to determine liability; for example a driver who had insurance, but has filed for bankruptcy. That, however, is a direct claim against the policy, not a claim that the insurer failed to assume the defense. *Gen. Acc. Assur. Co. v. Caldwell*, 59 F.2d 473 (9th Cir. 1932); *Larson v. New Jersey Fid. & Plate Glass Ins. Co.*, 167 Wash. 86, 8 P.2d 985 (1932) (Plaintiff subrogated to insured). It is better to just say HSC should litigate this with Fireman's Fund as an additional insured. *Equilon Enterprises LLC v. Great Am. Alliance Ins. Co.*, 132 Wn. App. 430, 132 P.3d 758 (2006). If HSC has a right to require VMSI to pay its defense costs in an ordinary tort action, there was no reason to require that HSC be named an additional insured. App. 17. Certainly a careful scrivener will have both protections in case insurance lapses or there is a default in coverage, but what happened here is a covered event. It is illogical to allow HSC to seek defense costs covered by insurance purchased by VMSI.

2. The awarding of fees to a non-prevailing party on an appeal conflicts with prior decisions of this Court and other divisions of the Court of Appeals.

At the close of its decision, the Division 3 remanded the case to the superior court to determine the amount of fees on appeal:

> We also remand to the trial court to determine a reasonable sum of attorney fees and costs incurred by HSC in defending the Widrig claim and prosecuting the cross claim, including fees and costs incurred on appeal. The amount of the

> attorney fees and costs award for prosecuting the cross claim shall not be limited by the amount of available insurance nor taken into consideration when determining the amount of insurance available.

Widrig, p. 9, *supra*, App. 10-11. HSC receives its attorneys' fees on appeal, but only a prevailing party may recover costs on appeal. RAP 14.2. If a dismissal is remanded, those fees must await a determination of the outcome of the case. In *Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 94 P.3d 930 (2004); this Court held that where a summary judgment is reversed and remanded for trial, there is no "prevailing party" and therefore the court does not award fees upon appeal.

> *Riehl* requests attorney fees pursuant to RAP 18.1 and chapter 49.60 RCW. Suppl. Br. on behalf of Pet'r at 19. RAP 18.1 allows recovery of attorney fees and expenses where the law grants the right to recover such fees. 'RCW 49.60.030(2) has been interpreted as granting parties a right to attorney fees on appeal' for discrimination based suits. *Allison v. Hous. Auth. Of Seattle*, 118 Wn.2d 79, 98, 821 P.2d 34 (1991). However, even if a party requests such fees under RAP 18.1, the party must prevail on his or her claim to receive attorney fees. *Id.* Where a party has succeeded on appeal but has not yet prevailed on the merits, the court should defer to the trial court to award attorney fees. *McClarty v. Totem Elec.*, 119 Wn. App. 453, 472-73, 81 P.3d 901 (2003). If the party prevails on the merits, the trial court may award fees for trial and appellate costs. *Id.* Because Riehl's disparate treatment claim has survived summary judgment, but has not yet been decided on the merits, we defer to the trial court to award attorney fees.

152 Wn.2d at 153. Fireman's Fund settled this matter for an undisclosed amount. *Widrig*, p. 3, *supra*, App. 4. If we assume that this was for policy

limits, then there is no "available insurance" because the policy has been expended. "[T]he duty to defend is different from and broader than the duty to indemnify." *Am. Best Food, Inc. v. Alea London, Ltd.*, 168 Wn.2d 398, 404, 229 P.3d 693 (2010), *as corrected on denial of reconsideration* (June 28, 2010). But the duty to indemnify does not cover HSC's breach of contract claim. "Under the 'gist of the action' doctrine, the claims against PMA must fail because the insurance policy in question does not cover breach of contract or breach of warranty claims." *Pennsylvania Manufacturers' Ass'n Ins. Co. v. L.B. Smith, Inc.*, 831 A.2d 1178, 1183 (Penn. Super. 2003). There cannot possibly be "available insurance," and HSC cannot be the prevailing party. "The prevailing party in a lawsuit is that party in whose favor judgment is entered." *Andersen v. Gold Seal Vineyards, Inc.*, 81 Wn.2d 863, 865, 505 P.2d 790 (1973). Only a prevailing party is entitled to cost and attorneys' fees on appeal. *Riehl v. Foodmaker, Inc., supra.* Division 3's decision is contrary to clearly established precedence in the Supreme Court.

F. CONCLUSION

The Court of Appeals' decision conflicts with longstanding precedence of this Court by incorrectly placing liability on an indemnitor where none was intended and in awarding attorneys' fees to a non-prevailing party. Even though unpublished, this case will far reaching, adverse effects

on standard contract language that has uniformly been used by scriveners and courts to limit liability. The Court should accept review of this matter and reinstate the judgment of the Benton County Superior Court in its entirety.

Respectfully submitted this 14th day of July, 2015.

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G. APPENDIX

1. *Widrig v. Village at Meadow Springs*, Nos. 31687-4-III and 32122-3-III (March 26, 2015)

NOTE: UNPUBLISHED OPINION, SEE WA R GEN GR 14.1

Court of Appeals of Washington,
Division 3.

Dana WIDRIG, Plaintiff,
v.
The VILLAS AT MEADOW SPRINGS, a Washington limited liability company, Respondent,
Robert Young And Associates, LLC, a Washington limited liability company, and Riverstone Residential West, LLC, a Delaware limited liability company, Defendants,
HSC Real Estate, Inc., a Washington corporation, Appellant.

Nos. 31687–4–III, 32122–3–III. | March 26, 2015.

Appeal from Benton Superior Court; Hon. Cameron Mitchell, J.

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UNPUBLISHED OPINION

FEARING, J.

***1** The owner and manager of an apartment complex dispute whether, under an indemnity clause in their management agreement, the owner should indemnify the manager for the cost of defending a tenant's claim resulting from the manager's negligence. The trial court ruled in favor of the owner on summary judgment and held that the owner need not indemnify the manager for the expenses of defending the suit brought by the tenant. We reverse and hold that the owner must indemnify the manager under the terms of the management agreement to the extent of insurance coverage.

FACTS

VMSI, LLC (VMSI or owner) owns The Villas at Meadow Springs (The Villas) apartment complex in Richland. VMSI entered into a contract with HSC Real Estate, Inc. (HSC or manager), for management of The Villas. An opening paragraph of the agreement defined "Project" as the property: "Villas at Meadow Springs." Clerk's Papers (CP) at 301.

The management agreement required both parties to carry insurance. Section 10 required VMSI to obtain and keep adequate insurance "against liability ... for loss, damage or injury to property or persons which might arise out of the occupancy, management, operation or maintenance of the [p]roject" and to name HSC as an additional insured on all of its liability policies for the project. The agreement demanded that the liability insurance be adequate to protect the interests of both the owner, VMSI, and the agent, HSC. HSC was to maintain insurance against its misfeasance, malfeasance, or nonfeasence relating to the management of The Villas.

The management agreement contained an indemnity clause. Section 11 of the agreement stated:

> 11. INDEMNIFICATION OF AGENT: Except in cases of negligence or Agent's intentional misconduct, Owner shall release, indemnify, defend and save Agent harmless from all suits, claims, assessments and charges which pertain to the management and operation of the Project. The Project's duty to indemnify shall include all litigation expenses including reasonable attorney's fees. Regardless of Agent's conduct, Agent shall be indemnified to the extent of available insurance coverage.

CP at 62. The last sentence of paragraph 11 is the focus of this appeal.

Paragraph 20 read:

> 20. LITIGATION: Any action brought to enforce or to interpret the terms and provisions of this Agreement shall be brought in the Superior Court of the State of Washington, in and for Benton County. The prevailing party in any such action shall be entitled to recover the reasonable costs and expenses of such litigation, including, but not limited to, the reasonable fees and expenses of attorneys and certified public accountants.

CP at 306.

The management agreement is printed on HSC stationery. Nevertheless, during oral argument, neither party could identify who drafted the agreement. Wash. Court of Appeals oral argument, *Widrig v. The Villas at Meadow Springs,* No. 31687–4–III;

32122–3–III (Dec. 4, 2014), 4 min., 50 sec; 7min.; 16 min., 40 sec. (on file with court).

*2 In December 2009, an employee of HSC sexually assaulted Dana Widrig in her apartment at The Villas. The State of Washington convicted the employee of assault. In October 2011, Widrig filed a civil suit against VMSI and HSC, as well as other defendants later voluntarily dismissed. Widrig's complaint alleged that VMSI's and HSC's negligent hiring, negligent supervision, negligent management, and negligent security were the cause of the assault and her injuries.

A few weeks after Dana Widrig filed her complaint, HSC sent a letter to VMSI requesting indemnification for all legal expenses and costs associated with the litigation. HSC emphasized the indemnification provision in section 11 of the management agreement. HSC wrote: "In accordance with the terms of the Agreement, HSC, as [a]gent for [p]roperty [o]wner, is submitting this lawsuit to [VMSI] for handling and requests that you promptly forward to your insurance carrier." CP at 299.

In December, HSC answered Dana Widrig's complaint. HSC also filed a cross complaint against VMSI, asserting a breach of contract claim for failing to obtain adequate insurance and for failing to defend, indemnify, and hold HSC harmless. HSC's insurance company, Chartis, hired counsel Martens & Associates to defend against Widrig's complaint and to assert the cross claim against VMSI.

In May 2012, VMSI responded to HSC's cross claim and also filed a cross claim of its own. VMSI contended that it was entitled to indemnification or contribution from HSC if VMSI is found liable for the acts of HSC employees.

A month later, VMSI's insurance carrier, Fireman's Fund Insurance Company (Fireman's), confirmed that HSC was a named insured under VMSI's liability policy and accepted the defense, with a reservation of rights, of HSC for Dana Widrig's claims. Fireman's appointed defense counsel to represent HSC and agreed to reimburse Chartis for costs and fees incurred to defend HSC prior to the appointment. However, HSC did not agree to substitute Fireman's appointed counsel for its current counsel. HSC based its denial of substitution on appointed counsel's conflict of interest and on the timing of the appointment.

PROCEDURE

VMSI moved for summary judgment against HSC and Dana Widrig. VMSI contended that HSC's cross claim for inadequate insurance should be dismissed because HSC failed to contest, as allowed under the contract, the sufficiency of the insurance when it was purchased. VMSI contended that Widrig's claims against VMSI should be dismissed because VMSI was not liable for HSC's negligent acts.

HSC opposed VMSI's summary judgment motion and filed its own motion for

summary judgment. HSC asked the court to rule that the insurance and indemnity provisions of the management agreement were valid and enforceable and that the provisions applied to the claims asserted by Dana Widrig. The trial court partly granted HSC's motion and ruled that sections 10 and 11 of the management agreement were enforceable. The court also partly granted VMSI's summary judgment and ruled that HSC was barred from contesting the sufficiency of the dollar limits of the insurance policies. The court denied the remainder of both parties' summary judgment motions. The court explained in its oral ruling that a question remained, because of Fireman's reservation of rights, as to whether VMSI obtained the insurance for HSC demanded by section 10 of the agreement. The trial court also bifurcated HSC's and VMSI's cross claims from Widrig's claims. The court deferred resolution of the cross claims until Widrig's claims against HSC and VMSI were resolved.

***3** Fireman's lifted its reservation of rights. In a letter to HSC, Fireman's expressed hope that the lifting would align the defenses of the parties and extinguish the cross claims. Fireman's reminded HSC that it appointed counsel to defend HSC and, if HSC wished to keep its personal counsel involved in the case, personal counsel should cooperate with appointed counsel. Pursuant to Fireman's previous request, HSC sent Fireman's a statement of costs for attorney services. The statement included all services provided to HSC, including costs for pursuing the cross claims against VMSI. The record shows no payment on that statement.

In early 2013, Dana Widrig's claims against HSC and VMSI were resolved by settlement and dismissed by stipulation. The amount of the confidential settlement did not exceed the limits of the Fireman's policy. HSC did not pay any of the settlement amount. Once the settlement was reached, counsel appointed by Fireman's withdrew from representation of HSC.

HSC continued to pursue its cross claims against VMSI for indemnification. HSC renewed its summary judgment motion and asked the trial court to enter summary judgment on its cross claim. HSC contended that the trial court already determined, in response to the first summary judgment motion, that Dana Widrig's claims against HSC were covered by the indemnity clause of the management agreement. HSC maintained that, under the indemnity clause, VMSI was required to indemnify HSC for all claims, even negligence, to the extent of available insurance. HSC requested payment by VMSI of the former's fees, costs, and expenses in defending Widrig's suit. HSC also requested an award of attorney fees and costs under the management agreement's provision that grants attorney fees to the prevailing party in an action to enforce the contract.

VMSI contested HSC's renewed motion for summary judgment and requested dismissal of HSC's cross claim. VMSI maintained the enforceability of the agreement was never challenged, and the trial court's initial summary judgment order made no determination as to whether the indemnity clause covered HSC's claims or the meaning of the clause. VMSI also contended that the indemnity clause

did not require VMSI to indemnify HSC because the duty to defend did not apply in cases of HSC's negligence, and negligence was Dana Widrig's only remaining claim at settlement. VMSI also contended that, once it purchased insurance for HSC as required by the contract, the indemnity clause did not permit an action against VMSI. According to VMSI, VMSI must indemnify HSC only in claims not asserting HSC's negligence, regardless of whether the act was covered by insurance or not. VMSI maintained that any claims by HSC for unpaid costs should be brought against Fireman's as the insurer and not VMSI. Nevertheless, HSC never joined Fireman's as a party to the litigation.

The trial court in essence granted VMSI summary judgment. The trial court denied HSC's renewed motion for summary judgment and dismissed its cross claim against VMSI. The court determined that VMSI was the prevailing party and entitled to attorney fees under the management agreement.

***4** HSC moved for reconsideration. Based on an argument made by VMSI during summary judgment, HSC argued, in its new motion, that whether HSC could pursue a claim against Fireman's was irrelevant to VMSI's duties under the indemnity clause. HSC also challenged VMSI's argument that HSC had no damages because Chartis, as HSC's own insurer, covered the costs of litigation.

The trial court affirmed its earlier decision, noting that it took HSC's new arguments on reconsideration into account at the time of its initial decision. The court relied on the language of the management agreement that exempts VMSI from defending HSC in cases of HSC's negligence or intentional misconduct. Because Dana Widrig's claim centered on HSC's negligence, the court ruled that HSC's position requiring indemnification was contrary to the plain language of the contract. In a written memorandum, the trial court wrote:

> To accept HSC's position would require the court to ignore and give no meaning to the plain language in Section 11 of the contract that states that "*Except in cases of negligence* or Agent's intentional misconduct, Owner is required to "[sic] release, indemnify, *defend,* and save Agent harmless from all suits, claims, assessments and charges." (emphasis added) Since this is clearly a claim of negligence on the part of the Agent, HSC, this court finds that to accept HSC's position would be contrary to the plain language of the contract.

CP at 417.

VMSI filed a motion with the trial court for an award of costs and attorney fees against HSC. In response, HSC contended that attorney fees were not proper because VMSI's motion was an attempt by Fireman's to subrogate its attorney fees against its insured, HSC. Alternatively, HSC contended that VMSI failed to prove the reasonableness of its fees. The trial court rejected HSC's subrogation argument since Fireman's was not a party to the action and not the party seeking attorney fees. The court awarded VMSI $53,729.15 in attorney fees after a detailed review of VMSI's accounting records.

LAW AND ANALYSIS

ISSUE 1: Whether the indemnity provision of the management agreement imposed a duty on VMSI to indemnify HSC, regardless of HSC's negligent conduct?

ANSWER 1: Yes, to the extent of available insurance coverage.

We begin with two preliminary observations. First, the parties proceed as if Dana Widrig's suit and settlement of her claim were based on HSC's sole negligence. We will assume such also.

Second, because the lower court resolved the dispute on summary judgment, we need not defer to the trial court's ruling. Summary judgment orders are reviewed de novo on appeal. *Vallandigham v. Clover Park Sch. Dist. No. 400,* 154 Wn.2d 16, 26, 109 P.3d 805 (2005). When there are no disputed material facts and no extrinsic evidence presented on the issue, the meaning of a contract may be decided as a matter of law. *Snohomish County Pub. Transp. Benefit Area Corp. v. FirstGroup Am., Inc.,* 173 Wn.2d 829, 834, 271 P.3d 850 (2012). The parties present no extrinsic evidence concerning the negotiations leading to or the drafting of the management agreement. At oral argument, neither party identified any issue of fact requiring a remand to the trial court. Wash. Court of Appeals oral argument, *supra,* at 15 min., sec. 5; 23 min., 35 sec.; 24 min., 50 sec.

***5** We now move to the obligatory recitation of principles of contract construction. Unless the contract violates public policy, parties may enter into a contract where one party agrees to indemnify another party for loss, including claims and losses resulting from the latter's negligence. *Snohomish County Pub. Transp. Benefit Area Corp. v. FirstGroup Am., Inc.,* 173 Wn.2d at 835. Indemnification agreements are interpreted in the same manner as other contracts. *Id.* Words in a contract are given their ordinary meaning. *Cambridge Townhomes, LLC v. Pac. Star Roofing, Inc.,* 166 Wn.2d 475, 487, 209 P.3d 863 (2009). Courts do not adopt a contract interpretation that renders terms ineffective or meaningless. *Id.*

While indemnity agreements are generally permissible, a contract of indemnity will not be construed to indemnify the indemnitee against the loss resulting from his own negligence unless this intention is expressed in clear and unequivocal terms. *Snohomish County,* 173 Wn.2d at 836; *Jones v. Strom Constr. Co.,* 84 Wn.2d 518, 520, 527 P.2d 1115 (1974). Agreements that purport to exculpate an indemnitee from liability from losses flowing solely from his own acts or omissions are not favored and to be clearly drawn and strictly construed, with any doubts therein to be settled in favor of the indemnitor. *Snohomish County,* 173 Wn.2d at 836. "What is required is language unquestionably showing the parties' intent to indemnify in the event of losses resulting from the indemnitee's negligence." *Id.* at 836–37.

It is the duty of the court to declare the meaning of what is written, not what was intended to be written. *Hearst Commc'ns, Inc. v. Seattle Times Co.,* 154 Wn.2d 493, 504, 115 P.3d 262 (2005); *J.W. Seavey Hop Corp. v. Pollock,* 20 Wn.2d 337, 349,

147 P.2d 310 (1944). We do not seek to ascertain the intention of the bodies independent of the agreement's language. *J.W. Seavey Hop Corp.*, 20 Wn.2d at 349. Subjective intent of the parties is generally irrelevant if the intent of the parties can be determined from the actual words used. *Hearst Commc'ns, Inc.*, 154 Wn.2d at 504. And one final critical principle: a contract can be enforced only against a party to it. *State v. Antoine,* 82 Wn.2d 440, 444, 511 P.2d 1351 (1973), *rev'd on other grounds sub nom. Antoine v. Washington,* 420 U.S. 194, 95 S. Ct. 944, 43 L. Ed. 2d 129 (1975); *McIntyre v. Johnson,* 66 Wash. 567, 570, 120 P. 92 (1912).

We must determine if the management agreement between HSC and VMSI affords HSC limited indemnification under the circumstances when HSC and VMSI are sued for HSC's negligence. We read and reread, review and rereview the agreement to answer this question. We repeat the indemnification paragraph with emphasis on pertinent language:

> 11. INDEMNIFICATION OF AGENT: *Except in cases of negligence* or Agent's intentional misconduct, Owner shall release, indemnify, defend and save Agent harmless from all suits, assessments and charges which pertain to the management and operation of the *Project.* The *Project's* duty to indemnify shall include all litigation expenses including reasonable attorney's fees. *Regardless of Agent's conduct,* Agent shall be indemnified to the extent of available insurance coverage.

***6** CP at 62.

We now parse the indemnity clause language. The paragraph employed the word "Project" at the end of the first sentence and the beginning of the second sentence. An opening paragraph defined "Project" as the property: Villas at Meadow Springs. Use of the word in section 11's first sentence is consistent with the agreement's definition, since the word "Project" in this sentence entails the apartment complex as an undertaking, rather than a legal entity. Use of "Project" in the second sentence causes confusion since a duty is generally imposed on a legal entity, not an undertaking. The Villas is not a legal entity. VMSI, LLC, the owner, is a legal entity. We conclude that use of "Project" in the second sentence refers to the owner, since the agreement imposes indemnification obligations on only the owner. The second sentence compliments the first sentence and expands on the duty to indemnify imposed by the first sentence. Thus, the obligor under the second sentence should be the obligor under the first sentence. In addition, the owner owns the "Project" and thus owns the obligation to indemnify.

We disagree with the trial court and hold that the third sentence of section 11 applies under the circumstances on appeal. The trial court's reading of the paragraph renders the last sentence superfluous. If VMSI has no duty to indemnify HSC for its negligence, the phrase "[r]egardless of the Agent's conduct" passes from the agreement. CP at 62. The first and third sentence of the agreement may be read together to recognize a consistent intent of the parties. VMSI has no duty to

indemnify HSC for the latter's negligence except to the extent of the availability of insurance coverage. If HSC is sued for the conduct of others, VMSI must indemnify HSC regardless of insurance coverage.

HSC asserts that the trial court erred in interpreting section 11 to mean that HSC's remedies for VMSI's admitted failure to indemnify HSC are limited to pursuing VMSI's insurer. We do not read the record as establishing that VMSI admitted to a duty to indemnify and a corresponding failure to indemnify. Nor does the record reflect a ruling by the trial court that VMSI has no duty to indemnify since HSC may pursue a claim against VMSI's insurer. Nevertheless, we would disagree with such a reading of the agreement or ruling by the lower court. The management agreement is a contract between VMSI and HSC and creates no rights against third parties, such as an insurer of one of the parties. If HSC holds rights against Fireman's, those rights must arise from some other document. Nothing in the management agreement suggests that HSC has a direct cause of action against an insurer nor does any language limit HSC's remedy to an insurer.

The third sentence in section 11 of the management agreement does not identify who holds the obligation to indemnify HSC to the extent of insurance coverage. But the obligation could only be imposed on VMSI, since it is the only other party to the agreement. Imposing that obligation on a third party, such as an insurer, is unreasonable, since the third party is not bound by the management agreement. Stated conversely, such a reading is reasonable only if the insurer procured by VMSI signed and agreed to be bound by the management agreement. To repeat, a contract can be enforced only against a party to it. *State v. Antoine,* 82 Wn.2d at 444; *McIntyre v. Johnson,* 66 Wash. at 570.

***7** HSC also contends that the trial court erred in concluding that HSC has no damages because its own insurer defended it against Dana Widrig's claims. The record reflects no such ruling by the trial court. Assuming any such ruling, we disagree. The second sentence of the indemnity clause expressly provides that the duty to indemnify shall include litigation expenses and reasonable attorney fees. It is undisputed that neither VMSI nor its insurer paid HSC's litigation expenses or attorney fees. HSC's procurement of liability insurance to cover claims against it does not void VMSI's duty of indemnification. HSC's procurement of alternative coverage is merely a wise decision to maintain several layers of protection.

While HSC did not pay to settle Dana Widrig's claims, this fact does not absolve VMSI of its contractual duty under section 11 to indemnify HSC against the expense of litigation, including attorney fees. The duty to pay for litigation expenses is independent of any obligation to pay the third party's claim. *Edmonson v. Popchoi,* 155 Wn.App. 376, 386, 228 P.3d 780 (2010), *aff'd,* 172 Wn.2d 272, 256 P.3d 1223 (2011).

Many contracts include a paragraph that states each party waives its right to indemnification from the other party to the extent of insurance coverage. The

management agreement between HSC and VMSI contains no such paragraph. Nevertheless, our reading of section 11 is consistent with such a standard paragraph, because the indirect consequences of this reading lead to this end. VMSI is not obligated to defend HSC beyond available insurance limits and we suspect that any payment by VMSI to HSC will be reimbursed to VMSI by its insurer.

We recognize that indemnity agreements are strictly construed against the indemnitee if the agreement appears to indemnify the indemnitee from its own wrongdoings. We find no ambiguity in the language, however. The phrase "regardless of Agent's conduct" in the third sentence clearly imposes the limited duty to indemnify even in instances of HSC's negligence. Our reading is also consistent with the first sentence in section 11, wherein only VMSI assumes an obligation to indemnify.

We recognize that the parties or the person drafting the management agreement might have intended the interpretation placed on the indemnity clause by VMSI and the trial court—that the purpose of the last sentence in the clause is merely to prevent Fireman's from claiming its liability insurance policy does not cover HSC rather than the clause imposing an independent duty on VMSI. Nevertheless, VMSI presents no evidence of discussions leading to the drafting of the agreement that support such a reading. The drafter is not identified let alone has the drafter explained the intended purpose of the last sentence in section 11. We are bound by the language of the agreement, not the unstated and unsubstantiated intent of the parties or the agreement's drafter. To repeat, our duty is to declare the meaning of what is written, not what was intended to be written. *Hearst Commc'ns, Inc.,* 154 Wn.2d at 504.

***8** If VMSI did not wish to assume the duty imposed in the third sentence, it could have substituted as the third sentence: "despite claims of negligence being exempted from the owner's duty to indemnify, an insurance company may not avoid its duty to defend HSC and pay claims based upon negligence of Agent." In the alternative, the sentence could have read: "Regardless of the Agent's conduct, Agent shall be indemnified by Owner's liability insurance company to the extent of available insurance coverage."

Our dissenting brother notes that the management agreement is printed on HSC stationery and concludes that HSC must have drafted the agreement. Nevertheless, neither party can identify the drafter of the agreement. HSC astutely noted, during oral argument, that, in this age of computers and e-mail, parties can mutually engage in drafting an agreement, while the agreement is later printed on only one party's stationery.

ISSUE 2: Should attorney fees and costs be awarded HSC against VMSI under the parties' management agreement?

ANSWER 2: Yes.

HSC argues on various grounds that the trial court erred in awarding VMSI attorney fees and costs incurred in defending its cross claim. HSC argues, for instance, that Fireman's is the real party in interest and an insurance company may not subrogate against one of its insureds. We reverse the award on another ground: VMSI is not the prevailing party. We instead award HSC its attorney fees and costs incurred at the trial court level for pursuing its cross claim of indemnification, in addition to reasonable attorney fees and costs incurred in defending Dana Widrig's claim.

Section 20 of the management agreement provides that the prevailing party is entitled to reasonable attorney fees. A prevailing party or substantially prevailing party is one that receives judgment in its favor at the conclusion of the entire case. *Harmony at Madrona Park Owners Ass'n v. Madison Harmony Dev., Inc.,* 160 Wn.App. 728, 739–40, 253 P.3d 101 (2011). That party is HSC.

Both parties seek a recovery of attorney fees and costs on appeal. Reasonable attorney fees incurred on appeal are recoverable if allowed by statute, rule, or contract and the request is made pursuant to RAP 18.1(a). HSC made such a request. We grant reasonable attorney fees and costs to HSC for this appeal.

CONCLUSION

Under the third sentence in paragraph 11 of the management agreement, VMSI must pay HSC's attorney fees and expenses incurred to defend Dana Widrig's lawsuit, as a matter of law, to the extent of available insurance coverage. We reverse the summary judgment ruling in favor of VMSI and grant HSC summary judgment on its cross claim for indemnity. We vacate the judgment against HSC and in favor of VMSI for attorney fees and costs. We award HSC reasonable attorney fees and costs incurred in defending the claim asserted by Dana Widrig and for pursuing its cross claim against VMSI. We remand to the trial court to determine the extent of available coverage and thus the outer bound of VMSI's duty to indemnify for the defense of the Widrig claim.

***9** We also remand to the trial court to determine a reasonable sum of attorney fees and costs incurred by HSC in defending the Widrig claim and prosecuting the cross claim, including fees and costs incurred on appeal. The amount of the attorney fees and costs award for prosecuting the cross claim shall not be limited by the amount of available insurance nor taken into consideration when determining the amount of insurance available.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

I CONCUR: SIDDOWAY, C.J.

LAWRENCE–BERREY, J. (dissenting).

***9** Paragraph 15 of the management agreement prohibits construing the agreement in favor of one party or the other. Because the majority construes the ambiguity in the indemnification paragraph in favor of HSC, the party which created the ambiguity, I dissent.

The majority acknowledges the simple fact that the management agreement was written on HSC Real Estate, Inc., letterhead. Clerk's Papers (CP) at 59. Although the parties are unable to identify the scrivener of their agreement, there can be little or no doubt that the scrivener was an HSC employee or agent.

Paragraph 10 of the management agreement requires the owner, VMSI, LLC, to purchase an insurance policy to insure against claims arising out of the project. That paragraph also requires VMSI to name HSC as an additional insured under such policy.

The next paragraph, paragraph 11, requires VMSI to indemnify HSC against claims arising out of the project, except in cases of HSC's negligence or intentional conduct. The final sentence of paragraph 11 uses the passive voice. It provides: "*Regardless of [HSC's] conduct, [HSC] shall be indemnified to the extent of available insurance coverage.*" CP at 62.

This panel has read and reread the above italicized sentence in an attempt to construe the ambiguity created by the scrivener's use of the passive voice. The majority resolves this ambiguity by construing the last sentence to mean: "Regardless of HSC's conduct, *VMSI* shall indemnify HSC to the extent of available insurance coverage." I dissent because this ambiguity can just as easily be resolved by construing the last sentence to mean: "Regardless of HSC's conduct, *the insurer* shall indemnify HSC to the extent of available insurance coverage."

The majority notes that a promise to indemnify for losses caused by another's negligence must be clear and unequivocal. There is no question that the final sentence of paragraph 11 creates an obligation to indemnify HSC for HSC's own negligence. Where we part is *what entity* has the obligation to indemnify HSC for HSC's own negligence.

The majority reasons that because the management agreement is between two parties, the obligation to indemnify HSC for its own negligence must be that of the other party, i.e., VMSI. The problem with the majority's reasoning is that the first sentence of paragraph 11 explicitly states that VMSI has no obligation to indemnify HSC for HSC's own negligence. Therefore, when HSC tendered its defense to VMSI of Ms. Widrig's negligent management claim, VMSI was well within its contractual right to refuse the tender. Had HSC instead tendered its defense to Fireman's Fund, Fireman's Fund would have been obligated to assume the defense of its additional insured "to the extent of available insurance coverage."

***10** Had HSC simply tendered its defense to its insurer, Fireman's Fund, the litigation of HSC's cross claim would have been unnecessary. Instead, HSC would have fully realized on its contractual right to be indemnified to the extent of available insurance. HSC created its own cross claim by neglecting its contractual right as an additional insured. Without doubt, HSC failed to reasonably mitigate its damages when it neglected to tender its defense to Fireman's Fund, its insurer.

The majority construes HSC's ambiguous language in favor of HSC. The majority construes the final sentence of paragraph 11 in a manner that contradicts the first sentence of that paragraph. HSC created this inconsistency by poorly drafting the provision. HSC then compounded the problem it created by failing to tender the defense of its alleged negligence to its insurer, Fireman's Fund. For each and all of these reasons, I respectfully dissent.

2. Order Denying Motion for Reconsideration

FILED JUNE 16, 2015
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON DIVISION THREE

DANA WIDRIG,
Plaintiff,
v.

THE VILLAS AT MEADOW SPRINGS, a Washington limited liability company,

Respondent,

ROBERT YOUNG AND ASSOCIATES, LLC, a Washington limited liability company, and RIVERSTONE RESIDENTIAL WEST, LLC, a Delaware limited liability company,

Defendant,

HSC REAL ESTATE, INC., a Washington corporation,

Appellant.

No. 31687-4-III
Consolidated with 32122-3-III

ORDER DENYING MOTION FOR RECONSIDERATION

THE COURT has considered appellant's motion for reconsideration, and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED the motion for reconsideration of this court's opinion of March 26, 2015, is denied.

DATED: June 16, 2015

PANEL: Judges Fearing, Siddoway, Lawrence-Berrey

FOR THE COURT:
/s/
Laurel H. Siddoway

Chief Judge

3. Management Agreement

HSCReal Estate, Inc.
A Property Management Company

MANAGEMENT AGREEMENT

This AGREEMENT is made and entered into as of the 25th day of October. 2004, by and between HSC REAL ESTATE, INC., a Washington corporation (hereinafter referred to as the "Agent") and VMSI, LLC (hereinafter referred to as "Owner").

APPOINTMENT: Owner appoints Agent as its sole and exclusive Agent to lease and manage the following described property Villas at Meadow Springs. 286 units, 250 Gage Blvd., Richland. WA 99352 (Project). The relationship of the parties to this Agreement shall be that of principal and agent. All duties to be performed by Agent under this Agreement shall be for and on behalf of Owner, in Owner's name, and for Owner's account.

1. COMPENSATION: As compensation for the services provided by Agent under this Agreement (and exclusive of reimbursement of expenses to which Agent is entitled), Owner shall pay to Agent two and five - tenths percent (2.5%) of the total monthly gross receipts from the Project, payable by the 10th day of the current month for the duration of this Agreement. Payments due to Agent for periods of less than a calendar month shall be prorated over the number of days for which compensation is due. The percentage amount shall be based upon the total gross receipts from the Project during the preceding calendar month. The term "gross receipts" includes all rents and other income and charges from the normal operation of the Project, including, but not limited to, rents, parking fees, laundry income, forfeited security deposits, pet deposits, other fees and deposits, and other miscellaneous income. Gross receipts does not include income arising out of the sale of the Project or the settlement of fire or other casualty losses, or from tax refunds.

2. OTHER SERVICES: Should Owner wish Agent to perform services which are not otherwise governed by the terms and provisions of this Agreement, the parties shall meet to discuss and to agree upon the additional compensation to be paid by Owner to Agent for such additional services.

3. BUDGET: Owner and Agent will establish on an annual basis a budget for operation and management of the Project. The budget shall act as a general guide for the management of the Project by Agent, and shall be updated and revised from time to time to reflect changes in conditions and actual Project operations. Any expenditure not specifically set forth in the budget shall require Owner's advance written approval, except as provided in Section 5.4 hereof.

4. DUTIES OF AGENT:

4.1 Shall use its best efforts to keep the apartment units in the Project fully rented by procuring tenants for the Project.

4.2 Shall negotiate, prepare and execute all rental agreements, and to terminate or modify existing rental agreements, as agent for the Owner. All costs of leasing shall be paid out of the operating account. No rental agreement shall be for a period in excess of one year without the written approval of Owner.

4.3 Shall establish and change or revise all rents, fees or deposits, and any other charges chargeable with respect to the Project; and shall collect all rents, charges and other amounts received in connection with the management and operation of the Project. All security deposits (excluding non-reimbursable cleaning fees and the like) shall be deposited into a security deposit trust account in states that require such accounts. AU other receipts shall be deposited into the operating account.

4.4 Shall advertise the Project and vacant units within the Project for rent, Using periodicals, signs, plans, brochures or displays, or such other means as Agent may deem proper and advisable.

4.5 Shall institute in Owner's name or in the name of Agent, all legal actions relating to the enforcement of any rental agreement, the collection of rent or other income, or for the eviction of tenants or other persons from the Project. Agent may select the attorney to handle such litigation. Agent is authorized, when expedient and in the best interest of the Project, to settle, compromise and release claims. Any moneys expended for the actions described within this section shall be an operating expense of the Project.

4.6 Shall hire, supervise, discharge and pay (from Project funds} all employees necessary for the effective management, maintenance and operation of the Project. All such employees shall be deemed employees of the Project and of Agent. All wages and fringe benefits payable to Project employees (but not to Agent's employees who are not employed directly by the Project) and all local, state and federal employment taxes and assessments shall be treated as an operating expense of the Project.

4.7 Shall be authorized to enter into agreements, in Owner's name, for all necessary utility and other services provided to the Project. All agreements will have a term of no more than 30 days or be cancelable on 30 days' notice by either Agent or Owner.

4.8 Shall comply with all applicable landlord-tenant laws, the Fair Housing Act, and all other laws that apply to the management and operation of the Project.

4.9 SCREENING SERVICES: Agent shall be entitled to charge prospective tenants a reasonable screening fee. Such fees shall not be a part of the gross receipts.

4.10 COLLECTION SERVICES: Agent shall be entitled to charge Owner a fee equal to fifty percent (50%) of all sums collected from former tenants, whether such collection is or is not the result of litigation, and whether or not such collection shall be based on a judgment taken at the time of an eviction, or otherwise. Such collections shall not be a part of the gross receipts. Owner shall retain fifty percent (50%) of all sums collected, as described above, and these sums will be included as part of the gross receipts.

5. TERM & TERMINATION: The initial term of this Agreement shall be for a period of one (1) month (the " Initial Term") commencing with the 25th day of October, 2004. This Agreement shall be automatically renewed for periods of one (1) month unless this Agreement is terminated as provided herein. Each renewal period is referred to as a "Renewal Term".

5.1 TERMINATION BY EITHER PARTY: This Agreement may be terminated by either Owner or Agent, with or without cause, at the end of the Initial Term or of any Renewal Term upon giving at least thirty (30) days' written notice prior to the end of the Initial Term or any Renewal Term.

5.2 N/A with the term being MTM.

5.3 ASSUMPTION OF CONTRACTS; TURN OVER OF ASSETS: Upon the termination of this Agreement:

i. Owner shall assume the obligations of any contract or obligation executed or incurred by Agent under this Agreement, for the benefit of the Project.

ii. Agent may withhold the funds in the operating account for up to thirty (30) days after the end of the month in which this Agreement is terminated necessary to pay the estimated bills previously incurred but not yet invoiced and to close accounts. Thereafter, Agent shall deliver to Owner any balance of moneys due Owner or of tenant security deposits, or both, which were held by Agent with respect to the Project, as well as a final accounting reflecting the balance of income and expenses with respect to the Project as of the date of termination or withdrawal, and all records, contracts, leases, receipts for deposits, and other papers or documents which pertain to the Project. If there shall be additional sums due and payable to Agent, Owner shall promptly pay such sums.

111. Agent will provide a final accounting of all activity through the termination date. All records, contracts, leases, rental agreements, receipts for deposits, unpaid bills, and other papers and documents which pertain to the Project will be delivered to Owner upon the effective date of termination.

6. BANK ACCOUNTS: Agent is authorized to establish one or more operating bank accounts and security deposit trust accounts for the Project. All accounts shall be maintained in accordance with all applicable laws. All interest earned on the accounts shall be an asset of the Project. Upon acceptance of this Agreement, Owner shall remit to Agent the amounts necessary to fully fund all required tenant trust accounts.

6.1 DISBURSEMENT FROM OPERATING ACCOUNTS: From the operating account, Agent is authorized to pay or to reimburse Agent for all fees and expenses and for all other sums due Agent under this Agreement. To the extent that funds are available, and after maintaining an agreed upon cash reserve between Owner and Agent, Agent shall transmit net cash proceeds to Owner no later than the 20th of each month. The net proceeds shall be remitted to Owner, unless Agent is otherwise notified, in writing.

6.2 PRIORITY OF PAYMENT: Should collected funds (excluding tenant security deposits) be insufficient to satisfy the current debts and obligations of the Project, such debts and obligations shall be paid in the following order: Project payroll, including state and federal payroll related taxes; underlying mortgage obligations; management fees and other management expenses; other required payments.

6.3 ADVANCE PAYMENTS: All purchases and other obligations incurred in connection with the management of the Project shall be the sole cost and expense of the Project. Agent shall be under no duty to utilize or apply Agent's own funds or credit, for the payment of any such debt or obligation. If such an advance is made Owner shall reimburse Agent within fourteen (14) days of the advance. If Owner shall fail to make the required reimbursement within such period, interest shall accrue at the rate of eighteen percent per annum.

6.4 EXTRAORDINARY EXPENSES: Except as provided in the Budget, which was approved by Owner, Agent shall not expend or authorize the expenditure of any sum in excess of Two Thousand Dollars ($2,000) for any one item of repair or alteration without the consent of Owner. However, in the event of an emergency, Agent may authorize any expenditure necessary to preserve and protect the Project, to alleviate a condition adverse to human or animal life, or to take such actions as may be ordered by any federal, state or local governmental agency.

7. MAINTENANCE & OPERATION: Agent is authorized to make or cause to be made, through Project employees, Agent's employees, or through contracted services, all ordinary repairs and replacements reasonably necessary to preserve the Project in its present condition and for the operating efficiency of the Project, and all alterations required to comply with governmental regulations or insurance requirements. Agent is also authorized to decorate the Project and the units and to purchase or rent, on Owner's behalf, all equipment, tools, appliances, materials, supplies. Uniforms and other items necessary for the management, maintenance or operation of the Project. Agent shall not have the authority to make structural modifications to the Project, without Owner's consent.

8. OWNER SUPPLIED FACILITIES: The Project shall provide and pay all expenses related to a Project Office, including, but not limited to, furnishings, equipment, postage and office supplies, electricity and other utilities, and telephone.

9. REPORTS:

i. By the tenth (lOth) day of each month, Agent shall furnish Owner with a statement of receipts and disbursements from the operation of the Project during the prior calendar or fiscal month. The reports are a management tool and are maintained in accordance with generally accepted accounting principles ("GAAP").

ii. Weekly occupancy, leasing status and traffic reports.

iii. Monthly market comparable rent surveys.

iv. In addition, Agent shall, on a mutually acceptable schedule, prepare and submit to Owner such other reports as the parties shall agree upon.

Owner shall have the right to audit any applicable accounts managed by Agent. The cost of this audit shall be paid by the Owner unless a Material Discrepancy is found in which case the Agent will be responsible for the cost of the audit up to Two-Thousand, Five Hundred Dollars ($2,500). As it relates to this section, Material Discrepancy shall be defined as a discrepancy of more than 2% of the net operating income.

10. INSURANCE:

i. Owner shall obtain and keep in force adequate insurance against fire (with extended coverage endorsement), theft, and property damage, and against liability (to include non-owned auto coverage for site employees who use their own vehicle for project purposes) for loss, damage or injury to property or persons which might arise out of the occupancy, management, operation or maintenance of the Project. The amounts and types of insurance shall be acceptable to both Owner and Agent, and any deductible required under such insurance policies shall be a Project expense. Agent shall be covered as an additional insured on all liability insurance maintained with respect to the Project. Liability insurance shall be adequate to protect the interests of both Owner and Agent and in form; substance and amounts reasonably satisfactory to Agent. Owner agrees to forthwith furnish Agent with certificates evidencing such insurance or with duplicate copies of such policies. If Owner fails to do so, Agent may, but shall not be obligated to, place said insurance and charge the cost thereof to the operating account. Said policies shall provide that notice of default or cancellation shall be sent to Agent as well as Owner and shall require a minimum of thirty (30) days' written notice to Agent before any cancellation of or changes to said policies.

ii. Agent shall be obligated to, because all personnel who handle or are responsible for the safe keeping of moneys or other property of Owner to be covered by a fidelity bond or fidelity insurance in the minimum amounts of Fifty Thousand Dollars ($50,000) with a company determined by HSC and approved by Owner. Agent agrees to forthwith furnish Owner with certificates evidencing such bond or insurance or with duplicate copies of such bond or policy. If Agent fails to do so, Owner may, but shall not be obligated to, place said insurance and charge the cost thereof to the Agent. Said policies shall provide that notice of default or cancellation shall be sent to Owner as well as Agent and shall require a minimum of thirty (30) days' written notice to Owner before any cancellation of or changes to said policies. Such insurance or bond shall be obtained and secured at the Agent's expense.

iii. Agent shall procure, pay for and maintain insurance against the misfeasance, malfeasance, or non-feasance (errors and omissions) of Agent relating to the management of the Project, with limits of at least One Million Dollars ($1,000,000) each occurrence and with a deductible of not more than Twenty- Five Thousand Dollars ($25,000) per claim. Said policies shall provide that notice of default or cancellation shall be sent to Owner as well as Agent and shall require a minimum of thirty (30) days' written notice to Owner before any cancellation of or changes to said policies. Such insurance shall be obtained and secured at the Agent's expense.

11. INDEMNIFICATION OF AGENT: Except in cases of negligence or Agent's intentional misconduct, Owner shall release, indemnify, defend and save Agent harmless from all suits, claims, assessments and charges which pertain to the management and operation of the Project. The Project's duty to indemnify shall include all litigation expenses including reasonable attorney's fees. Regardless of Agent's conduct, Agent shall be indemnified to the extent of available insurance coverage.

12. INDEMNIFICATION OF OWNER: Agent SHALL INDEMNIFY, DEFEND, AND SAVE Owner harmless from and against all suits, claims, and actions arising from Agent's actions and omissions with respect to any alleged or actual violation of federal, state, or local labor, employment, and anti-discrimination laws. Agent's obligations with respect to such claims shall include the full payment of all settlements, judgments, damages, liquidated damages, penalties, forfeitures, court costs, and litigation expenses (including but not limited to reasonable attorney's fees).

13. TERM OF INDEMNIFICATION: The indemnification made by any party to this Agreement, for and on behalf of any other party to this Agreement, shall survive the termination of this Agreement, and shall continue after the termination of this Agreement until such time as any applicable statute of limitation shall have run as to any claims which may be asserted by a third party or third parties against Agent, Owner or the Project.

14. OTHER LIABILITY: Agent assumes no liability whatsoever for any acts or omissions of Owner, or any previous owners of the Project, or any previous management or other agent of either. Agent assumes no liability for any failure of or default by any tenant in the payment of any rent or other charges due Owner or in the performance of any obligations owed by any tenant to Owner. Nor does Agent assume any liability for violations of environmental or other regulations which may become known during the period that this Agreement is in effect. Any such regulatory violations or hazards discovered by Agent shall be brought to the attention of Owner in writing within three (3) days and Owner shall promptly cure them. Agent does not assume and is given no responsibility for compliance of the Project or any building thereon or any equipment therein with the requirements of any building codes or with any statute, ordinance, law or regulation pertaining thereto, except to notify Owner of the discovery of any such condition.

15. GOVERNING LAW AND CONSTRUCTION: This Agreement shall be governed by the internal laws of the State of Washington. This Agreement shall be binding upon the parties hereto, as well as their respective successors and assigns. No change or modification of this Agreement shall be valid unless the same shall be in writing and signed by all of the parties hereto. The invalidity or unenforceability of any particular provision of this Agreement shall not affect the other provisions hereof, and the Agreement shall be construed in all respects as if such invalid or unenforceable provision were omitted. This Agreement is not to be construed more favorably to one party than to another.

16. ENTIRE AGREEMENT: This Agreement, including any specified attachments, constitutes the entire agreement between Owner and Agent with respect to the management and operation of the Project and supersedes and replaces any and all previous management agreements entered into and/or negotiated between Owner and Agent relating to the Project covered by this Agreement.

17. HEADINGS: All headings and subheadings employed within this Agreement are inserted only for convenience and ease of reference and are not to be considered in the construction or interpretation of any provision of this Agreement. *As* required by the context, all pronouns shall be deemed to refer to and include the masculine, feminine, neuter, singular and plural.

18. SURVIVAL OF REPRESENTATIONS: All representations and warranties of the parties shall survive the termination of this Agreement. All provisions of this Agreement that require Owner to insure or to defend, reimburse or indemnify Agent shall survive any termination; and if Agent is or becomes involved in any proceeding or litigation by reason of having been Owner's Agent, such provisions shall continue to apply.

19. NOTICES: Any notices, demands, consents and reports necessary or provided for under this Agreement shall be in writing and shall be addressed as follows, or at such other address as Owner and Agent individually may specify hereafter in writing:

AGENT: PRESIDENT
HSC REAL ESTATE, INC.
111 QUEEN ANNE AVENUE N., 2ND FLOOR
SEATTLE, WA 98109

OWNER: VMSI, LLC
c/o BRYAN STONE
SRM DEVELOPMENT, LLC S. 104 DIVISION
SPOKANE, WA 99202

Such notice or other communication shall be band delivered or delivered by certified mail, or by over-night private mail carrier, return receipt requested, postage prepaid. For purposes of this Agreement, notices shall be deemed to have been "given" or "delivered" upon personal delivery thereof, or upon delivery by an over-night mail carrier, or forty-eight (48) hours after having been deposited in the United States mails as provided herein. Any party to this Agreement may change the address which all such communications and notices shall be sent hereunder by addressing such notice, as provided for herein.

20. LITIGATION: Any action brought to enforce or to interpret the terms and provisions of this Agreement shall be brought in the Superior Court of the State of Washington, in and for Benton County. The prevailing party in any such action shall be entitled to recover the reasonable costs and expenses of such litigation, including, but not limited to, the reasonable fees and expenses of attorneys and certified public accountants.

21. COUNTERPARTS: This Agreement may be executed in one or more counterparts, each of which, when taken together, shall constitute one integrated and binding agreement upon all of the parties hereto.

IN WITNESS WHEREOF, the parties hereto have entered this Agreement as of the date and year first above written.

OWNER:

VMSl, LLC

By: _____
Bryan Stone
its Authorized Representative

AGENT:

HSC REAL ESTATE, INC.

By: _____
Walt Smith
its **President**

HSC Real Estate, Inc.

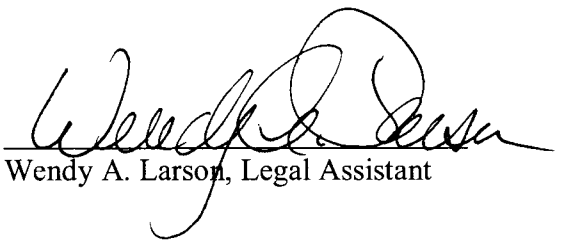
CERTIFICATE OF SERVICE

I, the undersigned, certify under penalty of perjury and the laws of the State of Washington that on July 14, 2015, I caused service of *Petition for Review* via Federal Express and/or legal messenger:

Clerk of the Court
Court of Appeals, Division III
500 N Cedar St
Spokane, WA 99201-1905
(Original with $200 check)

Kristina J. McKennon
William J. Flynn, Jr.
Mariah A. Wagar
Flynn Merriman McKennon, P.S.
8203 W. Quinault Avenue
Quinault Point, Suite 600
Kennewick, WA 99336

Richard L. Martens
Martens + Associates, P.S.
705 Fifth Avenue South, Suite 150
Seattle, WA 98104



Wendy A. Larson, Legal Assistant