FILED

NOV 18 2013

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By

No. 31687-4-III

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

HSC REAL ESTATE, INC., a Washington corporation,

Appellant,

v.

VMSI, LLC, a Washington limited liability company,

Respondent.

REPLY BRIEF OF APPELLANT HSC REAL ESTATE, INC.

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I. REPLY TO VMSI'S STATEMENT OF THE CASE

1. VMSI asserts that HSC's description of the Management Agreement in Section IV, B. of its brief is inaccurate and argumentative. Resp. Br. at 3. But VMSI identifies no inaccuracies or inappropriate argument.

2. VMSI also asserts that HSC misstates the facts concerning the motions for summary judgment. Resp. Br. at 4. But, again, VMSI fails to identify any inaccuracies in HSC's brief.

3. VMSI misrepresents what Fireman's Fund agreed to do with regard to reimbursement of HSC's fees and costs incurred in its defense. Resp. Br. at 4. In fact, Fireman's Fund agreed to reimburse only those fees and costs it deemed reasonably necessary to HSC's defense before its belated appointment of its own choice of counsel, Gordon Hauschild, Esq., at a point when the parties were already in the midst of summary judgment briefing. Although Mr. Hauschild was not prepared to assume the defense, Fireman's Fund deemed HSC's existing defense counsel "private counsel" from the date of Mr. Hauschild's appointment, effectively refusing to reimburse the necessary and reasonable costs of HSC's defense from that date until Mr. Hauschild was ready to assume the

entire defense (which never actually happened). In any event, it is not disputed by VMSI that Fireman's Fund **never** reimbursed HSC for **any** of its defense costs and expenses.

4. VMSI misrepresents that the trial court "awarded costs and reasonable attorneys' fees to VMSI as the prevailing party under § 20 of the Agreement." Resp. at 4-5. In fact, the superior court denied VMSI's motion once, granting leave to file a renewed motion. *See* CP 445 ¶ 4. In response to the renewed motion for fees and costs – filed after court-ordered discovery VMSI previously refused to provide – HSC pointed out that VMSI's defense was controlled by Fireman's Fund and Fireman's Fund was attempting to improperly subrogate against its own insured, HSC, which is prohibited by Washington law. *See* CP 430-31; see also, CP 445-46 ¶ 4. After hearing argument on VMSI's renewed motion on August 2, 2013, the superior court did not rule and still has not ruled on it. *See* Docket. So, contrary to VMSI's representation, it has not been awarded prevailing party fees and costs in this case.

II. VMSI CONFUSES THE STANDARD OF REVIEW ON A MOTION FOR RECONSIDERATION HERE

VMSI is correct that the standard of review for an order on summary judgment is *de novo*. And, generally, the standard of review for

an order denying a motion for reconsideration is manifest abuse of discretion. *See Jacob's Meadow Owners Assoc. v. Plateau 44 II, LLC*, 139 Wn. App. 743, 752 fn. 1, 162 P.3d 1153 (2007). But that is not always the case. *See id.* And it is categorically not the case here.

Typically, motions for reconsideration are denied without comment, and in such cases the proper standard of review in Washington is manifest abuse of discretion. So the manifest abuse of discretion standard really applies to review of a superior court's denial of reconsideration without comment just as if the court declined to consider the motion at all. However, in this case, the superior court actually considered HSC's motion for reconsideration on its merits and issued a letter ruling explaining the basis for the decision. CP 417. The standard of review applicable in this particular circumstance – in which the court provides a reasoned ruling – has not been squarely addressed in any reported decision of the Washington appellate courts.[1]

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[1]The closest Washington authority found by HSC is the *Jacob's Meadow* case, in which Division I held that when the superior court indicated in its order denying a motion for reconsideration that it had, nevertheless, considered the evidence submitted on the motion, that evidence becomes part of the summary judgment record on appeal. *See Jacob's Meadow*, 139 Wn. App. 743, 162 P.3d 1153 (2007) at 754-55, *citing Noble Manor Co. v. Pierce County*, 133 Wn.2d 269, 284 n. 9, 943 P.2d 1378 (1997), *and Tanner Elec. Co-op. v. Puget Sound Power & Light*, 128 Wn.2d 656, 675 n. 6, 911 P.2d 1301 (1996). The holding in *Jacob's Meadow* made the evidence part of the summary judgment record subject to *de novo* review, effectively merging the order on the motion

The circumstance of a motion for reconsideration being denied after the superior court's consideration and ruling on the merits of the issues raised being a matter of first impression, then, Washington courts properly look to federal cases concerning the corresponding federal rules. *See Moore v. Wentz*, 11 Wn. App. 796, 799, 525 P.2d 290 (Div. III, 1974). In this circumstance, the federal courts of appeals have reviewed a lower court's ruling under the standard applicable to the underlying motion for summary judgment *de novo*. *See, e.g., Dyson v. District of Columbia*, 710 F.3d 415, 420 (D.C.Cir. 2013). As the Court of Appeals for the District of Columbia Circuit reasoned:

> *De novo* review is appropriate in this case because the District Court *assessed the merits* of equitable tolling both when it granted the City's motion to dismiss and again when it denied Appellant's motion for reconsideration. The abuse of discretion standard ordinarily applies to a district judge's decision *whether to consider* a new theory raised on motion for reconsideration. *Connors*, 935 F.2d at 341 n. 9. In this case, the District Court did consider the merits of Appellant's new theory of equitable tolling. Therefore, we review the matter *de novo,* just as we would have if Appellant had

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for reconsideration into the summary judgment order. However, the court did not explicitly address the standard of review for the order itself when the order denying reconsideration contains a reasoned decision.

> appealed the District Court's rejection of her theory of equitable tolling presented in opposition to the City's motion to dismiss. *See Patton Boggs LLP v. Chevron Corp.*, 683 F.3d 397, 402 & n. 4 (D.C.Cir. 2012) (noting that if the district court addresses the merits of a new theory raised for the first time pursuant to Rule 59(e), the appellate court "would review that decision *de novo*"). The principles enunciated in *Patton Boggs* and *Connors* are controlling in this case regarding the appropriate standard for our review of the District Court's denial of Appellant's motion for reconsideration.

Id. (all emphasis original); *see also, American Elec. Power Co., Inc. v. Affiliated FM Ins. Co.*, 556 F.3d 282 (5th Cir. 2009) ("Because the district court considered the merits of the Rule 59(e) motion and still granted summary judgment, we review the reformation issue under the familiar summary-judgment standard of *de novo*."), *citing Templet v. HydroChem Inc.*, 367 F.3d 473, 477 (5th Cir. 2004); *United States v. American Ins. Co.*, 18 F.3d 1104, 1107 n. 4 (1st Cir. 1994) ("We properly consider the arguments raised by American in its motion for reconsideration, even though they were not initially presented to the district court, because these contentions were ultimately presented to and considered by the district court prior to its entering a final order."). In this case, the superior court stated that it considered the merits of HSC's arguments in its motion for

reconsideration in the original summary judgment decision. CP 417. Therefore, in accordance with the above federal authorities, this Court should review the order denying reconsideration *de novo*.

Moreover, in ruling on HSC's motion for reconsideration, the superior court based its denial of the motion on its interpretation and construction of the contract at issue, which VMSI does not dispute is an issue of law. *See* CP 417. So, for this additional reason, this Court should review *de novo* the superior court's reasoned order denying HSC's motion for reconsideration.

III. HSC BRIEFED THE SO-CALLED "STRANGERS TO THE CONTRACT" AND "NO DAMAGES" ARGUMENTS ON SUMMARY JUDGMENT, NOT JUST RECONSIDERATION

VMSI argues that two of HSC's arguments on appeal, the so-called "strangers to the contract" and "no damages" arguments, are "not properly before this court." Resp. at 6-7. VMSI asserts that these arguments were made for the first time on reconsideration, but VMSI is mistaken. *See id.*

To be accurate, it was VMSI that argued to the superior court on summary judgment that HSC had "no damages," asserting that "HSC has not been required to pay any claim in the underlying action, so there is no right to indemnity." CP 280. HSC responded in its reply brief that, under

the parties' contract, the duty to indemnify includes "all litigation expenses including reasonable attorney's fees." CP 317, *quoting* CP 62 § 11. As HSC stated in its reply on summary judgment, "VMSI does not dispute that HSC has not be indemnified and held harmless by VMSI in accordance with the contract (nor could it)." CP 318. Thus, VMSI raised the "no damages" argument in its opposition to HSC's renewed motion for summary judgment, and HSC responded to it in its reply brief. HSC is certainly not precluded from arguing on appeal that it has damages.

Similarly, it was VMSI that argued HSC's sole remedy under the indemnification provision was against the insurer, Fireman's Fund. *See* CP 285-87. HSC then replied that Fireman's Fund was a stranger to the contract, "which does not bind the insurance carrier to the owners' obligations." CP 319; *see generally*, CP 319-20.

In sum, both arguments, the co-called "stranger to the contract" and "no damages" arguments, were either made or addressed by HSC in response to arguments in VMSI's opposition to summary judgment. No wonder, then, that the superior court stated in denying HSC's motion for reconsideration that, "[t]he court took the arguments presented by HSC in its Motion for Reconsideration into account at the time of its initial decision." CP 417. Those arguments were raised in the summary

judgment briefing; they were not raised for the first time on reconsideration, nor for the first time on this appeal. They are properly before this Court on the merits of the present appeal.

IV. VMSI BREACHED THE INDEMNITY OBLIGATION UNDER THE MANAGEMENT CONTRACT

Once VMSI's various procedural objections are resolved, all that remains is the *de novo* interpretation and construction of the parties' contract, which is, after all, what this appeal is really all about.

While VMSI would like to engage in chimerical feats of logic to obfuscate its indemnity obligation under the management agreement, it is the agreement itself that governs. *See* Resp. at 8. Section 11 of the management agreement between VMSI and HSC provides:

> 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 62 at § 11 (emphasis added). VMSI engages in and focuses

exclusively on a "sentence-by-sentence" review of the provision. Resp. at 11-12. Such an analysis is not improper so long as it still considers the entire provision in context, giving full meaning and effect to all its parts. *Hearst Comm., Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503, 115 P.3d 262 (2005). VMSI's analysis fails in this fundamental respect. It simply has not considered the agreement as a whole.

In accordance with Washington's well-settled rules of contract interpretation and construction: (1) one must consider the contract as a whole, including that it is between only two parties, VMSI, as owner, and HSC, as agent; (2) that the obligations imposed are only between VMSI, as owner, and HSC, as agent; and (3) that the purpose of the contract is to govern the rights and responsibilities of the two parties concerning the operation of the "Project" identified as the Villas at Meadow Springs, 286 units, 250 Gage Blvd., Richland, WA 99352." CP 59.

VMSI's sentence-by-sentence analysis fails to read the provisions at issue in context. Rather, VMSI separates the indemnity provision from the contract and separates each sentence of the indemnity provision from the other sentences, reading each in splendid but inappropriate isolation. *See* Resp. at 11-12. As VMSI states, the first sentence is, itself, not at issue because Ms. Widrig's complaint alleged negligence by both HSC

and VMSI. *See id.* But it must be read with the other sentences to give them meaning and context.

The second sentence provides: "The Project's duty to indemnify shall include all litigation expenses including reasonable attorney's fees." CP 62 at § 11. VMSI looks at this sentence in isolation, noting particularly that "it is the Property's duty, to 'indemnify.' This obligation omits any mention of VMSI's obligation to 'release,' 'defend,' and 'save harmless.'" Resp. at 12. VMSI does not present any argument concerning the significance of any of this, likely because there is none.

As indicated at the beginning of the contract, the "Project" is the Villas at Meadow Springs. It goes on to identify VMSI as the owner and HSC as the owner's agent. *See* CP 59. So there is no meaningful distinction between an obligation of the Project to HSC and an obligation of VMSI to HSC arising from the management of the Project, which is simply property legally owned by VMSI. *See id.*

In short, obligations of the Project to HSC are ultimately obligations of the owner, VMSI. So, what VMSI is seizing on as quite significant is actually without legal significance. At most, it reflects sloppy drafting. Nor does VMSI attempt to explain what "the Property's duty" to indemnify would entail if it were literally the Project that had the

duty to indemnify HSC independently of any duty of VMSI. Resp. at 12.

Similarly, the omission of "release," "defend," and "save harmless" from the second sentence is of no legal significance. A release by the owner necessarily refers to the release of a claim by the owner, as the owner cannot issue a release of someone else's claim. There is no reason for a release to include litigation fees and costs because that is not what a release is or what it does. Likewise, the duty to "defend" is distinct and separate from the duty to "indemnify," so a duty to indemnify would not include a duty to defend, but to reimburse, and that reimbursement can include litigation fees and costs, just as the second sentence specifically provides. CP 62. Finally, there is no meaningful legal distinction between the terms "indemnify" and "hold harmless."[2]

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[2]While no Washington court is known to have ruled on this particular issue, numerous courts in other jurisdictions have, and their reasoning is highly persuasive.

> As a result of its traditional usage, the phrase "indemnify and hold harmless" just naturally rolls off the tongue (and out of the word processors) of American commercial lawyers. The two terms almost always go together. Indeed, modern authorities confirm that "hold harmless" has little, if any, different meaning than the word "indemnify." Black's Law Dictionary in fact defines "hold harmless" by using the word "indemnify."

Majkowski v. American Imaging Mgt. Serv., LLC, 913 A.2d 572, 589 (Del. Ch. 2006), *citing* BLACK'S LAW DICTIONARY 749 (8th Ed. 2004) ("hold harmless, vb. To absolve (another party) from any responsibility for damage or other liability arising from the transaction; INDEMNIFY - Also termed save harmless") (capitals and emphasis in

All the second sentence of the indemnity provision is addressing is that litigation fees and costs are included in the duty to indemnify. This clarifies what is included in the duty to indemnify under the first sentence. There is simply no reason to include a duty to defend, a duty to release, or a duty to hold harmless in that second sentence. VMSI is highlighting a meaningless distinction without even arguing how it is meaningful or significant.

The third sentence of the indemnification provision provides: "Regardless of Agent's conduct, Agent shall be indemnified to the extent of available insurance coverage." CP 62. Here, again, VMSI reads this sentence in isolation, noting "there is no mention of who is to indemnify HSC, the Agent. This sentence does not mention VMSI, the Owner, only HSC's right to be indemnified to the extent of available insurance coverage." Resp. at 12. VMSI then provides its wholly conclusory construction of the sentence's legal effect: "The logic of this sentence is to prevent an insurer from attempting to escape liability under Sentence 1." Resp. at 12. But VMSI's construction does not follow from the words used or their context within Section 11 or the contract as whole. The

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original); *see also, Pinney v. Tarpley*, 686 S.W.2d 574, 579 (Tenn. App. 1984) ("'Hold harmless' means to fully compensate the indemnitee for all loss or expense.").

contract is only between two parties and if one is identified as the indemnitee, the other necessarily must be the indemnitor.

VMSI's construction necessarily assumes that an insurer would have liability to HSC under the first sentence, and the third sentence is an adjunct to the first designed to prevent the insurer's escape from liability. *See* Resp. at 12. However, as VMSI has admitted, the first sentence obligates only the "Owner" to indemnify HSC; it does not obligate any insurer to indemnify HSC. So if the first sentence does not obligate the insurer, how does the third sentence "prevent the insurer from attempting to escape liability under Sentence 1"? Resp. at 12. VMSI has no answer.

VMSI's analysis also fails to reconcile the limited obligations of the first sentence created with the narrowing clause, "except in cases of negligence or intentional misconduct" with the unlimited obligation of the third sentence explicitly providing "regardless of Agent's conduct." CP 62. If the "logic" of the third sentence is "to prevent an insurer from attempting to escape liability under Sentence 1," why is the first clause in each sentence so dramatically different from the other as to the circumstances in which they apply? Again, VMSI has no answer.

Logically, the truth is that VMSI begins with a faulty premise that is not supported by the words used in the contract. And a faulty premise

invariably leads to a faulty conclusion.

As argued in HSC's opening brief, the way Section 11 works when read as a whole is that, except in cases of negligence or [HSC's] intentional misconduct, [VMSI] shall release, indemnify, defend, and save [HSC] harmless . . ." CP 62. That obligation applies regardless of whether VMSI has any insurance coverage for the obligation. *See id.* So VMSI is assuming a far greater risk to its own assets "except in cases of negligence or Agent's intentional misconduct." *Id.*

The promise of the last sentence of Section 11 is different in that, even in cases of negligence or Agent's intentional misconduct, i.e., "regardless of Agent's conduct," VMSI is assuming no present duty to defend, only a future duty to indemnify "to the extent of available insurance coverage." *Id.* In the later promise VMSI is placing none of its own assets at risk, i.e., it is assuming a broader duty of indemnification, but further limiting the risk to its own assets by circumscribing HSC's ability to recover only to "the extent of available insurance coverage." *Id.* In order to effect the promise made by VMSI in the contract, HSC must pursue a claim against VMSI to judgment, but then collect the judgment only to the extent of "available insurance coverage." So HSC assumes the risk that, at the end of the day, there may be no available insurance

coverage to pay the judgment.

V. VMSI AGREES WITH HSC THAT THE PHRASE "TO THE EXTENT OF AVAILABLE INSURANCE COVERAGE" ALLOWS A DIRECT CLAIM AGAINST VMSI.

Curiously, VMSI argues in favor of what HSC has been maintaining all along, that the phrase "to the extent of available insurance coverage" allows a direct claim against the defendant with recovery limited to the available insurance coverage. *See* Resp. at 13. This is directly contrary to VMSI's position on summary judgment that the third sentence of the indemnity provision precluded HSC's claims against VMSI, limiting HSC to asserting a claim only against VMSI's insurer, who is a stranger to the contract. CP 278-87.

Just as curiously, and perhaps even more so, VMSI then asserts that "[t]his language does not create a claim against VMSI; it protects VMSI from HSC's claims, just as it protects the bankrupt, the sovereign, the deceased and the marital community." Resp. 13. Well, yes and no.

VMSI is correct to the extent the phrase "to the extent of available insurance coverage" does not *create* a claim and it does protect VMSI's assets from the risk of liability, but it also allows an *existing* claim, such as the breach of contract asserted by HSC, to be brought directly against

VMSI with recovery limited to VMSI's available insurance coverage, just as it would against the bankrupt, the sovereign, the deceased, and the marital community. This is entirely consistent with the cases cited both in HSC's opening brief and in VMSI's brief. *See* Resp. at 13, *citing Brooks v. Sturiano*, 497 So.2d 796 (Fl. App. 1987), *Mims v. Clanton*, 215 Ga. App. 665, 452 S.E.2d 169 (1994), *Schulz v. Holmes Transportation, Inc.*, 149 B.R. 251 (D. Mass. 1993), *Callaghan v. Coberly*, 927 F.Supp. 332 (W.D.Ark. 1996), and *Nelson v. Schnautz*, 141 Wn. App. 466, 170 P.3d 69 (2007); *see also,* HSC br. at 27-28, citing numerous cases.

Those same cases cited by VMSI recognize the right to proceed directly against the defendant/wrongdoer – not the defendant's insurance company. *See Brooks v. Sturiano*, 497 So.2d 976 (Fl. App. 1986) (holding wife injured in automobile accident in which driver/husband was killed could proceed on direct claim against deceased husband's estate on tort claim); *Mims v. Clanton*, 215 Ga. App. 665, 452 S.E.2d 169, 171 (1994) (holding county partially waived sovereign immunity to the extent of available insurance coverage, allowing direct claim against County for amounts above deductible amount and less than policy limits); *Schulz v. Holmes Transportation, Inc.*, 149 B.R. 251, 259-60 (D. Mass. 1993) (ruling that plaintiff could refile complaint against debtor in bankruptcy,

limiting recovery to proceeds of debtor's insurance) , *Callaghan v. Coberly*, 927 F.Supp. 332, 334 (W.D.Ark. 1996) (denying defendant estate's motion for summary judgment dismissal based on exemption to non-claim statute allowing recovery entirely from available insurance); *Nelson v. Schnautz*, 141 Wn. App. 466, 476, 170 P.3d 69 (2007) (holding that probate statute limited plaintiff's "recovery against the estate to available insurance proceeds."), *citing Wagg v. Estate of Dunham*, 146 Wn.2d 63, 73-74, 42 P.3d 968 (2002). Thus, all of the cases cited by VMSI actually support HSC's right to proceed directly against VMSI for indemnification under Section 11 of the contract with recovery limited "to the extent of available insurance coverage." CP 62.

The basis for the claim is the promise in the parties' contract that, "[r]egardless of Agent's conduct, Agent shall be indemnified . . ." CP 62. The undisputed fact that HSC has not been fully indemnified creates the cause of action for breach and damages. The phrase, "to the extent of available insurance coverage" then limits VMSI's exposure on the claim to only its available and admitted insurance coverage.

VMSI's attempt to distinguish HSC's authorities as limited to tort claims is unavailing. *See* Resp. at 8-9, *citing Arreygue v. Lutz*, 116 Wn. App. 938, 69 P.3d 881 (2003). VMSI ignores the *Cambridge Townhomes*

case, also cited and discussed in HSC's brief, in which the plaintiff in a breach of contract case had earlier obtained relief from a bankruptcy stay "for the purpose of pursuing any insurance proceeds that are the result of any insurance coverage the debtor may possess." *Cambridge Townhomes, LLC v. Pac. Star Roofing, Inc.*, 166 Wn.2d 475, 480, 209 P.3d 863 (2009); *see* HSC br. at 20. So VMSI arguments about tort damages and whether they are liquidated are simply beside the point.

The issue is the meaning and legal effect of the phrase "to the extent of available insurance coverage" in the parties' contract, and the cases cited by HSC, both Washington and non-Washington authorities, establish that it does not reflect or effect an election of remedies to pursue a claim only against the defendant's insurer, but to limit any recovery against the defendant to the defendant's available insurance coverage.

VI. HSC AND VMSI ARE THE REAL PARTIES IN INTEREST

VMSI's argument that the dispute before this Court "is really between Chartis and Fireman's Fund," as the real parties in interest, is not well taken. *See* Resp. at 9. Certainly, Chartis retained the Martens firm to defend HSC, and HSC's insurer is subrogated for defense fees incurred above HSC's $10,000 deductible. *See* CP 91 ¶ 2; CP 92 ¶ 7. But in this

respect, this case is indistinguishable from the *McRory* case discussed in HSC's opening brief. Nor does VMSI try to distinguish it from *McRory*. *See* HSC br. at 24-29, *citing McRory v. Northern Ins. Co. of N.Y.*, 138 Wn.2d 550, 558-59, 980 P.2d 736 (1999). As the court in *McRory* held, the insured remained the real party in interest. *See id.* Thus, whether the subrogation is sought against the defendant or defendant's insurer is irrelevant. Significantly, VMSI cites no authority drawing such a distinction.

VMSI relies on the *Broderick* case as "more analogous" to the situation here, but fails to explain how it is analogous at all, let alone more analogous. *See* Resp. at 9-10, *citing Broderick v. Puget Sound Traction, Light & Power Co.*, 86 Wash. 399, 150 P. 616 (1915). In *Broderick*, the plaintiff's automobile was in the care of the Broadway Automobile Company ("Broadway") – a bailment – when it was struck and damaged by defendant's freight car. 86 Wash. at 400. Broadway and its insurer arranged for the repairs, some of which were done by Broadway. *Id.* Ms. Broderick paid nothing for the repairs, but brought suit against the defendant anyway. In affirming the dismissal of plaintiff's claims, the Washington Supreme Court affirmed the trial court's conclusion that the plaintiff could not maintain a claim for more than the $45 she spent on

alternate transportation while her car was repaired because, if she had recovered money for the repairs, the judgment would not be a bar to Broadway or its insurer suing defendant on the repairs. *See* 86 Wash. at 403. In short, she had no cause of action for recovery of amounts not paid by her or on her behalf. *See id.*

That is not the case here, where HSC is seeking to recover its $10,000 deductible as well as the attorneys' fees and costs paid on its behalf by HSC's insurer. Thus, *Broderick* is inapposite. And it is the only case cited by VMSI regarding the real party in interest. *See* Resp. at 9-10. Respectfully, the long line of Washington authority, going back at least as far as *Alaska Pac. S. S. Co. v. Sperry Flour Co.*, 94 Wash. 227, 229-30, 162 P.26 (1917), which distinguished the *Broderick* case, supports HSC's position as the real party in interest.

VII. PAYMENT OF HSC'S DEFENSE FEES IS A COLLATERAL SOURCE INDEPENDENT OF VMSI'S CONTRACTUAL DUTY TO INDEMNIFY

VMSI seeks to avoid application of the collateral source rule here by a strained argument that it "is not a tortfeasor or contract breacher." Resp. at 18, *citing Hayes v. Trulock*, 51 Wn. App. 795, 803, 755 P.2d 830 (1988). Rather, VMSI argues, "[t]he tortfeasor and contract breacher here is Cody Kloepper." *Id.* VMSI goes on to argue that "the payments made

on HSC's behalf were not because of VMSI's breach of contract, they were made because of Cody Kloepper's wrongful conduct. This is a matter of proximate cause." Resp. at 18. Respectfully, this is utter nonsense. Whether his conduct resulted in Ms. Widrig's suit, which then triggered the duty to indemnify, is one thing, but Mr. Kloepper did not cause VMSI to breach the duty to indemnify HSC under the management agreement. VMSI and its insurer controlled whether or not it breached that duty. Mr. Kloepper's actions were not even arguably a proximate cause of VMSI's breach.

Still, VMSI maintains that the collateral source rule does not apply in contract cases, despite the fact the rule itself, as quoted in Washington cases, states: "Benefits received by a plaintiff from a source collateral to the tortfeasor or ***contract breacher*** may not be used to reduce a defendant's liability for damages." *Hayes v. Trulock*, 51 Wn. App. 795, 803, 755 P.2d 830 (1988) (emphasis added), *quoting* D. DOBBS, REMEDIES 185 (1973).

VMSI's protest that the *Consolidated Freightways* case, cited by HSC, does not specifically mention the collateral source rule is of no moment, as the case nonetheless applies the rule. *See* Resp. at 21. As Washington courts have explained about the collateral source rule, the

policy supporting its application is that "the wrongdoer should not benefit from collateral payments made to the person he has wronged." *Ciminski v. CSI Corp.*, 90 Wn.2d 802, 805, 585 P.2d 1182 (1978). "The very essence of the collateral source rule requires exclusion of evidence of other money received by the claimant so the fact finder will not infer the claimant is receiving a windfall and nullify the defendant's responsibility." *Johnson v. Weyerhaeuser Co.*, 134 Wn.2d 795, 803, 953 P.2d 800 (1998).

Functionally, the collateral source rule helps effect the right to subrogation, as subrogation "is a device adopted by equity to compel the ultimate discharge of an obligation by him who in good conscious ought to pay it." *Consolidated Freightways, Inc. v. Moore*, 38 Wn.2d 427, 430, 229 P.2d 882 (1951), *quoting* 50 Am.Jur. 678. Thus, subrogation is simply the means by which the collateral source – here HSC's insurer – obtains reimbursement. Accordingly, regardless of whether the collateral source rule is explicitly invoked, it is applied in almost all subrogation cases.

Similarly, the court in *Consolidated Freightways* held that the plaintiff's insurance company, which was a collateral source, "is subrogated to appellant's contract right of indemnity." *Id.* at 431. Thus, in this case, like many cases based on contract, the policy behind the collateral source rule is the basis of the subrogation action to "obtain

reimbursement from him who in good conscious ought to pay it." *See id.*

In this case, like *Consolidated Freightways*, the cause of action is based on a contractual right to indemnity, and HSC seeks reimbursement of its both its $10,000 deductible and the fees and costs incurred on its behalf by its insurer, which is a collateral source vis-a-vis VMSI. As the *Consolidated Freightways* court stated, "[s]ubrogation is an equitable principle and applies to contract rights as fully as it does to tort actions." 38 Wn.2d at 431. And the collateral source rule applies equally to tortfeasors and contact breachers alike. *See* D. DOBBS, REMEDIES 185 (1973)*, quoted with approval in, Hayes v. Trulock*, 51 Wn. App. 795, 803, 755 P.2d 830 (1988). There simply is no logical basis to conclude that either subrogation or the collateral source rule are limited to tort claims. If such were the law in Washington, then *Consolidated Freightways* and many other cases relied upon by HSC would have been overruled long ago.

CONCLUSION

For the forgoing reasons, this Court should reverse the summary judgment entered by the superior court and remand with directions to enter judgment in favor of HSC.

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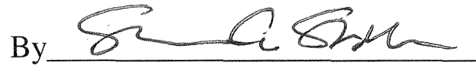
RESPECTFULLY SUBMITTED this 15th day of November, 2013.

Martens + Associates | P.S.

By

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CERTIFICATE OF SERVICE

I certify that on the day and date indicated below, I caused the foregoing to be filed with the court and served on behalf of Appellant HSC Real Estate, Inc., on the following counsel as indicated below:

Counsel for Respondent VMSI, LLC William A. Cameron, Esq. Lee Smart P.S. 1800 One Convention Place 701 Pike Street Seattle, Washington 98101-3929	☐ ☐ ☑ ☐ ☐	U.S. Mail Telefax Hand Delivery Overnight Delivery E-mail with Recipient's Approval

I declare under the penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

SIGNED THIS 15th day of November 2013 at Seattle, Washington.

Matthew Morgan
Paralegal for Martens + Associates | P.S.