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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
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NO. 316874

COURT OF APPEALS STATE OF WASHINGTON
DIVISION III

DANA WIDRIG, Plaintiff,

v.

THE VILLAS AT MEADOW SPRINGS, LLC, et al.

HSC REAL ESTATE, INC, Cross-claimant/Appellant

VMSI, LLC, Cross-Claim Defendant/Respondent.

BRIEF OF RESPONDENT VMSI, LLC

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I. INTRODUCTION

VMSI LLC developed a large apartment complex in Richland, Washington, known as the Villas at Meadow Springs. VMSI hired HSC Real Estate, Inc. to manage these apartments, and the two entered into a Management Agreement ("Agreement"). The Agreement contained several provisions for insurance and liability between the parties. VMSI was obliged to purchase insurance that named HSC as an additional insured on its policy and to hold HSC harmless and indemnify it for all acts except for HSC's negligence and intentionally wrongful conduct.

Dana Widrig, a resident at the Villas, was brutally raped and assaulted by one of HSC's employees, Cody Kloepper. Ms. Widrig sued both VMSI and HSC for damages. Her case was settled by Fireman's Fund Insurance Company, VMSI's insurer.

When Ms. Widrig filed her lawsuit, HSC sent a copy of the summons and complaint to VMSI and requested that VMSI forward it to Fireman's Fund. Initially, HSC's own insurance carrier, Chartis, retained Martens + Associates to defend HSC, and Fireman's retained Lee Smart, P.S., Inc. to defend VMSI. HSC was, however, named as an additional insured on VMSI's policy, and Fireman's Fund eventually retained Gordon Hauschild to represent HSC.

Fireman's Fund has agreed to reimburse Chartis for its expenses in employing Martens. However, HSC has pursued this action against VMSI under the indemnity provisions of the Agreement, insisting that even though all of the allegations were allegations of negligence, it is still entitled to indemnity directly from VMSI because there was "available insurance." HSC's argument makes no sense. The claim had originally included an allegation that HSC could determine post hoc whether VMSI had purchased adequate insurance coverage. Benton County Superior Court Judge Robert Swisher dismissed that claim on summary judgment prior to trial. Benton County Superior Court Judge Cameron Mitchell dismissed the indemnity claim after the case was settled, basing his decision on the language of the Agreement's indemnity clause. Only Judge Mitchell's decision is on appeal.

II. ASSIGNMENTS OF ERROR

Assignments of Error

VMSI, LLC assigns no error to the trial court's decision.

Issues Pertaining to Assignments of Error

1. Whether the superior court correctly held on summary judgment that HSC was not entitled to recover its costs and attorneys' fees from co-defendant VMSI under the indemnity provisions of their Management Agreement.

2. Whether the superior court acted within its sound discretion in denying HSC's motion for reconsideration?

3. Whether VMSI is entitled to its attorneys' fees under the Management Agreement.

III. STATEMENT OF THE CASE

A. The underlying facts.

The facts set out by HSC in §IV. A of its Brief are correct, except the assertion that HSC's cross-claim was "mandatory." App. Br. at 4.

B. HSC misstates the terms of the Management Agreement.

HSC's description of the Management Agreement in §IV.B. of its Brief is argumentative, and the last paragraph is not accurate. App. Br. at 6. The facts concerning the matters in the last paragraph are more accurately set out below:

Upon receiving the summons and complaint, HSC sent a copy to VMSI along with a letter with the following request:

> Please take special note of the last sentence in the paragraph which specifically states that regardless of Agent's conduct, Agent shall be indemnified to the extent available under insurance coverage. In accordance with the terms of the Agreement, HSC, as Agent for Property Owner, is submitting this lawsuit to Property Owner for handling and requests that you promptly forward to your insurance carrier.

CP 299-300. Chartis insured HSC. Chartis hired Martens + Associates to represent HSC. Fireman's Fund confirmed that HSC was an additional insured under VMSI's policy and that it was primary. Fireman's Fund appointed Gordon Hauschild as defense counsel and agreed to reimburse Chartis for reasonable and necessary fees and costs incurred by Chartis to defend HSC. CP 90-95, 389-94.

C. HSC misstates the facts concerning the motions for summary judgment.

Section IV.C. is misleading and inaccurate. App. Br. at 6-8. These facts are more accurately set out below.

Before trial, the court entered the following order:

> IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendant HSC Real Estate, Inc.'s Motion for Partial Summary Judgment on Cross-Claims Regarding Insurance, Defense, and Indemnity is hereby GRANTED as to the validity and enforceability of sections 10 and 11 of the Management Agreement between HSC Real Estate, Inc. and VMSI, LLC, but the remainder of the motion is DENIED; and defendant VMSI, LLC's Motion for Summary Judgment dismissal of HSC Real Estate, Inc.'s Cross-Claim Regarding Insurance, Defense, and Indemnity is hereby GRANTED insofar as HSC is barred from contesting the sufficiency of the dollar limits of the insurance policies obtained by VMSI, but is otherwise DENIED.

CP 52. Following settlement of the underlying tort claims, HSC renewed its motion for attorneys' fees against VMSI. CP 313-24. The trial court denied HSC's claim and awarded costs and reasonable attorneys' fees to

VMSI as the prevailing party under §20 of the Agreement. CP 396-98. The court denied HSC's motion for reconsideration. CP 415-17.

IV. SUMMARY OF ARGUMENT

The Management Agreement does not "unquestionably demonstrates" that VMSI must indemnify HSC for HSC's own wrongful conduct. To this end HSC misinterprets language intended to prevent an insurance company from claiming a release from its obligations and to ensure that HSC can only recover against insurance.

The balance of HSC's arguments was only presented to the Superior Court in its motion for reconsideration and should not be considered on appeal. Even if this Court considers these arguments, they lack merit. HSC had at least three insurance companies covering any loss to Ms. Widrig. If HSC must collect its losses from one or more of them, it is not being forced to choose a remedy. HSC's collateral source argument is likewise flawed, because this rule is neither applicable to ordinary contracts nor can it be fit into the facts of this case because VMSI is not the wrongdoer.

V. ARGUMENT

A. The standard of review for a motion for summary judgment is de novo and the standard of review for a motion for reconsideration is manifest abuse of discretion.

The proper standard of review for a motion for summary judgment is de novo. The proper standard of review for a motion for reconsideration is abuse of discretion.

> "Motions for reconsideration are addressed to the sound discretion of the trial court and a reviewing court will not reverse a trial court's ruling absent a showing of manifest abuse of discretion." *Wilcox v. Lexington Eye Inst.,* 130 Wn. App. 234, 241, 122 P.3d 729 (2005). An abuse of discretion exists only if no reasonable person would have taken the view the trial court adopted, the trial court applied the wrong legal standard, or it relied on unsupported facts. *Salas v. Hi–Tech Erectors,* 168 Wn. 2d 664, 668–69, 230 P.3d 583 (2010).

Fishburn v. Pierce Cny. Planning & Land Servs. Dep't., 161 Wn. App. 452, 472, 250 P.3d 146 (2011).

B. The court should not consider HSC "No Damage" and "Strangers to the Contract" Arguments because HSC failed to perfect those issues for appeal.

Those sections of HSC's brief that argue the "strangers to the contract" theory and the "no damages" theory are not properly before this court. App. Br. §§VI. B. & C., 17-28. These theories appeared only in HSC's motion for reconsideration and come too late.

> Wilcox claims she can raise new theories of law for the first time in a motion for reconsideration. Wilcox's reliance

> on *Reitz* [*v. Knight*, 62 Wn. App. 575, 814 P.2d 1212 (1991)] is misplaced. In *Reitz,* we held that a new theory based on the evidence presented in a nonjury bench trial could be raised for the first time in a motion for reconsideration. But here, the motion for reconsideration arguments were based on new legal theories with new and different citations to the record. Wilcox offers no explanation for why these arguments were not timely presented. CR 59 does not permit a plaintiff to propose new theories of the case that could have been raised before entry of an adverse decision.

Wilcox v. Lexington Eye Inst., 130 Wn. App. 234, 241, 122 P.3d 729 (2005). HSC ascribes the reasons for the superior court's ruling on these two issues to VMSI's arguments. App. Br. at 8, 11, 17. The superior court did nothing other than construe the language of §11 of the Management Agreement in ruling on the merits of HSC's claim. CP 417.

C. There are no mandatory cross-claims.

HSC finds it necessary to justify its bringing this action by claiming its cross-claims were "mandatory cross-claims." App. Br. §IV. A., at 4. Cross-claims are not mandatory. CR 13(g) is written in permissive language. "Under CR 13(g), the assertion of a cross-claim is permissive.[1]" *Krikava v. Webber*, 43 Wn. App. 217, 221, 716 P.2d 916 (1996). This is in keeping with HSC's claims that it had to bring this action against VMSI because if "mandatory contractual cross-claims are

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[1] CR 13(g) states, in part: "A pleading *may* state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action." (Italics ours.)

not brought, they are arguably waived." CP 336. This position is wholly untenable. HSC is bringing the wrong action against the wrong party for the wrong reasons.

D. VMSI did not breach the Indemnity Provisions of the Management Agreement.

1. HSC's contract interpretation violates the rules of logic.

The essence of HSC's contract interpretation argument is summed up in a single sentence: "So available insurance coverage ***was*** available and the duty to indemnify HSC even for its own negligence, if any, ***was*** triggered by 'available insurance coverage' provided in VMSI's insurance policy issued by Fireman's Fund." CP 44. If this were a true statement, then the contrapositive would be true: "There was no available insurance coverage and the duty to defend HSC was not triggered."[2] Neither of these statements makes the slightest sense. HSC's argument is not logically sound.

2. The cases upon which HSC relies are not applicable to this litigation.

This is a contract action by HSC against VMSI over their Management Agreement. In support of its various propositions, HSC cites

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[2] Take the statement, "*If an object is red, then it has color.*" The contrapositive is, "*If an object does not have color, then it is not red.*" This follows logically from the initial statement and, like it, it is true. *See Roe v. TeleTech Customer Care Mgmt. (Colorado) LLC*, 171 Wn. 2d 736, 257 P.3d 586 (2011) fn. 4.

cases involving tort claims intended to establish liability or liquidate the underlying claim. An example of this is reliance on *Arreygue v. Lutz*, 116, Wn. App. 938, 69 P.3. 881 (2003); App. Br. at 20. These cases are intended to bolster the argument that VMSI has an "obligation to indemnify HSC 'to the extent of available insurance coverage.'" App. Br. at 15. The trouble with analogizing this case with cases such as *Arreygue* is that liability has been determined and the claim liquidated. HSC is just not satisfied with the extent of Fireman's Fund's indemnity, and that issue must be resolved elsewhere. This dispute, if it is to be characterized as HSC desires, is really between Chartis and Fireman's Fund. They are the real parties in interest. CR 17. A more analogous situation occurred in *Broderick v. Puget Sound Traction, Light & Power Co.*, 86 Wash. 399, 150 P. 616 (1915). where Mary Broderick sued a street railroad for damage to her automobile. The vehicle was being returned to the Broadway Automobile Company, which stored the car for her, by one of Broadway's employees. Broadway and its insurer repaired the car. Mrs. Broderick was uninvolved other than she incurred $45.00 in transportation charges while her vehicle was being repaired. At the close of trial Judge Humphries offered to enter judgment for the $45.00, and, when this was refused, he dismissed the case. Our Supreme Court affirmed. The rationale was simple; Mrs. Broderick's obtaining a judgment against the

street railway would not be *res judicata* as to the Broadway Automobile Company.

If the real party in interest analogy is applied to this case, Fireman's Fund has liquidated and resolved the claim as to Widrig. What is not resolved is the question of what "available insurance" exists to satisfy HSC, Martens or Chartis' claim for Martens' fees. VMSI has no means by which it can audit Martens' claim or determine what insurance is available, and, even if it did, Fireman's Fund would not be obliged to pay, because it is not a party to this action or the indemnity agreement. Fireman's is an insurer and undertook the obligation to defend HSC; that is the extent of "available insurance." This issue cannot be resolved in this action. It is also a factual issue that precludes summary judgment for HSC.

3. The superior court correctly applied the rules of contract interpretation and construction to the Management Agreement.

The first sentence of §11 obliges VMSI to indemnify and hold HSC harmless, except for HSC's intentional or negligent acts. This exception from indemnity applies in this case because the only claims prior to trial were negligence. Ms. Widrig's claims were never for anything but negligence. CP 7. Words in a contract are given their ordinary meaning, and courts do not adopt a contract interpretation that

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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 his 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) (emphasis added).

Newport Yacht Basin Ass'n of Condo. Owners v. Supreme Nw., Inc., 168 Wn. App. 86, 285 P.2d 79 (2012). The Agreement contains a clear disclaimer of any duty to defend and indemnify for HSC's negligent or intentional conduct. It is HSC's burden to show that the Agreement "unquestionably demonstrates" VMSI was to indemnify HSC for its own wrongful conduct rather than an insurer.

A sentence-by-sentence review of §11 shows how the foregoing principles apply here.

Sentence 1:

> 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.

CP 62. 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.

Sentence 2:

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

"The Project" refers to the real property, the "Villas at Meadow Springs." CP 59. The sentence then announces it is the Property's duty, to "indemnify." This obligation omits any mention of VMSI, "release," "defend," and "save harmless."

Sentence 3:

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

As in the preceding sentence, 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. 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.

The phrase "to the extent of available insurance coverage" is commonly used where a direct claim is barred, but 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.*, *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, many courts, including Washington 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 deceased 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. 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. "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).

HSC argues that the rules of contract construction would be violated by VMSI's interpretation. App. Br. at 11-17. But it is VMSI's interpretation that comports with the contract construction rules. All the parts have meaning. The parts are not contradictory. VMSI's interpretation is consistent with the clearly express agreement that it need not indemnify HSC for its own wrongful conduct, and this is consistent with how Washington courts are prone to interpret such agreements.

E. HSC is not necessarily entitled to a remedy against VMSI.

HSC argues that the superior court limited its remedies to pursuing VMSI's insurer, App. Br. at 17-23, claiming the court relied on VMSI's arguments. HSC refers us to CP 283-85, *Id.* p. 17, which is VMSI's response to HSC's motion for partial summary judgment. VMSI's response does not suggest such a result.

There are a number of contractual relations involved. Most are contemplated by, if not directly the result of, the Management Agreement. Some are express; some are implied. A short list includes:

> (1) The Management Agreement, CP 59-64; (2) VMSI's Insurance Policy with Fireman's Fund, CP 389-90; (3) an endorsement to the policy making HSC an addition insured, *id.*; (4) an excess or umbrella policy from Chubb, CP 171; (5) an endorsement to the Chubb Policy making HSC an addition insured, *id.*; (6) HSC's Insurance Policy with Chartis, CP 389-90; (7) an agreement between Chartis employ Martens + Associates to represent HSC, CP 91; (8) an agreement between Fireman's Fund and Lee Smart to defend VMSI; (9) an agreement between Fireman's Fund and Gordon Hauschild to defend HSC, CP 66; (10) an agreement between VMSI to be represented by Lee Smart; (11) an agreement between HSC to be represented by Martens + Associates; (12) an agreement between HSC to be represented by Gordon Hauschild; and (13) an agreement between Chartis and Fireman's Fund over the primary assumption of defense, CP 389-94.

Chartis paid or is liable for Martens' fees if it hired Martens + Associates to defend HSC.[3] *See, e.g., Johnson v. Cont'l Cas. Co.*, 57 Wn. App. 359, 788 P.2d 598 (1990). Fireman's Fund agreed to pay HSC's defense costs.[4] CP 389-94. HSC fails to explain why the parties are litigating an issue having nothing to do with either VMSI or HSC, other than they both purchased insurance policies.

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[3] "The firm was retained by Andrew Handler of Chartis (now known as AIG) on or about November 3, 2011, to defend HSC and Riverstone in this case." CP 91.

[4] When Hauschild was employed to represent HSC, Martens was entitled to be paid at that time. RCW 2.44.020. This would have been a condition of substitution. HSC does not explain why this was not resolved.

HSC claims:

> Here, the trial court's ruling that HSC's sole remedy was against VMSI's insurers actually likely precludes a recovery of the insurance proceeds by HSC because one cannot garnish an insurance policy simply by asserting a third party claim against it.

App. Br. at 22. To the contrary, HSC has at least two insurance policies that provided defense in this case. Chartis hired Martens, and Fireman's hired Hauschild. Like the attorney hired by Continental in *Johnson, supra,* Martens and Hauschild were obliged to defend HSC. This fails to explain why HSC would need compensation from VMSI. If the usual contractual obligations were in play here, and Chartis hired Martens + Associates to defend HSC, Chartis would have been liable for those fees. *Johnson, supra.*[5]

HSC may have been obligated to pay its deductible under its policy from Chartis.

> In this case, this firm has not been paid for its work as the client would prefer to have VMSI cover the defense costs under the indemnity agreement and thus protect the client from an adverse claims ratio which would presumably raise its insurance costs. Here, HSC has a $10,000 deductible under its insurance policy which is applicable to both defense costs and any payment to the claimant.

[5] "[A]n insurer must . . . retain competent defense counsel for the insured." *Johnson,* 57 Wash. App. at 362.

CP 92. HSC is asking for more than $10,000, but this issue was settled by the trial court's order of October 26, holding, "HSC is barred from contesting the sufficiency of the dollar limits of the insurance policies obtained by VMS." CP 36. This order was not appealed. Under the Management Agreement, "any deductible required under such insurance policies shall be a Project expense." CP 62. HSC has a perfect right to repay itself the deductible from Project revenue. All of this has been tied up by the Agreement.

Mr. Martens' declaration shows that he repeatedly dealt with and billed Fireman's Fund for his services. CP 93-95. Whether Mr. Martens and Fireman's Fund satisfactorily resolved these discussions and claims is not relevant to the contractual obligation between HSC and VMSI, unless these claims are for an improper purpose.

The superior court did not abuse its discretion in denying HSC's motion for reconsideration based on its "strangers to the contract" theory.

F. HSC's "no damage" argument incorrectly mixes parties, and tort versus contract remedies.

HSC's "no damage" argument, App. Br. at 23-29, arises from a single paragraph in VMSI's Response to HSC's motion for summary judgment. "'It is settled law that indemnity actions accrue when the party seeking indemnity pays or is legally adjudged obligated to pay damages to

a third party.' *Cent. Washington Refrigeration, Inc. v. Barbee,* 133 Wn. 2d 509, 517, 946 P.2d 760 (1997)." CP 280. This section, CP 279-81, was part of an argument that factual issues precluded summary judgment for HSC. The "no damage" argument is something concocted by HSC. It appears only in its motion for reconsideration. CP 399-411.

Nonetheless, from this premise HSC digresses into a discussion of the collateral-source rule.

> 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. This collateral source rule holds true even if the benefits are payable to the plaintiff because of the defendant's actionable conduct. *See* D. Dobbs, *Remedies* 185 (1973).

Hayes v. Trulock, 51 Wn. App. 795, 803, 755 P.2d 830 (1988). The problem with applying this concept to these circumstances is that VMSI is not a tortfeasor or a contract breacher. The tortfeasor and contract breacher here is Cody Kloepper. Cody Kloepper committed the wrongful acts, not VMSI. It is true that HSC claims VMSI breached its agreement by not paying all HSC's costs, CP 13-15, but 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.

In *Alaska Pac. S. S. Co. v. Sperry Flour Co.*, 94 Wash. 227, 162 Pac. 26 (1917); Joseph Egan, an employee of the Alaska Pacific Steam Ship Company, was injured by a plank that was allegedly negligently fastened and furnished by the Sperry Flour Company. Alaska was liable to Egan for $4,479.10 for failing to provide a safe place to work. Alaska sued Sperry the actual wrongdoer. Sperry defended by pointing out that Alaska carried employer's liability insurance from a mutual insurance company and so Alaska had suffered no damage. Our Supreme Court, writing on a slate "untrammeled by former decisions," adopted the collateral-source rule. "Surely the liability of a wrongdoer cannot be increased or diminished by reason of the contract of insurance entered into between the insurer and insured, and which is of no concern to the wrongdoer; he in no way being a party to such contract." *Id.* at 229, 231. If we substitute HSC for Alaska (failed to provide a safe place), Ms. Widrig for Egan (the injured party), Kloepper for Sperry (the real wrongdoer), and Fireman's Fund for the mutual insurance company (settled the claim), VMSI does not fit into this picture. Only Kloepper would be subject to the collateral-source rule, never VMSI.

HSC's reliance on *McRory v. Northern Ins. Co.*, 138 Wn. 2d 550, 900 P.2 736 (1999), is misplaced. *McRory* is not a collateral source case;

it is a subrogation and *Olympic Steamship* case.[6] The precise issue was whether, if the excess insurer has paid "attorney fees in the declaratory judgment action" to compel the primary carrier to defend, the insurer may collect those fees back on behalf of the excess carrier. *Id.* at 551. The answer is yes. Put in the context of the parties in this case the question would be whether, if HSC sued Fireman's Fund to compel it to defend, could HSC recover the fees of bringing the action on behalf of Chartis which paid the fees? The answer is yes, but that is, of course, not the question before this court. Subrogation and collateral source cases invariably involve the plaintiff in a tort action, not a defendant.

A second reason, despite the dicta in *Hayes,* is that the collateral-source rule does not apply to ordinary contracts.

> We have found no authority to support the application of the collateral source rule in the contracts field. Authority is to the contrary.
>
> The policy rationales underlying the collateral source rule also do not support its application to contract cases.

United States v. City of Twin Falls, Idaho, 806 F.2d 862, 873-74 (9th Cir. 1986) (citations omitted). The Ninth Circuit's rationale is the Restatement (Second) of Contracts §374, which specifically permits such an offset in

[6] *Olympic S.S. Co. v. Continental Ins. Co.*, 117 Wn. 2d 37, 811 P.2d 673 (1991).

the contract situation. Washington has firmly adopted §347.[7] *Eastlake Const. Co., Inc. v. Hess*, 102 Wn. 2d 30, 686 P.2d 465, 473 (1984). No Washington case has ever applied the collateral source rule to a purely contractual dispute. HSC cites *Goodman v. Boeing Co.*, 75 Wn. App. 60, 877 P.2d 703 (1994) *aff'd,* 127 Wn. 2d 401, 899 P.2d 1265 (1995); and *Consol. Freightways v. Moore*, 38 Wn. 2d 427, 229 P.2d 882 (1951); for the proposition that the collateral source rule applies in contract cases, but in *Goodman* the court held "application of the collateral source rule here would violate the principle against double recovery," *Goodman*, 75 Wn. App. at 87 and *Consolidate* is a subrogation case with no mention of the collateral source rule.

HSC's argument suggests that Chartis has paid Marten's fees. App. Br. at 26. It has long been established in this state and elsewhere that when an excess insurer such as Chartis is required to pay its insured, it is subrogated to its claim against the primary insurer. *Millers Cas. Ins. Co., of Texas v. Briggs*, 100 Wn. 2d 9, 13, 665 P.2d 887 (1983). Clearly HSC or Chartis' claim is against Fireman's Fund, not VMSI.

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[7] Subject to the limitations stated in §§350-53, the injured party has a right to damages based on his expectation interest as measured by

> (a) the loss in the value to him of the other party's performance caused by its failure or deficiency, plus
> (b) any other loss, including incidental or consequential loss, caused by the breach, less
> (c) any cost or other loss that he has avoided by not having to perform.

HSC has legally and factually misapplied the collateral-source rule to VMSI and has not advanced a sound legal or factual argument to show that VMSI breached the Management Agreement or committed some tort towards HSC. The trial court did not abuse its discretion in denying reconsideration on HSC's "no damage" argument.

G. VMSI is entitled to reasonable attorneys' fees.

"Whether a party is entitled to attorney fees is an issue of law which is reviewed de novo." *Ethridge v. Hwang*, 105 Wn. App. 447, 460, 20 P.3d 958 (2001). Section 20 of the Management Agreement provides that the prevailing party is entitled to reasonable attorneys' fees.

> 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.

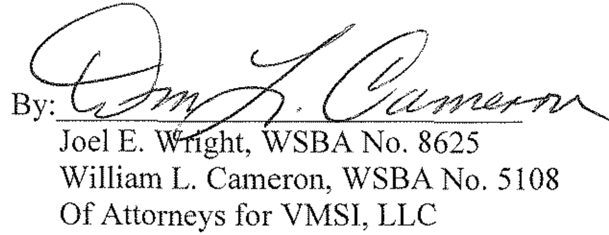
CP 64. VMSI has prevailed on its claims against HSC. "[A] prevailing party or substantially prevailing party is the one that receives judgment in its favor at the conclusion of the entire case." *Harmony at Madrona Park Owners Ass'n v. Madison Harmony Dev., Inc.*, 160 Wn. App. 728, 739-40, 253 P.3d 101 (2011). VMSI is entitled to recover its reasonable attorneys' fees on appeal.

VI. CONCLUSION

This court should affirm the decision of the Benton County Superior Court in its entirety. VMSI is entitled to its reasonable attorneys' fees on this appeal.

Respectfully submitted this 17th day of October, 2013.

LEE SMART, P.S., INC.



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DECLARATION OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington, that on October 17, 2013, I caused service of the foregoing pleading on each and every attorney of record herein:

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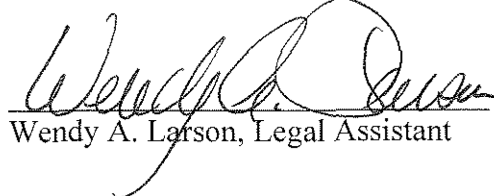

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