

65092-1

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No. 65092-1

COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

ENOS D. FERGUSON,

Appellant,

v.

INTERNATIONAL ALLIANCE OF THEATRICAL STAGE
EMPLOYEES, LOCAL 15, an international union,

Respondent,

THYSSENKRUPP SAFWAY, INC., fka SAFWAY SERVICES, INC., a
corporation,

Cross-Appellant/Respondents,

KING COUNTY, a governmental entity,

Cross-Respondent.

REPLY BRIEF OF RESPONDENT/CROSS-
APPELLANT THYSSENKRUPP SAFWAY, INC.

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I. INTRODUCTION

King County's authorized representative, David Sizemore, signed a Rental Quotation agreeing to rent scaffolding from Safway. The Rental Quotation plainly stated, directly above Sizemore's signature, that it was subject to the terms and conditions contained in the Safway Rental Agreement. The Rental Agreement plainly stated that King County was required to defend and indemnify Safway with respect to any claims arising out of the use of the scaffolding.

The County seeks to avoid its indemnity obligations by ignoring the language in the Rental Quotation. Contrary to the County's assertion, the requirements for incorporation by reference have been satisfied, and the indemnity provision in the Rental Agreement applies. The trial court erred in concluding otherwise.

Although the trial court did not reach these issues, King County argues that the indemnity provision should not be enforced because it is unconscionable and because its application is limited to circumstances involving the County's concurrent negligence. The indemnity provision at issue is a standard provision, contained in a two-page agreement, in type the same size as the other contract provisions. It clearly provides that Safway will be indemnified except when Safway is solely negligent; there

is no requirement that the County be deemed negligent before the duty to indemnify is triggered.

The trial court erred in refusing to enforce the indemnity provision in the Rental Agreement between King County and Safway, and its decision must therefore be reversed.

II. ARGUMENT

A. The terms of the Rental Agreement were incorporated by reference into the Rental Quotation.

1. Whether material is incorporated by reference presents a question of law subject to de novo review.

In its opening brief Safway explained that this Court independently determines whether the terms and conditions of the Rental Agreement, including the indemnity provision at issue here, are incorporated by reference.¹ King County suggests that the de novo standard of review applies only when the issue of incorporation by reference arises in a patent case.² In fact, as the case cited by the County for this proposition explains, “the doctrine of incorporation by reference has its roots in the law of wills and contracts,” and “[i]n those areas of jurisprudence, whether

¹ Brief of Respondent/Cross-Appellant Thyssenkrupp Safway, Inc. (“Safway Cross-Appeal Brief”) at 39.

² Brief of Cross-Respondent King County (“King County Response Brief”) at 16-17.

material is incorporated by reference presents a question of law.”³ Thus, de novo review is warranted whenever a court must decide whether material is incorporated by reference into a contract.

King County also incorrectly asserts that only the substantial evidence standard applies to the review of mixed questions of law and fact.⁴ Instead, a three-part analysis applies to such issues.⁵ The first step is to establish the relevant facts, which must be supported by substantial evidence.⁶ The Court must then determine the applicable law and apply that law to the facts.⁷ The final two steps—determining the relevant law and applying it to the facts—present questions of law subject to de novo review.⁸

In addition, the Washington courts have repeatedly recognized that the interpretation of a contract, such as the Rental Quotation in this case,

³ *Advanced Display Sys., Inc. v. Kent State Univ.*, 212 F.3d 1272, 1283 (Fed. Cir. 2000). King County also cites *Atlantic Mutual Insurance Co. v. Metron Engineering & Construction Co.*, 83 F.3d 897 (7th Cir. 1996), in which the court reversed a summary judgment holding that a document was incorporated by reference into a contract. The court ruled that an ambiguity existed regarding whether the parties to the contract intended incorporation by reference and then explained the resolution of an ambiguity presents a question of fact for the jury. *Id.* at 901. Inexplicably, the court did not address or apply the long-standing rule, cited above, that the specific issue of incorporation by reference presents a question of law.

⁴ King County Response Brief at 17.

⁵ *Erwin v. Cotter Health Ctrs.*, 161 Wn.2d 676, 687, 167 P.3d 1112 (2007).

⁶ *Erwin*, 161 Wn.2d at 687.

⁷ *Id.*

⁸ *Id.*

presents a question of law subject to de novo review.⁹ Contrary to King County's claim,¹⁰ this rule is not limited to cases where summary judgment may be appropriate.¹¹

Finally, King County asserts, incorrectly, that the interpretation of the Rental Quotation involves factual issues because more than one reasonable inference can be drawn from the extrinsic evidence considered by the trial court.¹² The extrinsic evidence offered in this case cannot alter the plain and unambiguous language of the Rental Quotation stating that it is subject to the terms and conditions of the Rental Agreement.¹³ Thus, as a matter of law, the Rental Agreement is incorporated into the Rental Quotation signed by King County's authorized agent, David Sizemore, and the indemnity provision contained in the rental agreement applies to require the County to indemnify Safway for defense costs incurred in this action.

⁹ See, e.g., *N.H. Indem. Co. v. Budget Rent-a-Car Sys., Inc.*, 148 Wn.2d 929, 933, 64 P.3d 1239 (2003) (interpretation of insurance contracts presents a question of law subject to de novo review); *Absher Constr. Co. v. Kent Sch. Dist. No. 415*, 77 Wn. App. 137, 141, 890 P.2d 1071 (1995) (interpretation of an unambiguous contract presents a question of law making summary judgment proper even if parties dispute legal effect of contract provisions).

¹⁰ King County Response Brief at 16.

¹¹ See, e.g., *Johnson v. Allstate Ins. Co.*, 126 Wn. App. 510, 515, 108 P.3d 1273 (2005) (court properly removed issue involving interpretation of contract from jury because court, not jury, decides questions of law).

¹² King County Response Brief at 17-18 (citing *Berg v. Hudesman*, 115 Wn.2d 657, 668, 801 P.2d 222 (1990)).

¹³ *Berg*, 115 Wn.2d at 669 (extrinsic evidence may not be used to add to, modify, or contradict the terms of a written agreement).

B. The parties mutually agreed to the terms and conditions contained in the Rental Agreement.

King County notes that an essential requirement of contract formation is mutual assent but does not explain why that element has not been satisfied here.¹⁴ Presumably the County is referring to whether Sizemore intended to agree to the terms contained in the Rental Agreement when he signed the Rental Quotation.

Washington has adopted the objective manifestation test for contracts.¹⁵ Thus, in order to form a contract, the parties must objectively manifest their mutual assent.¹⁶ A party's unexpressed subjective intent is irrelevant.¹⁷ Instead, the court will "impute an intention corresponding to the reasonable meaning of the words used."¹⁸

Although Sizemore testified that he believed the reference to the Rental Agreement in the Rental Quotation referred to the Rental Quotation itself and not to a separate document, he conceded that he did not communicate this belief to Safway. 5/5 RP at 68- 69. The Rental Quotation plainly states that it is subject to the terms and conditions of the

¹⁴ King County Response Brief at 20-21.

¹⁵ *Keystone Land & Dev. Co. v. Xerox Corp.*, 152 Wn.2d 171, 177, 94 P.3d 945 (2004).

¹⁶ *Keystone*, 152 Wn.2d at 177.

¹⁷ *Hearst Commc'ns v. Seattle Times Co.*, 154 Wn.2d 493, 503-04, 115 P.3d 262 (2005).

¹⁸ *Hearst*, 154 Wn.2d at 503.

Rental Agreement, and Sizemore's subjective belief to the contrary is of no consequence.

C. Safway clearly and unequivocally incorporated the terms and conditions of the Rental Agreement into the Rental Quotation.

King County asserts that the requirements for incorporation by reference are not satisfied here because (1) the identity of the agreement to be incorporated cannot be readily ascertained, (2) the terms of the Rental Quotation and Rental Agreement do not evidence an intent to incorporate the Rental Agreement by reference, and (3) any ambiguities regarding incorporation by reference must be construed against Safway.¹⁹ As explained below, none of these arguments is well-taken.

1. The identity of the Rental Agreement was readily ascertainable.

King County cites several Washington cases in support of its assertion that incorporation by reference is not warranted here because Safway did not provide a copy of the agreement to Sizemore with the Rental Quotation.²⁰ However, none of these cases imposes such a requirement. Instead, the Washington courts have expressly recognized

¹⁹ King County Response Brief at 23-35.

²⁰ *Id.* at 23-24.

that documents do *not* have to be attached in order to be incorporated by reference.²¹

Here, the undisputed evidence establishes that (1) Safway would have provided a copy of the Rental Agreement to Sizemore had he requested it, and (2) Safway provided copies of the Rental Agreement to King County on several prior occasions, including as recently as the month before the execution of the Rental Agreement at issue here. Exs. 100, 101; 5/5 RP at 31-35, 45-46. In addition, Safway provided copies of the Rental Agreement to King County when Sizemore rented scaffolding on behalf of the County in 2003 and 2004.²² Ex. 102; 5/5 RP at 23-24. The terms and conditions of the Rental Agreement are identical in each case. *Compare* Ex. 115 *with* Exs. 100, 101, 102. The County thus had ample opportunity to familiarize itself with the terms of that agreement. Under these circumstances, the County should not be permitted to avoid its contractual obligations by claiming that neither Sizemore nor anyone

²¹ *W. Wash. Corp. of Seventh-Day Adventists v. Ferrellgas, Inc.*, 102 Wn. App. 488, 498-99, 7 P.3d 861 (2000). King County argues that Safway has abandoned its assignments of error to portions of Findings of Fact Nos. 53 and 54. King County Response Brief at 26-27. However, Safway expressly asserted that, contrary to these Findings of Fact, the Rental Quotation specifically referenced, and thereby incorporated, the terms of the Rental Agreement. Safway Cross-Appeal Brief at 43.

²² Some of Safway's records before 2005 are missing, and a copy of the 2004 Rental Agreement has not been located. 5/5 RP at 23-24. However, there is no reason to believe Safway did not issue such an agreement, in accordance with its standard business practices. *See* 5/5 RP at 26.

else with an appropriate level of authority read the terms of the Rental Agreement.²³

King County also contends it is not clear whether the Rental Quotation refers to the Rental Agreement or another document, including the Rental Quotation itself.²⁴ The Rental Quotation states that it is subject to the terms of “the SAFWAY rental/sales agreement.” Ex. 110b. This cannot reasonably be construed to refer to the Rental Quotation itself, as King County suggests. The Rental Quotation is plainly labeled as such; nothing on the document states or implies that it is a “rental/sales agreement.” And it does not make sense that an agreement would state that it is subject to its own terms and conditions, and even less so by referring to itself by a different name.

Nor can the reference to the Rental Agreement reasonably be construed to refer to some indefinite, unidentified, future agreement. The Rental Quotation states that it is subject to the terms of “*the*” Safway “rental/sales agreement,” a document Safway had provided to King County in the past and a copy of which Safway provided to King County the next day. Clearly, the Rental Quotation referenced an existing document.

²³ See *Alexander & Alexander, Inc. v. Wohlman*, 19 Wn. App. 670, 679-80, 578 P.2d 530 (1978) (party cannot escape liability under a contract by claiming he did not read it or was ignorant of its contents).

²⁴ King County Response Brief at 28.

Under these circumstances, the reference to the Rental Agreement in the Rental Quotation is sufficiently definite that its identity can reasonably be ascertained. Incorporation of the terms of the Rental Agreement into the Rental Quotation is therefore appropriate.

2. Neither the terms of the Rental Quotation nor the terms of the Rental Agreement preclude incorporation by reference.

King County argues that the terms of the Rental Quotation and Rental Agreement establish that the parties did not intend to incorporate the Rental Agreement into the Rental Quotation. Specifically, the County argues that the relevant language in the quotation actually constitutes a “condition precedent,” that the Rental Agreement’s integration clause precludes incorporation by reference, and that the terms in the Rental Agreement are not the type to be incorporated by reference. None of these arguments should succeed.

a. Execution of the Rental Agreement was not a condition precedent to Safway’s performance.

King County argues that the language of the Rental Quotation incorporating the Rental Agreement by reference actually constitutes a condition precedent to performance.²⁵ “‘Conditions precedent’ are ‘those facts and events, occurring subsequently to the making of a valid contract, that must exist or occur before there is a right to immediate performance,

²⁵ *Id.* at 29-31.

before there is a breach of contract duty, before the usual judicial remedies are available.”²⁶ Conditions precedent usually are created by such phrases as “on condition,” “provided that,” or “so that.”²⁷ Where it is not clear whether the parties intended to create a promise or a condition precedent, the language will be interpreted as creating a promise.²⁸

This Court’s decision in *Coast Trading Co. v. Parmac, Inc.*,²⁹ is instructive regarding the meaning of the language of the Rental Quotation. In that case, the defendant provided a quotation to the plaintiff’s agent for the purchase of storage tanks. The Court explained that this quotation constituted an offer to purchase on the terms and conditions set forth in the quotation.³⁰ Thus, where the quotation form stated that offers to purchase were made in accordance with the company’s standard terms and conditions, those terms and conditions were necessarily incorporated into the offer and, upon acceptance, became part of the contract in the absence of further negotiations.³¹

In this case, the Rental Quotation states that it is subject to the terms and conditions of the Rental Agreement. This language does not

²⁶ *Tacoma Northpark, LLC v. Nw., LLC*, 123 Wn. App. 73, 79, 96 P.3d 454 (2004) (quoting *Ross v. Harding*, 64 Wn.2d 231, 236, 391 P.2d 526 (1964)).

²⁷ *Tacoma Northpark*, 123 Wn. App. at 80.

²⁸ *Id.*

²⁹ 21 Wn. App. 896, 587 P.2d 1071 (1978).

³⁰ *Coast Trading*, 21 Wn. App. at 907.

³¹ *Id.* (citing *A. Belanger & Sons, Inc. v. United States*, 275 F.2d 372 (1st Cir. 1960)).

provide, as King County suggests, that Safway's performance will be conditioned upon the execution of the Rental Agreement. Instead, as this Court explained in *Coast Trading*, the Rental Quotation constitutes an offer to purchase subject to the terms and conditions stated in the quotation, including the terms and conditions of the Rental Agreement. Sizemore's signature on the Rental Quotation constitutes an acceptance of that offer, in accordance with the terms proposed by Safway, including the terms and conditions of the Rental Agreement incorporated by reference.

b. The existence of an integration clause in the Rental Agreement does not preclude incorporation by reference.

Nor do the terms of the Rental Agreement preclude incorporation by reference. King County asserts that, because the Rental Agreement contains an integration clause, it cannot be incorporated by reference into the Rental Quotation.³² However, as this Court has expressly recognized, where it is apparent that the parties did not intend a writing to be a complete expression of the terms of their agreement, an integration clause will not be given effect.³³

In this case, even the most cursory review of the transaction between Safway and King County establishes that the integration clause

³² King County Response Brief at 33.

³³ *Equitable Life Leasing Corp. v. Cedarbrook, Inc.*, 52 Wn. App. 497, 505, 761 P.2d 77 (1988).

cannot be given the effect the County suggests. While the provision states that “[t]his Agreement” and the Safety Guidelines provided by Safway comprise the entire contract between the parties, the Rental Quotation also must be deemed to be part of the agreement between Safway and King County. The cornerstone of contract interpretation is determining the parties’ intent.³⁴ In this case, it cannot be disputed that the parties intended both the Rental Agreement *and* the Rental Quotation to comprise their agreement because only the Rental Quotation set forth the price to be paid by King County.

c. The nature of the provisions to be incorporated by reference is irrelevant.

The trial court found that the Rental Agreement was not incorporated by reference because the terms contained in that agreement “are of a kind that would normally be expected to be contained in a rental agreement and not incorporated into a rental quotation.” CP 1775. Whether or not this is true, it is immaterial. Under Washington law, whether contractual provisions will be incorporated by reference depends upon whether those provisions “have a reasonably clear and ascertainable

³⁴ *Renfro v. Kaur*, 156 Wn. App. 655, 663, 235 P.3d 800 (2010).

meaning.”³⁵ There are no limitations as to the type of terms that may be incorporated, as long as the reference to those terms is clear.

3. The Rental Quotation unambiguously incorporates the terms and conditions of the Rental Agreement.

As discussed above, the alternative interpretations of the Rental Quotation suggested by King County are not reasonable and therefore do not suffice to create an ambiguity.³⁶ Even if the Court concluded the incorporation language in the Rental Quotation is ambiguous, this does not, as King County asserts, mean the language must automatically be construed against Safway. Instead, rules of construction, such as the rule that ambiguities in a contract should be construed against the drafter, apply only when the parties’ intent cannot be determined by other means.³⁷ Here, the circumstances surrounding the execution of the agreement between Safway and King County, including their prior course of dealing, support the conclusion that the parties understood and intended that the Rental Agreement would form part of the bargain between them. In particular, as discussed above, Safway had rented equipment to King County on several previous occasions and, on each occasion, had provided

³⁵ *Ferrellgas*, 102 Wn. App. at 494.

³⁶ See *Certain Underwriters at Lloyd's, London v. Valiant Ins. Co.*, 155 Wn. App. 469, 477, 229 P.3d 930 (2010) (contract will be deemed ambiguous only if susceptible to two or more reasonable interpretations).

³⁷ *Scott Galvanizing, Inc. v. Nw. Enviroservices, Inc.*, 120 Wn.2d 573, 584, 844 P.2d 428 (1993).

a copy of the Rental Agreement to the County. The fact that the County's employees did not familiarize themselves with the terms contained in that agreement does not, as the County claims, preclude enforcement of the agreement.

D. King County ratified the contract with Safway.

As explained in Safway's opening brief, the trial court's determination that Sizemore had authority to enter into the indemnity provision in the Rental Agreement renders a determination as to whether the County ratified Sizemore's acts unnecessary. However, Safway raised the ratification issue in its opening brief in the event King County challenged the trial court's finding regarding Sizemore's authority. King County did not do so, and it is thus immaterial whether the County ratified Sizemore's actions.³⁸

In any event, King County ratified the contract with Safway by accepting and paying for the scaffolding. The County asserts ratification is appropriate only if the principal acts with full knowledge of the material facts.³⁹ This is not the law in Washington. "For a principal to be charged with the unauthorized act of his agent by ratification, it must act with full knowledge of the facts *or* accept the benefits of the acts *or* intentionally

³⁸ See *Stroud v. Beck*, 49 Wn. App. 279, 286, 742 P.2d 735 (1987) (principal may be charged with unauthorized acts of agent by ratifying those acts).

³⁹ King County Response Brief at 36.

assume the obligation imposed without inquiry.”⁴⁰ Here, it is undisputed that King County accepted the benefits of its contract with Safway—i.e., the rental of the scaffolding from Safway. Thereafter, King County intentionally assumed the obligations imposed by the contract—i.e., paying for the scaffolding—without, apparently, inquiring as to the scope of those obligations, as referenced in the Rental Quotation and set forth in the Rental Agreement.

King County also erroneously asserts that its payment does not constitute ratification because it has not disputed the obligation to pay for the rental of the scaffolding.⁴¹ The County adds that, under these circumstances, its payment “does not prove agreement to new terms.”⁴² This argument misses the point. The terms of the Rental Agreement are not “new.” As explained above, they form a part of the parties’ agreement because they are incorporated by reference into the Rental Quotation signed by Sizemore.⁴³ Thus, even if Sizemore had lacked authority to sign the Rental Quotation on behalf of King County, the County’s payment

⁴⁰ *Stroud*, 40 Wn. App. at 286 (emphasis added), cited in *Riss v. Angel*, 131 Wn.2d 612, 636, 934 P.2d 669 (1997).

⁴¹ King County Response Brief at 36.

⁴² *Id.*

⁴³ And the terms of the Rental Agreement are contained in the same document signed by King County employee Eric Butler. The County asserts that Butler made a deliberate decision not to sign the agreement on the line provided because he did not have authority to enter into the agreement on behalf of King County. King County Response Brief at 9. In fact, Butler testified he did not sign in the space provided because he did not see it. 5/5 RP at 120.

constitutes ratification of that document together with the terms and conditions of the Rental Agreement incorporated by reference.

E. The indemnity provision is clearly spelled out and is not procedurally or substantively unconscionable.

In the trial court, King County argued the indemnity provision in the Rental Agreement could not be enforced because it was not clearly spelled out and was unconscionable. CP 1850-51. The court did not rule on these arguments, but King County raises them on appeal as alternative grounds for affirming the trial court's decision.

1. The indemnity provision is clearly spelled out.

King County asserts that the indemnity provision is unenforceable because it was hidden in fine print and does not clearly state that the County may be obligated to indemnify Safway for Safway's own negligence.⁴⁴ The indemnity provision at issue here is set forth on the back of a two-page agreement, in type that is the same size as the other provisions contained in the agreement. The provision states:

9. Indemnification. The CUSTOMER agrees to fully protect, defend, indemnify and hold harmless the COMPANY from all actions, suits, proceedings, claims, costs, damages, liens, liabilities and expenses, including reasonable attorneys' fees, which may be brought or made against COMPANY which in any way arise out of, or by reason of, or are claimed to arise out of or by reason of the manufacture, ownership, installation, maintenance, sale, disposition, use or misuse of the EQUIPMENT hereunder,

⁴⁴ King County Response Brief at 37-38.

excepting only such actions, claims, costs, damages, liabilities and expenses resulting from the sole negligence of the COMPANY. The intent hereof is that the CUSTOMER shall fully indemnify and hold harmless the COMPANY to the maximum extent allowable by law. CUSTOMER agrees and understands that the furnishing of services and/or EQUIPMENT by COMPANY pursuant to this Agreement is good, valuable and valid consideration for Customer's indemnity obligations arising under this Agreement. CUSTOMER waives any and all rights it may have to immunity from an action, claim or suit for recovery or contribution by COMPANY which arise out of any law, statute, rule or regulation.

The indemnity provision clearly and unambiguously states that King County must indemnify Safway with respect to any claims or actions arising out of the scaffolding except those arising out of Safway's sole negligence. In fact, it is similar to a provision in the Special Use Permit issued to Lakeside by King County. That provision states:

TLG [Lakeside] expressly agrees to protect, defend, indemnify and hold harmless King County, its elected and appointed officials, employees, and agents from and against liability for any claims (including all demands, suits, and judgments) for damages arising out of injury to persons or damage to property where such injury or damage is caused by, arises out of, or is incident to the scope of activities under this Permit, except for where the injury to persons or damage to property is deemed the sole negligence of the County. . . .

Ex. 129. In each case, the indemnity provision broadly requires the indemnitor to indemnify the indemnitee with respect to all claims except those arising out of the indemnitee's sole negligence.

It is not physically possible for Safway to emphasize *every* provision of the contract. As discussed below, some provisions—such as warranty provisions—must be given emphasis. If Safway were to emphasize every provision, however, it would thereby emphasize none. All terms of the contract apply, and there is no basis for the County to argue that Safway cannot enforce the indemnity provision on the ground that the provision was not emphasized.

The fact that Safway did not include a copy of the Rental Agreement with the Rental Quotation does not, as King County asserts, mean the indemnity provision was not “clearly spelled out.”⁴⁵ The Rental Quotation expressly stated, directly above Sizemore’s signature, that it was subject to the terms and conditions of the Rental Agreement. Those terms and conditions included the indemnity provision at issue here. Safway would have readily provided a copy of the Rental Agreement to Sizemore had he asked to see it and, in fact, had provided numerous copies of the Rental Agreement to King County on previous occasions. 5/5 RP at 45-46; Exs. 100, 101, 102. The fact that Sizemore elected to sign the Rental Quotation without reviewing all of the applicable terms and conditions does not render those terms and conditions unenforceable on the ground that they were not “clearly spelled out.”

⁴⁵ See *id.* at 38.

2. The indemnity provision is not procedurally unconscionable.

Procedural unconscionability relates to impropriety during the negotiation of a contract and has been defined as “blatant unfairness in the bargaining process and a lack of meaningful choice.”⁴⁶ In determining whether procedural unconscionability exists, a court should consider all of the circumstances surrounding the transaction, including the manner in which the contract was entered, whether the parties had a reasonable opportunity to understand the terms of the contract, and whether the important terms were hidden in a maze of fine print.⁴⁷ The ultimate issue to be resolved is whether a meaningful choice existed.⁴⁸

In this case, there can be no dispute that King County had a meaningful choice with respect to the decision to rent scaffolding from Safway. First, Safway was not the only source of scaffolding available to King County. 5/5 RP at 22-23. Sizemore testified that he used Safway because that was the company Lakeside had used in the past; he knew he could rent from other scaffolding vendors. *Id.* at 88.

Second, as discussed above, King County had a reasonable opportunity to review the terms of the Rental Agreement, including the

⁴⁶ *Torgerson v. One Lincoln Tower, LLC*, 166 Wn.2d 510, 518, 210 P.3d 318 (2009).

⁴⁷ *Zuver v. Airtouch Commc 'ns, Inc.*, 153 Wn.2d 293, 304, 103 P.3d 753 (2004).

⁴⁸ *Zuver*, 153 Wn.2d at 303.

indemnity provision, despite the fact that it was not attached to the Rental Quotation. Sizemore could have asked to see a copy of the Rental Agreement or reviewed any of the numerous copies previously provided to the County.

Third, the indemnity language was not hidden in a maze of fine print. The provision was set forth on the back of a two-page document, in type that was the same size as the other provisions of the agreement, and was prefaced by a heading, in bold, entitled “Indemnification.”

King County had a meaningful choice with respect to both the decision to rent scaffolding from Safway and the decision to enter into the agreement subject to the terms set forth in the Rental Agreement. The County’s assertion that the agreement is procedurally unconscionable must therefore be rejected.

3. The indemnity provision is not substantively unconscionable.

An agreement is substantively unconscionable only if it is one-sided or overly harsh.⁴⁹ An agreement must be “shocking to the conscience,” “monstrously harsh,” or “exceedingly calloused” to be deemed unconscionable.⁵⁰ A unilateral provision in an agreement is

⁴⁹ *Id.*

⁵⁰ *Id.*

substantively unconscionable only if it is “so ‘one-sided’ and ‘overly harsh’ as to render it unconscionable.”⁵¹

King County claims the indemnity provision in the Rental Agreement is substantively unconscionable because it violates RCW 62A.2A-210, which requires exclusion of implied warranties to be conspicuous. However, the indemnity provision has nothing to do with warranties; this topic is addressed in a completely separate provision.

Paragraph 8, directly above the indemnity provision, states:

8. Warranties. COMPANY MAKES NO WARRANTIES WITH RESPECT TO THE EQUIPMENT EITHER EXPRESS OR IMPLIED AND MAKES NO WARRANTY OF MERCHANTABILITY OR FITNESS FOR ANY PARTICULAR USE.

RCW 62A.2A-210 simply does not apply to the indemnity provision, and that provision cannot be deemed unconscionable on this basis.⁵²

In short, the provision at issue here is a standard indemnity provision that indemnifies Safway with respect to damages arising out of the scaffolding except where those damages are caused by Safway’s sole negligence. In light of the fact that the Washington courts have recognized that parties may go so far as to agree that an indemnitee will be

⁵¹ *Satomi Owners Ass’n v. Satomi, LLC*, 167 Wn.2d 781, 815, 225 P.3d 213 (2009) (quoting *Zuver*, 153 Wn.2d at 319 n. 18).

⁵² Although not relevant to the issue before the Court, it is worth noting that Paragraph 8 fully complies with the requirements of RCW 62A.2A-210.

indemnified for its sole negligence,⁵³ King County's assertion that the indemnity provision in this case should be characterized as unconscionable must be summarily rejected. The indemnity provision does not "shock the conscience," nor can it be described as "monstrously harsh" or "exceedingly calloused." King County's assertion that the indemnity provision is substantively unconscionable should be summarily rejected.

F. The indemnity provision applies regardless of King County's concurrent negligence.

King County argues that, because the trial court ruled that Safway could not allocate fault to the County, the indemnity provision is unenforceable.⁵⁴ This argument ignores the plain language of the agreement as well as the fact that the Washington courts have long preferred to "enforce indemnity agreements as executed by the parties."⁵⁵

⁵³ See, e.g., *Stocker v. Shell Oil Co.*, 105 Wn.2d 546, 549, 716 P.2d 306 (1986); *Nw. Airlines v. Hughes Air Corp.*, 104 Wn.2d 152, 702 P.2d 1192 (1985).

⁵⁴ King County Response Brief at 42. The County fails to note that Safway has challenged this ruling in its response to Ferguson's appeal. See Safway Cross-Appeal Brief at 29-39. Safway explained that the trial court erred in ruling that, as a matter of law, King County did not retain sufficient control over the jobsite to be held liable. *Id.* In his reply, Ferguson summarily asserts that the County did not retain the right of control but does not refute the evidence to the contrary submitted by Safway. Appellant's Reply Brief at 24. At a minimum, Safway has established the existence of questions of fact with respect to this issue requiring reversal of the trial court's summary judgment ruling.

⁵⁵ See *McDowell v. Austin Co.*, 105 Wn.2d 48, 53, 710 P.2d 192 (1985) (citations omitted).

In *Northwest Airlines v. Hughes Air Corp.*,⁵⁶ our supreme court recognized the general rule in Washington and other states that a party may agree to indemnification against his own negligence unless prohibited by statute or public policy.⁵⁷ The court added, “The Washington courts have repeatedly held that it is not against public policy for parties to enter into indemnity agreements in commercial leases whereby one party contractually agrees to indemnify, to be financially responsible for, the other party’s negligence.”⁵⁸ In fact, a provision indemnifying a party for his sole negligence is enforceable, as long as the parties’ intent is clear.⁵⁹

In this case, the indemnity provision in the Rental Agreement plainly requires King County to indemnify Safway except in cases involving Safway’s sole negligence. The provision is not prohibited by statute or public policy and must be enforced as written to require the County to indemnify Safway for the expenses incurred in defending against Ferguson’s claims.

Following the trial on Ferguson’s claims against Safway, the jury found that Safway was negligent but that its negligence did not proximately cause Ferguson’s injuries. Instead, as the evidence at trial established, Ferguson fell from the scaffolding because his coworker, John

⁵⁶ 104 Wn.2d 152, 702 P.2d 1192 (1985).

⁵⁷ *Nw. Airlines*, 104 Wn.2d at 154.

⁵⁸ *Id.* (citations omitted).

⁵⁹ *Id.*

Poulson, failed to tighten a bolt. 1/21 RP at 362, 1/26 RP at 758; 1/27 RP at 832, 838. Thus, the jury found that Ferguson's injuries were not caused by Safway's negligence at all, let alone by Safway's sole negligence. The plain and unambiguous language of the indemnity provision therefore obligates King County to indemnify Safway for expenses incurred in defending against Ferguson's claims.

Moreover, even if King County were correct that the indemnity provision required concurrent negligence as between Safway and King County, the County is not relieved of its obligation to indemnify Safway for its defense costs. The indemnity provision required King County to both defend and indemnify Safway. As this Court has explained, the duty to defend and the duty to indemnify arise at different times and are triggered by different events.⁶⁰ Only the duty to defend is at issue here, and the existence of that duty "is determined by the facts known at the time of the tender of defense,"⁶¹ not by a subsequent judicial determination regarding liability. At the time Safway tendered defense of this action to King County, the County was a named defendant, alleged by Ferguson to be negligent. *See* CP 1451. According to Ferguson, the County "supplied and installed the unsafe scaffolding, ladder and other

⁶⁰ *Knipschild v. C-J Recreation, Inc.*, 74 Wn. App. 212, 215-16, 872 P.2d 1102 (1994).

⁶¹ *Knipschild*, 74 Wn. App. at 216.

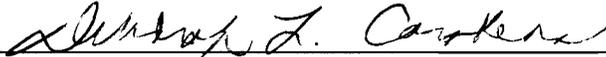
equipment for the spot tower” Similarly, Ferguson’s Claim for Damages filed with the County asserts, “King County and its agents supplied and negligently installed the subject ladder from which claimant fell and had the right and duty to maintain and control the premises where the incident occurred.” CP 548. Because the facts known to the parties at the time Safway tendered its defense demonstrated that King County would be held liable to Ferguson, King County was “concurrently negligent” in accord with its interpretation of the indemnity provision.

III. CONCLUSION

For the reasons set forth above, Safway respectfully requests that the judgment dismissing Safway’s claims against King County be REVERSED.

DATED: February 16, 2011.

BULLIVANT HOUSER BAILEY PC

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CERTIFICATE OF SERVICE

The undersigned certifies that on this 16th day of February, 2011, I

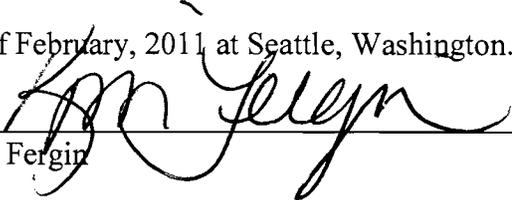
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I declare under penalty of perjury under the laws of the state of
Washington this 16th day of February, 2011, at Seattle, Washington.



Kim Fergin

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