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No. 70433-8-I

COURT OF APPEALS,  
DIVISION I OF THE STATE OF WASHINGTON

FILED  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
2014 MAR 20 PM 3:01

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SEAWAY PROPERTIES, LLC,

Appellant,

v.

CIAO BELLA FOODS, LLC,

Respondent.

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**REPLY BRIEF OF APPELLANT SEAWAY PROPERTIES, LLC**

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## I. INTRODUCTION

Ciao Bella's brief ("Resp. Br.") is a thinly veiled attempt to dispute facts on appeal that it never disputed in the trial court nor cross-appealed here. It now asserts for the first time that the lease agreement, particularly the defense and indemnity provisions of Section 23.2, are "confusing" and "ambiguous" and should, therefore, be construed against Seaway as the supposed drafter – directly contrary to the lease's express terms (Ex. 5, §32). None of those issues are properly before this Court on appeal. The bulk of the rest of Ciao Bella's arguments rely on half-truths and plain misstatements of fact and law in its attempts to support the trial court's findings of fact and conclusions of law challenged on Seaway's appeal. Ciao Bella's unsupported arguments should be rejected for the following reasons:

*First*, Ciao Bella states that "for reasons unknown" Helen Heuer did not name "co-Tenant" Ola Salon when she sued both Ciao Bella and Seaway after her fall just outside the entrance to Ciao Bella's restaurant, Café Revo. The reasons are not "unknown," nor was Ola Salon a "co-Tenant." As the trial court found in findings of fact that have not been appealed, the common area where Ms. Heuer fell was modified and used

exclusively by Ciao Bella, and not Ola Salon, which rented an entirely separate space in another wing of the building. They were no more “co-tenants” than two people renting separate apartments in the same apartment complex. And Ms. Heuer who had a lunch reservation with Ciao Bella, as a business invitee of Ciao Bella and not Ola Salon, obviously and correctly concluded that Ola Salon had no responsibility for the area where she fell immediately adjacent to the entrance to Café Revo. Ms. Heuer was not having her hair styled. She was simply going to lunch.

**Second**, Ciao Bella repeatedly asserts on appeal that the testimony of Seaway’s owner, Dahli Strayer, “introduced ambiguity” into the contract regarding the contractual indemnity provision in Section 23.2. This ignores well-settled Washington law that extrinsic evidence cannot introduce “ambiguity” into an otherwise unambiguous written contract or lease. Tellingly, Ciao Bella does not identify any specific words, phrases or terms in the contract that it contends are ambiguous. Instead, Ciao Bella simply avoids discussing the real issues raised by this appeal.

**Third**, Ciao Bella repeatedly raises strawman arguments to suggest Seaway would claim a right to indemnity for anything happening on the property caused by anyone, including trespassers. This is simply false and is completely divorced from the actual terms of the indemnity provisions of Section 23.2 of the lease.

**Fourth**, Ciao Bella failed to cross-appeal, but nevertheless disputes, findings of the trial court (“erroneous, in Ciao Bella’s view”) concerning defense fees and costs the trial court found to be incurred by Seaway. Because unappealed findings are verities on appeal, Ciao Bella should not be allowed to argue against findings and conclusions it failed to identify or cross-appeal.

**Fifth**, Ciao Bella confuses the issues regarding insurance. The issue at trial was whether Ciao Bella was required under Section 10 of the parties’ lease contract to specifically “name” Seaway as an additional insured, i.e., an additional named insured on the policy issued to Ciao Bella by Fireman’s Fund Insurance Company. The trial court concluded the contract so required and Ciao Bella breached Section 10. Ciao Bella did not appeal those findings and conclusions. The only issue concerning the insurance requirements in Section 10 of the lease properly before this Court on appeal is whether Seaway waived Ciao Bella’s breach by looking at and commenting on a certificate of insurance.

## **II. ARGUMENT**

Ciao Bella’s arguments range far and wide and seem designed to avoid discussion or analysis of the specific findings of fact and conclusions of law at issue on Seaway’s appeal. They are – to paraphrase William Shakespeare in *Macbeth* – a tale full of sound and fury, signifying

nothing. Instead meeting the issues head on, Ciao Bella addresses them only indirectly with regard to other issues. Nevertheless, the fact remains the only issues properly before this Court on the present appeal are one finding of fact and four conclusions of law: i.e., the trial court's Finding of Fact No. 32 and Conclusion of Law Nos. 9, 13, 14, and 15. Seaway replies to Ciao Bella's rhetoric, confusion, and obfuscation as follows.

**A. The Lease Provisions in Section 23.2 Are Clear and Unambiguous.**

Ciao Bella argues, citing none of the particular trial court rulings at issue, that the "trial court was presented with conflicting testimony about the intent of the parties regarding the scope of the tenant's duty to defend, indemnify and hold harmless." Resp. Br. p. 6. As is apparent from the discussion that follows in Ciao Bella's brief, Ciao Bella's basic premise is that regardless of how the trial court interpreted or construed the lease, its conclusion was allowed because of its "ambiguity". And, further, the trial court's effort to resolve the "ambiguities" in the lease justifies its rulings in each of the appealed conclusions of law, thereby entitling those conclusions to some measure of "deference" by this Court. *See* Resp. Br., pp. 6-20. But one cannot create ambiguity in a contract where none exists through the introduction of extrinsic evidence. Significantly, Ciao Bella fails to identify *any* ambiguity in the specific words or terms at issue.

And, more to the point, conclusions of law are always reviewed de novo, regardless of characterization.

Contrary to Ciao Bella's argument that testimony of Seaway's owner, Dahli Strayer, "introduces ambiguity" into the interpretation of the contract, it is well-settled that "[t]he intent of the parties in an unambiguous contract is to be determined from language of the contract itself." *Barnett v. Buchan Baking Co.*, 45 Wn. App. 152, 159, 724 P.2d 1077 (1986), citing *Lynch v. Carroll*, 24 Wn. App. 667, 670, 604 P.2d 510 (1979). "If the language is clear and unambiguous, the court must enforce the contract as written; it may not modify the contract or create ambiguity where none exists." *Lehrer v. State Dept. of Social and Health Services*, 101 Wn. App. 509, 516-17, 5 P.3d 722 (2000), citing *McDonald v. State Farm Fire & Cas. Co.*, 119 Wn.2d 724, 733, 837 P.2d 1000 (1992). Ms. Strayer's testimony is extrinsic evidence, which is admissible only "to determine the meaning of *specific words and terms used*" and not to "show an intention independent of the instrument" or to "vary, contradict, or modify the written word." *Hearst Comm., Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503, 115 P.3d 262 (2005) (emphasis original), quoting *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 695-96, 974 P.2d 836 (1999).

Here, Ciao Bella identifies **no** "*specific words or terms*" it alleges are ambiguous. *Hearst Comm.*, 154 Wn.2d at 503 (emphasis original).

Rather, Ciao Bella's reliance on Ms. Strayer's testimony is an improper attempt to inject "ambiguity" into the indemnity provision where none exists given the specific words and terms used. Seaway's brief argued only that, *if* the intent of the parties was ambiguous, Ms. Strayer was the only party to offer any testimony as to intent. *See* App. Br., p. 28. But Seaway has always maintained, and continues to maintain, that the words and terms used are not ambiguous. *See id.* ("Seaway believes that Section 23.2 is clear and unambiguous . . ."). Therefore, they may be both interpreted and construed as a matter of law. *See Barnett*, 45 Wn. App. at 159 ("Interpretation of an unambiguous contract is a question of law."), *citing In re Estates of Wahl*, 99 Wn.2d 828, 831, 664 P.2d 1250 (1983).

Given this, the trial court's evaluation of the lease language in determining the intent of the parties is not – contrary to Ciao Bella's argument – entitled to any "deference" whatsoever. Resp. Br., p. 8. In this case, both the interpretation and construction of the unambiguous indemnify provision in the lease are issues of law subject to de novo review in this Court. *See Barnett*, 45 Wn. App. at 159.

- B. Seaway's Construction of the Lease Agreement is Not "Overly Broad."**
  - 1. Ciao Bella fails to distinguish binding Washington Supreme Court authority construing similar indemnity agreements.**

Pertinent to Conclusion of Law Nos. 13 & 14, Ciao Bella initially argues that Seaway’s construction of the indemnity provision of the lease is “unreasonably broad,” relying – like the trial court – on the early case of *Jones v. Strom Construction*. Resp. Br. pp. 5-6, citing *Jones v. Strom Constr. Co., Inc.*, 84 Wn.2d 518, 521, 527 P.2d 115 (1974). But Ciao Bella pays scant attention to the authorities cited by Seaway in its opening brief, arguing in a single paragraph in a separate part of its brief that the written lease language at issue in *Northwest Airlines* is “far different” from the indemnity provision at issue in this case. See Resp. Br., p. 18, citing *Northwest Airlines v. Hughes Air Corp.*, 104 Wn.2d 152, 702 P.2d 1192 (1985). But language not being identical word for word does not equate to being materially different. And Ciao Bella fails to even allege that there is any material difference between the “arising . . . by reason of the condition or use of the Premises” language in this case and the “arising out of or in connection with the use and occupancy of the premises” language at issue in *Northwest Airlines*, relying instead on a conclusory argument that they are simply different. See *id.* Ciao Bella never even mentions the *Snohomish County* case cited and discussed in Seaway’s opening brief. See *Snohomish County Publ. Transp. Benefit Area Corp. v. FirstGroup America, Inc.*, 173 Wn.2d 829, 835, 271 P.3d 850 (2012). And that case is the Washington State Supreme Court’s latest survey and holding on

written indemnification agreements.

The fact remains that in both the *Northwest Airlines* and *Snohomish County* cases relied on by Seaway the language in the indemnify provisions at issue – as in the Seaway lease – required no culpable conduct on the part of the indemnitor in order to trigger the duty to defend, indemnify, and hold the indemnitee harmless. So the language at issue was *not* materially different from the language at issue here. Ciao Bella's brief, being conspicuously silent on this point, implicitly concedes the validity of Seaway's argument by failing to address or distinguish it.

In sum, Ciao Bella offers this Court nothing in support of the trial court's ruling in Conclusion of Law No. 13 that Section 23.2 does not apply because Ms. Heuer's unfortunate accident did not arise from any action, inaction, or negligence of Ciao Bella, nor the trial court's Conclusion of Law No. 14 that Ms. Heuer's alleged injury did not arise by reason of the "use of the premises" by Ciao Bella. Accordingly, Seaway's argument concerning the trial court's errors in Conclusion of Law Nos. 13 and 14 is essentially un rebutted, and this Court should reverse consistent with the decisions in both *Snohomish County* and, in particular, *Northwest Airlines*.

**2. The Court should reject Ciao Bella's strawman arguments regarding the Lease Agreement.**

A strawman argument Ciao Bella raises in various forms throughout its brief is that it would be in some sense “unreasonable” to construe the indemnity provision as proposed by Seaway because that would make Ciao Bella responsible for the actions of “anyone else on the property” (Resp. Br., p. 6), or triggered by “the subjective intent of a stranger” (*Id.*, p. 10), and a lengthy discussion of how “[a]nyone could have been on the property, for any number of reasons” including “cutting across the property to go elsewhere” or parking on the property, “due to convenience or lack of parking elsewhere, etc., intending to walk to another business entirely” (*Id.*, pp. 11-12) (emphasis original), or a “mischief-maker.” Resp. Br., p. 16. Of course, Seaway argued nothing of the kind. And hypotheticals were not part of the litigation.

The fatal flaw in all of this is that none of those fictitious interlopers are actually listed in the indemnity provision of Section 23.2 as people or entities whose actions, inactions, negligence, or willful misconduct would trigger Ciao Bella’s obligations to Seaway under Section 23.2. *See* Ex. 5, §23.2. None of the hypothetical interlopers would be on the property because of Ciao Bella’s “use of the Premises” as a restaurant and none would be “customers or invitees” of Ciao Bella. *See id.* So nothing in Section 23.2 even arguably makes Ciao Bella responsible for the actions, inactions, negligence, or willful misconduct of

what are essentially trespassers on the property, nor has Seaway ever argued such a construction of Section 23.2. *See id.*

Ciao Bella's strawman arguments are simply a diversion from the established facts that Ms. Heuer was a customer or invitee of Ciao Bella and only Ciao Bella, and was on the property at the time of her fall only because of Ciao Bella's use of the Premises for the operation of Café Revo, where Ms. Heuer had a reservation and was expected for lunch. *See* CP 31, FF 35-38. She was not a "stranger," she was not "cutting across the property" to go elsewhere, or there as "a mischief-maker," and she certainly was not a trespasser. In short, she was one of the categories of people enumerated in Section 23.2 (an invitee of Ciao Bella) whose actions, inactions, or negligence resulted in a claim being asserted against Seaway, triggering Ciao Bella's duty to defend, indemnify, and hold Seaway harmless under Section 23.2 of the lease. *See* Ex. 5, §23.2.

**3. Ciao Bella's repeated attempts to disclaim any responsibility for the Common Areas under the lease should be rejected.**

Similarly, Ciao Bella seeks to narrow its scope of responsibility under Section 23.2 of the lease by repeatedly referring to the Common Areas – particularly the common area where Ms. Heuer fell – as "parts of the property not leased to Ciao Bella" and stating affirmatively that "Ciao Bella is not responsible for the common areas." Resp. Br. pp. 6 & 8; see

*also id*, pp. 2 & 7. But Ciao Bella's bare assertions are not supported by the express terms of the lease itself or plain common sense.

First, the only material difference between the "Premises" under the lease and the "Common Areas" under the lease is that Ciao Bella's rights in the "Premises" were exclusive of any other tenants, while rights in the Common Areas were not exclusive. *See* Ex. 5, §§1.1 & 8. But all exclusive and non-exclusive rights in both areas were provided for in the lease and subject to the terms of the lease. *See id.* Ciao Bella's rights in the Common Areas existed only in the lease, including the right for its customers and invitees to use the parking lot and walkways. *See id.*

Second, Ciao Bella expressly agreed in numerous provisions of the lease that it was, in fact, responsible for common areas of the property, not the least in Section 23.2, which clearly refers to accidents or occurrences "on or to the Premises, Building, or Common Areas." Ex. 5, §23.2; *see also id.*, §§5.3, 5.5.1, 5.5.3, 5.5.8, 5.5.9, 8, 11.1, 16.3.1, 20, 30.1.1, and 30.2.1. So by the express and unambiguous terms of Section 23.2, Ciao Bella is, at least in certain circumstances, responsible for the Common Areas under the lease. *See id.*

C. **Ciao Bella Confuses Interpretation of a Contract with Its Construction.**

Ciao Bella's arguments reflect a consistent misapprehension of the

distinction between determination of the meaning of the specific words and terms used in the contract, i.e., interpretation, with construing the legal effect of the language used, i.e., construction. This is apparently in an effort to broadly categorize the trial court's rulings as determinations of intent, which, depending upon the existence of any ambiguity, may be a question of fact, a question of law, or a mixed question of fact and law. *See Barnett*, 45 Wn. App. at 159 ("Interpretation of an unambiguous contract is a question of law."), citing *In re Estates of Wahl*, 99 Wn.2d 828, 831, 664 P.2d 1250 (1983); *see also, Lawson v. State*, 107 Wn.2d 444, 462, 730 P.2d 1308 (1986) ("when extrinsic evidence is considered, interpretation of a [contract] becomes a mixed question of fact and law; the question of intent, however, is a factual one."). If Ciao Bella's conflation of the two were successful, this would presumably result in greater deference to the trial court as the trier of fact in a bench trial because, in the event of ambiguous intent, the trier of fact's determinations of the credibility of the witnesses and their intent would be virtually unassailable. But that is not the situation here.

In this case, the trial court's errors in its Conclusions of Law Nos. 13, 14, and 15 regarding the indemnity provisions of Section 23.2 of the lease are all errors in how the trial court construed the legal effect of the written provisions at issue. Each of them are subject to de novo review

without deference to the trial court. *See, e.g., State v. Rowe*, 93 Wn.2d 277, 280, 609 P.2d 1348 (1980), *citing Angelus v. Government Pers. Life Ins. Co.*, 51 Wn.2d 691, 692, 321 P.2d 545 (1958).

In Conclusion of Law No. 13, the trial court included two findings, which are not disputed, followed by its legal conclusion: “Accordingly, the second portion of Section 23.2 is inapplicable.” As Seaway argued in its opening brief, this is a legal error not supported by the findings of fact.

Similarly in Conclusion of Law No. 14, the trial court included several findings of fact, which are largely undisputed, and the question of law: “whether the accident causing injury was by reason of the use of the Premises. It was not.” Again, this conclusion is the result of the trial court, first, finding that the “use of the Premises” meant use by Ciao Bella rather than its customers or business invitees, then construing the legal effect of the words used: “by reason of the condition or use of the Premises . . .” to apply only to culpable conduct by Ciao Bella, not its “mere presence” at the location. CP 35, CL 14. Thus, this, too, was a legal error which did not depend on any extrinsic evidence.

Finally, with regard to Conclusion of Law No. 15, the trial court’s attempt to glean the intent of the parties solely from the words used improperly skewed the indemnity provision to apply *only* to personal injury claims brought by employees of Ciao Bella. *Cf. MacLean*

*Townhomes v. America 1<sup>st</sup> Roofing*, 133 Wn.App. 828, 138 P.3d 155 (2006) ( Indemnity agreements are not limited to tort situations). Thus, this last conclusion of law concerns a pure question of law to which no deference is required on review.

Nevertheless, *Ciao Bella* concludes its discussion of the indemnity provision thus: “The Court of Appeals should not substitute its judgment for that of the trial court as to how best to construe the Lease in light of the conflicting testimony and evidence.” Resp. Br., p. 20. But the testimony and (other) evidence are there to support the trial court’s findings of fact, while this Court looks to the findings of fact to support the conclusions of law. Fundamentally, it is not this Court’s function to go beyond the unappealed findings of fact and the lease itself in Exhibit 5 to determine the legal effect of Section 23.2 of the lease. Its construction is a matter of law. Indeed it is a pure question of law to which this Court properly accords the trier of fact no deference. That is the meaning of *de novo* review.

In sum, *Ciao Bella*’s liberal re-characterization of the trial court’s rulings as almost exclusively involving interpretation, rather than construction, of the contract simply muddies the analytical waters, which is only made worse by *Ciao Bella*’s repeated incantation that the trial court’s rulings are entitled to “deference” on review. None of the rulings

challenged by Seaway was a discretionary ruling or relied upon the trial court's evaluation of the credibility of any witness at trial. Therefore, the challenged rulings in this case are subject to de novo review only.

*Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 879-80, 73 P.2d 369 (2003).

**D. Ciao Bella Fails to Demonstrate that the Unappealed Findings of Fact and Conclusions of Law Support Conclusion of Law Nos. 13, 14, and 15 Regarding Indemnity.**

The defense, indemnity, and hold harmless provision is found in Section 23.2 of the Lease Agreement. *See* Ex. 5. Section 23.2 that Ciao Bella will :

“indemnify, defend, and hold Landlord . . . harmless from each and every loss, cost, damage and expense, including reasonable attorneys’ fees and court costs, arising out of any accident or other occurrence on or to the Premises, Building or Common Areas, causing injury to or death of persons or damage to property, whether real or personal, **by reason of the condition or use of the Premises, or arising out of any action, inaction, negligence** or willful misconduct **by Tenant . . . or any agents, vendors, **customers or invitees of Tenant,**** excepting only for such loss, cost, damage and expense resulting from the gross negligence or willful misconduct of the Landlord . . .”

Ex. 5 §23.2 (underlining and bold added). As the trial court analyzed this

provision, it had two parts, which for illustrative purposes can be separated as follows:

indemnify, defend, and hold Landlord . . .  
harmless from each and every loss, cost,  
damage and expense, including reasonable  
attorneys' fees and court costs, arising out of  
any accident or other occurrence on or to the  
Premises, Building or Common Areas,  
causing injury to or death of persons or  
damage to property, whether real or  
personal,

(a) by reason of the condition or use of the  
Premises, or

(b) arising out of any action, inaction,  
negligence or willful misconduct by Tenant .  
. . or any agents, vendors, customers or  
invitees of Tenant. . .

*See id.* This was at least logical and consistent with the structure of the paragraph at issue, and, so as not to confuse the analysis done by the trial court, this is the way Seaway analyzed these provisions in its opening brief.

Nevertheless, Ciao Bella comes up with an entirely different analytical framework, breaking the paragraph down as follows:

indemnify, defend, and hold Landlord . . .  
harmless from each and every loss, cost,  
damage and expense, including reasonable  
attorneys' fees and court costs,

(a) arising out of any accident or other  
occurrence on or to the Premises, Building

or Common Areas, causing injury to or death of persons or damage to property, whether real or personal, by reason of the condition or use of the Premises, or

(b) arising out of any action, inaction, negligence or willful misconduct by Tenant . . . or any agents, vendors, customers or invitees of Tenant, . . .

*See Resp. Br.*, pp. 9-10.<sup>1</sup> While interesting, Ciao Bella never proposed or argued this analytical framework to the trial court. Even if it had, it does not change anything except to drop the geographical limitation on the area in which enumerated conduct triggers the duty to defend, indemnify, and hold harmless. So, the reconfigured “(b)” subpart applies not just to the Premises, Building or Common Areas, but also to areas beyond the property subject to the lease.<sup>2</sup> It does not materially alter the analysis of whether the trial court erred in Conclusion of Law No. 13 by failing to consider whether the claims against Seaway arose from “any action, inaction, [or] negligence by . . . customers or invitees of Tenant” to trigger Ciao Bella’s contractual duty to defend, indemnify, and hold Seaway

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<sup>1</sup>Ciao Bella later proposes another version, breaking the paragraph down into subparts (1), (2)(a), and 2(b), but this version is heavily re-written and fails to accurately quote the language at issue. *See id.*, p. 13, *compare with* Ex. 5. Therefore, Seaway has not attempted an analysis of this fictitious lease provision, and neither should the Court.

<sup>2</sup>This makes sense in the context of a customer of Ciao Bella leaving the restaurant drunk and causing an accident some distance away. If Seaway were sued as a result of the accident, it reasonably would expect Ciao Bella to defend, indemnify, and hold Seaway harmless from the claim regardless of where the accident occurred.

harmless from Ms. Heuer's claims.

As previously argued by Seaway in its opening brief, the fundamental error of Conclusion of Law 13 is the trial court's conclusion that, because "Ms. Heuer's injury arose from her own actions," Ciao Bella's duties to Seaway under Section 23.2 were not triggered. CP 35, CL 13. But the full obligation even under Ciao Bella's framework is not limited to whether the claims asserted by Ms. Heuer against Seaway resulted from "any action, inaction, [or] negligence . . . by Tenant," but also whether they arose from "any action, inaction, [or] negligence . . . by . . . customers or *invitees* of Tenant." Ex. 5, §23.2 (emphasis added).

Elsewhere, in findings that were not appealed, the trial court found that Ms. Heuer *was* an invitee of Ciao Bella, i.e., of "Tenant," and her injuries were the result of her own deliberate acts. *See* CP 31-32, FF 41 & 43; *see also, id.*, FF 35-40. Because the appealed portion of Conclusion of Law No. 13 is clearly inconsistent with the unappealed findings of fact and omits material language in Section 23.2 of the lease, it is legally erroneous, failing to give effect to all the language in the contract. *See, e.g., Snohomish County Publ. Transp. Benefit Area Corp. v. FirstGroup America, Inc.*, 173 Wn.2d 829, 836, 271 P.3d 850 (2012) ("an interpretation of a contract that gives effect to all its provisions is favored over an interpretation that renders a provision ineffective, and a court

should not disregard language that the parties have used.”), *citing Wagner v. Wagner*, 95 Wn.2d 94, 101, 621 P.2d 1279 (1980).

Finally, with regard to Conclusion of Law No. 15, in which the trial court construed Section 23.2 as applicable *only* to claims cognizable under Title 51, the workers compensation statute, Ciao Bella argues that the trial court “cannot be faulted for applying the capitalized portion of section 23.2 as it did, based on the plain meaning of ‘the foregoing indemnity,’” arguing, yet again, that the provision was ambiguous and that the court did so only after “two days of testimony and argument, and after obviously giving careful consideration to the evidence.” Resp. Br., p. 20. Respectfully, this is nonsense, and a rather pathetic attempt to shield the trial court’s ruling from de novo review. But, as the trial court said itself, the parties never argued the issue, which the trial court raised and decided *sua sponte*. CP 36, CL 15. Once again, this is a pure issue of law, construing the legal effect of the unambiguous words used in the document. For the reasons argued in Seaway’s opening brief, Conclusion of Law No. 15 is legally erroneous and should be reversed.

**E. Ciao Bella Improperly Argues Against Findings of Fact and Conclusions of Law It Failed to Appeal Regarding Insurance.**

Ciao Bella devotes only a relatively short final section of its brief to Seaway’s appeal of Finding of Fact No. 32 and Conclusion of Law No.

9, in which the trial court first “found” that Seaway reviewed all the pertinent portions of the insurance policy issued by Fireman’s Fund to Ciao Bella and then “concluded” that Seaway’s reliance on a separate certificate of insurance provided by Ciao Bella constituted an “acceptance” of non-insured status on Ciao Bella’s commercial general liability policy, and waiver of Ciao Bella’s breach of Section 10 of the lease. Resp. Br., pp. 20-23. Ciao Bella relies, not on the evidence of record or any legal authority, but on bare argument to support the trial court’s rulings. *See id.* Argument is no substitute for substantial evidence in the record or legal authority to support the trial court’s conclusion of waiver.

First, Ciao Bella baldly asserts that “Seaway was not a named insured, but was nonetheless an additional insured.” Resp. Br. p. 20. This is contrary to the unappealed findings of the trial court. *See* CP 29, FF 25-29. In fact, the trial court did *not* determine whether or not Seaway was an additional insured, finding that Exhibit 11 was only an unauthenticated “sample” endorsement which, were it authentic, “at most, might be construed to confer status as an unnamed additional insured.” CP 29, FF 27-28. Ciao Bella did not appeal any of these findings, which are verities on appeal. *See, e.g., In re Estate of Lint*, 135 Wn.2d 518, 532-33, 957 P.2d 755 (1998); *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

Neither did Ciao Bella appeal the trial court’s findings that the

contract required Ciao Bella to “name” Seaway as additional insured on its policy, that Fireman’s Fund has taken the position that Seaway is neither named as additional insured on the policy nor entitled to status as an additional insured, and that Seaway had incurred damages in defending the Heuer claims. CP 28-29, FF 24-25; CP 32-33, FF 49, 52, & 53.

Nevertheless, Ciao Bella improperly argues on appeal that “there is no significant difference between a named insured and an additional insured” and that any breach was “a technical breach only, and resulted in no damages to Seaway.” Resp. Br., pp. 20 & 21; *but see* CP 33, FF 52-53.

All this despite the unappealed findings that Fireman’s Fund defended and indemnified Ciao Bella, but not Seaway. *See* CP 32, FF 49-50.

Ciao Bella also resorts to at least misleading, if not false, representations of fact, asserting that “[t]he trial court also found that Seaway reviewed the policy and pointed out at least one discrepancy, which was fixed. Resp. Br., p. 21, *citing* FF 32. First, this misrepresents the finding that the discrepancy was found in a separate document, the certificate of insurance, not the policy. *See* CP 30, FF 32. Second, Finding of Fact No. 32 as to the statement “Seaway did review the terms of the policy” is the one finding in this case that has been appealed by Seaway as not supported by substantial evidence – or indeed any evidence. So Ciao Bella simply citing the challenged finding as proof of the

proposition asserted is no answer to Seaway's challenge to the sufficiency of the evidence in the record to support it. Ciao Bella's argument is circular, nothing more and nothing less.

The fact is, the only evidence relied upon by the trial court in support of Finding of Fact No. 32 was that Seaway manager Todd Crooks reviewed the certificate of insurance and caught a typographical error in the certificate. From this the trial court made the illogical leap to infer Mr. Crooks had reviewed the entire insurance policy, which is a completely different document. *See* CP 30, FF 32. This is not substantial evidence, i.e., "a quantum of evidence sufficient to persuade a rational fair-minded person the premise is true." *Dickie*, 149 Wn.2d at 879, *citing Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000). Rather, Mr. Crook's review of the certificate of insurance actually supports Seaway's position that when the certificate of insurance indicates that Seaway is an additional insured on the policy, Mr. Crooks, who the trial court found was, like Seaway's owner, Dahli Strayer, unsophisticated in insurance matters, had no reason to then review the policy. *See* CP 24, FF 4.

In any event, there is simply no evidence whatsoever in the record indicating that either Mr. Crooks or Ms. Strayer reviewed the actual insurance policy, let alone that either of them recognized from such a

review that Seaway had not been named on the policy as an additional insured as required by Section 10 of the lease. So there is an abject lack of substantial evidence supporting the trial court's finding that "Seaway did review the terms of the policy." CP 30, FF 32.

This finding also is inconsistent with the following finding that "Seaway, like Ciao Bella, believed that the insurance policy obtained by Ciao Bella complied with Section 10 [of the lease]." CP 30, FF 33. Finding of Fact No. 33 has not been appealed and, since it is a verity on appeal, Seaway simply cannot have effected a knowing and intentional waiver of Ciao Bella's breach of Section 10 of the lease when it had no idea of the breach until after it was sued by Ms. Heuer and its tender was denied by the insurance company issuing the policy, Fireman's Fund. *See 224 Westlake, LLC v. Engstrom Properties, LLC*, 169 Wn. App. 700, 714, 281 P.3d 693 (2012) ("Where there is 'no evidence whatever' that a party had knowledge of the facts of a violation until after litigation began, there is no waiver."), *quoting Ross v. Harding*, 64 Wn.2d 231, 240, 391 P.2d 526 (1964).

Finally, Ciao Bella's arguments concerning coverage under the insurance policy are improper. *See Resp. Br.*, pp. 3-4. For one thing, the party to be bound on the insurance contract, Fireman's Fund, is not a party here. Second, the endorsement referenced by Ciao Bella was never

determined by the trial court to be a part of the policy. *See* CP 29, FF 26-28. Third, and most importantly, the issue on appeal, as before the trial court, was not what coverage was provided to the insured under the policy issued to Ciao Bella, but whether Seaway waived Ciao Bella's breach of failing to name Seaway as an additional insured on the policy.<sup>3</sup>

In sum, Ciao Bella points this Court to no substantial evidence in the record supporting the trial court's Finding of Fact No. 32 that "Seaway reviewed the terms of the policy," and that is the only finding that even arguably provides any support for the trial court's conclusion in Conclusion of Law No. 9 that Seaway waived Ciao Bella's breach, although an additional finding that Seaway was aware of the breach prior to the litigation also would be necessary.

Accordingly, this Court should reverse both Finding of Fact No. 32 and Conclusion of Law No. 9.

### **III. CONCLUSION**

Seaway's opening brief detailed the reasons both factual and legal why this Court should reverse the appealed trial court rulings. Conversely, Ciao Bella's brief offers little in defense of those rulings, instead relying

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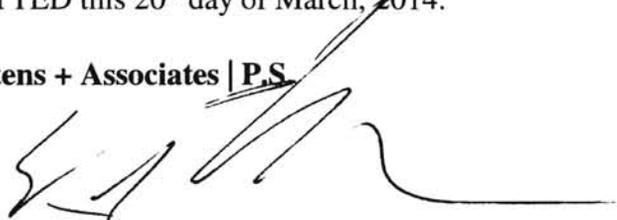
<sup>3</sup> If coverage were relevant, the trial court found that Fireman's Fund defending and indemnified Ciao Bella under the terms of the policy. So, apparently Ciao Bella had coverage and there is no reason to believe that, absent Ciao Bella's failure to name Seaway as required under the lease, Fireman's Fund would have defended and indemnified Seaway, as well.

on obfuscation and misdirection concerning specious assertions of ambiguity without actually identifying any such ambiguity in the parties' contract to argue that this Court should affirm. That is simply no basis to affirm what are, on the merits, clearly erroneous rulings.

Accordingly, this Court should reverse the trial court's Finding of Fact No. 32 and Conclusion of Law Nos. 9, 13, 14, and 15, and direct the trial court on remand to enter judgment of liability for Seaway.

RESPECTFULLY SUBMITTED this 20<sup>th</sup> day of March, 2014.

**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 clerk and a copy delivered on behalf of Appellant Seaway Properties, LLC, directed to the following counsel:

**Counsel for Respondent**

**Ciao Bella Foods, LLC.**

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- U.S. Mail
- Hand Delivery (ABC Legal)
- Facsimile
- Overnight Delivery
- E-mail with Recipient's Approval

By forwarding said documents via ABC Legal Messenger as indicated above on this date.

SIGNED THIS 20<sup>th</sup> day of March, 2014, in Seattle, Washington.

By



Matthew Morgan

Paralegal for Martens + Associates | P.S.