

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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No. 38160-5-II

**COURT OF APPEALS
STATE OF WASHINGTON**

BENEVOLENT & PROTECTIVE ORDER OF
ELKS OF THE UNITED STATES, INC.,
a foreign corporation

Plaintiff/Appellant,

v.

LARRY and JANE DOE ZIEGLER, a marital community,

Defendant/Respondent.

**REPLY BRIEF OF APPELLANT
BENEVOLENT & PROTECTIVE ORDER OF
ELKS OF THE UNITED STATES, INC.**

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BENEVOLENT & PROTECTIVE ORDER OF
ELKS OF THE UNITED STATES, INC.

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I.

ASSIGNMENTS OF ERROR

The trial court below erred as a matter of law in dismissing appellants', BENEVOLENT & PROTECTIVE ORDER OF ELKS OF THE UNITED STATES, INC., contractual indemnity claim against respondents, LARRY and JANE DOE ZIEGLER, because the trial court erroneously concluded the relevant indemnity provisions in a commercial lease: (1) only applied to third party claims: (2) were inconsistent with the parties' insurance obligations under the lease; and (3) were ambiguous and must therefore be strictly construed against appellant.

II. STATEMENT OF THE CASE

A. Factual Background.

The respondents, LARRY and JANE DOE ZIEGLER (hereinafter referred to as the "tenant"), do not substantially dispute the uncontroverted facts set out in paragraphs one through four of section II of appellant's, BENEVOLENT &

PROTECTIVE ORDER OF ELKS OF THE UNITED STATES, INC. (hereinafter referred to as the "landlord"), amended opening brief.

The tenant does claim it does not agree with the landlord that the record contains evidence of a cause or source of ignition for the fire at issue in this appeal. The tenant boldly claims, at page 4 of its brief, "[The landlord] cannot identify any place in the record that supports its assertion on page 3 of its Brief that 'the source of ignition for the fire was identified as one of several electrical components...found in the area of origin.'" In reply, the landlord believes it most certainly can. And, the tenant was kind enough to highlight this point in its very own brief at page three.

At this point, the landlord believes it is very important for this Court to take note of the tenant's liberal use of the ellipsis (...) throughout its brief. As will be demonstrated below, whenever the tenant confronts an inconvenient truth it does not wish to acknowledge, it employs the dreaded ellipsis to ignore the truth.

As correctly noted by the tenant in its brief at page 4, the landlord set out at page 15 of its amended opening brief that the fire was started by one of several office appliances that were owned and being operated by the tenant in the tenant's space at the time of the fire. The landlord cited CP 119 for this proposition. The tenant then claims, "However, this citation refers to the Port of Angeles Fire Department Report that stated that 'The cause of the fire is undetermined...!' (Emphasis added)."

If this Court turns to CP 119, under the section entitled, Investigative Conclusion, the second full paragraph, first *complete* sentence reads:

The cause of the fire is undetermined, *however it is most likely the result of an electrical fault in one of the electrical components found at the area of origin.* (Emphasis added)

The italicized portion of the sentence quoted from above was conveniently removed by the tenant in its brief at page 4 by employing the dreaded ellipsis. As this Court can see, when the full text of the Port Angeles Fire Department's report is reviewed

and acknowledged to exist, as tenant did at the top of page three of its brief, it is readily apparent the Port Angeles Fire Department concluded the fire was started by one of several office appliances that were owned and being operated by the tenant in the tenant's space at the time of the fire.

The tenant multiplies its misrepresentation of the record on appeal by claiming at page 4 of its brief that the landlord's fire expert, Michael Fitz, at CP 60, directly contradicts the Port Angeles Fire Department's conclusion that the fire was started by one of several office appliances that were owned and being operated by the tenant in the tenant's space at the time of the fire. Again, if this Court turns to CP 60, at paragraph 7 of Mr. Fitz's supplemental declaration, he states:

7. Based on completing the tasks and reviewing the materials set out in paragraph 7 of my original declaration, it is still my opinion that the fire at the Port Angeles Elks started inside the portion of the Port Angeles Elks on the ground floor occupied by defendant, Larry Ziegler doing business as Camera Corner, 135 East First Street, Port Angeles, Washington. The fire most probably originated in the northwest corner of

the space occupied by Camera Corner in an office area next to the refrigerator.

Paragraphs 7 and 8(a) - (b) of Mr. Fitz's original declaration filed in opposition to the tenant's motion for summary judgment stated [CP 107-108]:

7. During the course of my investigation into the origin and cause of the fire on December 9, 2003 that damaged the Port Angeles Elks, I performed the following tasks:

- Reviewed the fire investigation report and photographs taken of the fire scene by James Hart, a private fire investigator, who personally inspected and examined the fire scene at the Port Angeles Elks on December 15, 2003 on behalf of the Port Angeles Elks.
- Reviewed the fire investigation report and photographs taken of the fire scene by Kenneth Dubuc of the Port Angeles Fire Department who inspected and examined the fire scene at the Port Angeles Elks on December 15, 2003.
- Personally inspected at the offices of Case Forensics various pieces of electrical wiring, power cords, receptacles and appliances

retrieved from the fire scene by Case Forensics who had been hired by Camera Corner to investigate the origin and cause of this fire. By agreement with the Port Angeles Fire Department and the Port Angeles Elks, all of the physical evidence retrieved from the fire scene was supposed to be taken into the custody of Case Forensics.

8. Based on completing the tasks and reviewing the materials set out in paragraph 7, I have arrived at the following opinions and conclusions:

a. The fire at the Port Angeles Elks on December 9, 2003 started inside the portion of the Port Angeles Elks on the ground floor occupied by defendant, Larry Ziegler doing business as Camera Corner, 135 East First Street, Port Angeles, Washington.

b. The fire originated in the northwest corner of the space occupied by Camera Corner in an office area. *See* Exhibit A (diagram of Camera Corner floor plan drawn by Ken Dubuc). The Port Angeles Fire Department agrees. They concluded this fire started in this office area next to the refrigerator. They further concluded the cause of the fire was most likely an electrical

fault in one of the electrical components found at the area of origin. *See* Exhibit B.

No matter how liberally the tenant deploys the dreaded ellipsis to hide the truth, the record on appeal amply demonstrates the fire was started by one of several office appliances that were owned and being operated by the tenant in the tenant's space at the time of the fire.

The tenant claims the landlord inaccurately quoted on various occasions in its amended opening brief certain provision of the lease between the parties "that could mislead this Court regarding how poorly the Elks had drafted the original lease agreement." This certainly conjures up visions of the pot calling the kettle black. Nevertheless, a comparison of these "inaccuracies" highlighted in bold in the table below highlights the speciousness of this argument.

Location In Landlord's Opening Brief	Landlord's Quotation of Lease	Lease Language [CP 169-170]
Page 4	Tenant will indemnify Landlord and save him harmless from and against any and all claims[,]actions, damages, liability and expenses arising from or out of [1] any	Tenant will indemnify Landlord and save him harmless from and against any and all claims actions, damages, liability and expenses arising from or out of

	occurrence, in upon or at the leased premises, or [2] the occupancy or use by Tenant of the leased premises or part thereof, or [3] occasioned wholly or in part by an act if omission of the Tenant, its agents, contractors, employees, servants, Lessees or concessionaires.	any occurrence, in upon or at the leased premises, or the occupancy or use by Tenant of the leased premises or part thereof, or accasioned wholly or in part by an act if omission of the Tenant, its agents, contractors, employees, servants, Lessees or concessionaires.
21	For and in consideration of the execution of this lease by each of the parties hereto, Landlord and Tenant hereby release and relieve the other and waive their entire claim of recovery for loss or damage to the property arising out of or incident to fire, lightning[,] and the perils included in the extended coverage endorsement in, on [] or about the demised premises, whether due to the negligence of any said parties, their agents or employees or otherwise. Any increased premium charge caused by the provision shall be paid by Tenant. (Emphasis added) [CP 138]	For and in consideration of the execution of this lease by each of the parties hereto, Landlord and Tenant hereby release and relieve the other and waive their entire claim of recovery for loss or damage to the property arising out of the incident to fire, lightning and the perils included in the extended coverage endorsement in, on, or about the demised premises, whether due to the negligence of any said parties, their agents or employees or otherwise. Any increased premium charge caused by the provision shall be paid by Tenant. (Emphasis added) [CP 138]
23	There is no ambiguity in how this [lease] provision [paragraph 6C] is worded. In this instance, the waiver applies to: (1) any loss or damage to the property (2) arising out of the incidence of fire (3) in, on or about the demised premises.	This language to the left is not an actual recitation of the language in the lease, but the landlord's argument as to what the language means.

The tenant would have this court believe that substituting the word "or" for "the", adding one comma here and

deleting it there, would somehow change the complexion of the wording utilized in the lease to prevent the contractual intent of the parties from being plainly understood. Where was this impressive attention to detail on the part of tenant in reading the Port Angeles Fire Department's fire report and the declarations of the landlord's fire expert concerning what caused the fire? Notwithstanding this sudden infatuation with detail, none of these "inaccuracies" would hinder the average layperson from understanding what the intent of this language employed in the lease between the parties is meant to convey.

B. Procedural Background.

The tenant claims that the landlord failed to address the tenant's alleged claim in support of its motion for summary judgment that the landlord had failed to put forth any evidence to support the landlord's indemnity claim. If this Court dissects this disingenuousness, it will quickly identify the fatal fallacy of this argument.

The tenant claimed below in its motion for summary judgment that, "[Landlord's] Breach of Contract cause of action

alleges [tenant was] under a contractual obligation to indemnify the [landlord] for all damages arising out of any occurrence in, upon or at the building occasioned in whole or in part by any *act or omission* of the [tenant]. [Emphasis in original]" This was an accurate citation to what was *plead* at paragraph 4.3 of the landlord's Complaint.

However, in opposition to the tenant's motion for summary judgment, the landlord relied on the actual language contained in paragraph 6A of the lease between the parties [CP 54-55]. The plain and unambiguous language employed by the indemnity provision in the lease states tenant's duty to indemnify landlord from and against any and all damages will arise in three distinct situations:

1. Arising out of any occurrence in, upon or at the leased premises;
2. The occupancy or use by tenant of the leased premises or part thereof; or
3. Occasioned wholly or in part by an act if omission of the tenant, its agents, contractors, employees, servants, lessees

or concessionaires.

Moreover, the tenant's indemnity obligation contained in paragraph 6A of the lease is supplemented by a contractual duty in paragraph 6B to carry liability insurance naming the landlord as an additional insured. The liability insurance maintained by defendants at the time of the fire included coverage for the indemnity obligation contained in paragraph 6A.

You can lead a horse to the well, but you can't make it drink from the well. If the fire was started by one of several office appliances that were owned and being operated by the tenant in the tenant's space at the time of the fire, it stands to reason the fire arose out of an occurrence in, upon or at the leased premises and/or the occupancy or use by tenant of the leased premises or part thereof, both of which trigger tenant's indemnity obligation under paragraph 6A.

III. LEGAL ARGUMENT

A. Standard of Review.

The tenant does not dispute that the appropriate standard of review in this case *de novo*, with the appellate court

performing the same inquiry as the trial court. *Herron v. Tribune Publishing Co., Inc.*, 108 Wn.2d 162, 169, 736 P.2d 249 (1987).

B. The Trial Court Below Erred as a Matter of Law In Its Interpretation of the Relevant Provisions Contained in The Commercial Lease Entered Into Between the Parties.

1. Causation.

The tenant claims that the landlord cannot demonstrate the critical element of causation with respect to the landlord's indemnity claim. The tenant chooses to frame its argument in this regard with respect to what the landlord plead in its complaint, rather than the contents of the lease at issue in this lawsuit that was relied upon by the landlord in opposing the tenant's motion for summary judgment below.

Once again, from the top.

A tenant may be liable to a landlord under three separate theories for damage caused by a fire:

1. A tenant may be liable in tort if negligence causes the damage;

2. A tenant may be liable for fire damage on the grounds of breach of contract to surrender the possession of the

premises in good condition on expiration of the lease.

3. A tenant may be responsible to a landlord on the basis of contractual indemnity.

If the indemnity clause in the lease is broad enough to include damage or destruction by fire or other cause, the tenant is liable for such damage regardless of fault, as if the tenant had insured the landlord against these matters. *Friedman on Leases*, Vol. 1, §9:10, pp. 9-65 - 9-68 (5th Ed. 2007).

The plain and unambiguous language employed by the indemnity provision in paragraph 6A of the lease stated the tenant's duty to indemnify the landlord from and against any and all damages would arise in three distinct situations:

1. Arising out of any occurrence in, upon or at the leased premises;

2. The occupancy or use by tenant of the leased premises or part thereof; or

3. Occasioned wholly or in part by an act if omission of the tenant, its agents, contractors, employees, servants, lessees or concessionaires. [CP 138]

If the fire was started by one of several office appliances that were owned and being operated by the tenant in the tenant's space at the time of the fire, then the damage from the fire arose out of an occurrence in, upon or at the leased premises and/or the occupancy or use by tenant of the leased premises or part thereof, both of which trigger tenant's indemnity obligation under paragraph 6A.

At page 13 of the tenant's brief, the tenant states the landlord misunderstands the tenant's defense in this case. "Negligence is not the issue, causation is." Tenant goes on at page 14 to trumpet, "The Trial Court properly dismissed [the landlord's] indemnity claim because it could not provide any evidence of causation." Causation as to what? As demonstrated above, the evidence before the trial court was that the origin of the fire was in the tenant's space. And, although the Port Angeles Fire Department and the landlord's expert could not pinpoint the precise source of ignition for the fire, they both attributed the ultimate cause of the fire to one of several electrical appliances at the area of origin of the fire inside tenant's space.

By analogy, the evidence before the trial court couldn't identify which particular match started the fire, but did conclude it was the tenant's pack of matches that started the fire inside the tenant's space. Thus, there was more than ample evidence before the trial court to trigger the tenant's indemnity obligations under two of the three conditions that triggered such liability under paragraph 6A of the lease.

2. Third Party Claims.

The tenant claims that, generally speaking, an indemnity agreement applies only to agreements to protect the indemnitee, in this case the landlord, from third party claims. The tenant cites *Stocker v. Shell Oil Co.*, 105 Wn.2d 546, 549, (1986), for this proposition. If this, in fact, is a correct statement of Washington law, then the decision in *Northern Pacific Railway Co. v. Sunnyside Valley Irrigation District*, 85 Wn.2d 920, 540 P.2d 1387 (1975) would make no sense since in that case the court held that the plaintiff had failed to present sufficient evidence to sustain a first party indemnity claim against defendant, not that plaintiff was precluded as a matter of law

from bringing a first party indemnity claim against defendant at all.

The landlord believes that the Ninth Circuit Court of Appeals correctly set out what is generally understood on this subject in its decision in *Yang Mang Marine Transport Corp. v. Okamoto Freighters*, 259 F.3d 1086 (CA9 2001). In that case, the Ninth Circuit was called upon to interpret an indemnity clause found in a bill of lading. This indemnity clause stated that the land based shipper would indemnify the ocean going shipper for all loss, damage, expenses, liability, penalties and fines” arising out of the misdescription of the cargo. *Id.*, 259 F.3d at 1089. The land based shipper contended this indemnity provision only applied to claims for misdescription against third parties, not such a claim against it. The Ninth Circuit found this argument “unavailing.

To resolve Laufer's claim we must interpret the word "indemnify" as it is used in Section 7 of the Yang Ming/Laufer Bill of Lading. "Since the bill of lading is the contract of carriage between shipper and carrier, familiar principles of contract

interpretation govern its construction." *Henley Drilling Co. v. McGee*, 36 F.3d 143, 148 n.11 (1st Cir. 1994) (internal citations omitted). "Contract terms are to be given their ordinary meaning," and "[w]henever possible, the plain language of the contract should be considered first." *Klamath Water Users Prot. Ass'n v. Patterson*, 204 F.3d 1206, 1210 (9th Cir. 2000).

We have traditionally defined liberally the word "indemnify." See *Atari Corp. v. Ernst & Whinney*, 981 F.2d 1025 (9th Cir. 1992). In *Atari*, we reviewed a district court's conclusion that a plaintiff could not seek indemnification from the defendant when there was no third-party claim against the plaintiff. The district court based this conclusion on the premise that "[u]nder the ordinary and usual meaning of the word 'indemnify' as used in indemnity contracts, the indemnitor agrees to protect the indemnitee against claims of third parties alien to the contract." *Id.* at 1031.

We rejected this holding by the district court, stating that an indemnitor's obligation to indemnify an indemnitee extends beyond the mere reimbursement of third party claims. *Id.* ("[T]he district court was wrong to assume that the word 'indemnify' necessarily carries with it

the baggage of the clauses in which it most frequently appears."). We based our holding on the definition of "indemnify" provided by *Black's Law Dictionary*, which reads:

To restore the victim of a loss, in whole or in part, by payment, repair, or replacement. To save harmless; to secure against loss or damage; to give security for the reimbursement of a person in case of an anticipated loss falling upon him. To make good; to compensate; to make reimbursement to one of a loss already incurred by him.

Id. at 1031-32 (emphasis added) (quoting BLACK'S LAW DICTIONARY 769 (6th ed. 1990)). Thus, we concluded that "[t]he plain, unambiguous meaning of 'indemnify' is not 'to compensate for losses caused by third parties,' but merely 'to compensate.'" *Id.*

Id., 259 F.3d at 1092.

The trial court below stated, in conclusory fashion, that:

The wording of Section 6-A suggests that it is intended to cover third-party claims only, as opposed to claims between landlord and tenant. It would be a very strained interpretation of this language to find that it would apply to a claim between the landlord and the tenant. Even if the language

were found to be ambiguous, in the absence of clear evidence this strained interpretation, that ambiguity be construed against the landlord as the drafter of the document under standard rules of construction. [CP 27-28]

As the Ninth Circuit itself observed in the *Okamoto Freighters* decision, there is nothing “strained” about the landlord’s interpretation of the wording contained in paragraph 6A. An objective, impartial and unbiased interpretation of the actual words employed in paragraph 6A highlight the broad indemnity obligation undertaken by the tenant. The indemnity obligation is equally applicable to claims by the landlord against the tenant as it is claims by third parties against the landlord.

3. Insurance.

Paragraph 6B of the lease, entitled *Damages and Insurance*, imposed an obligation on defendants to carry liability insurance:

Tenant agrees to provide, pay for and maintain a policy or policies of public liability insurance with respect to the leased premises in standard form issued by a company or companies acceptable to Landlord insuring

Landlord and Tenant with minimum limits of liability of \$150,000.00 and \$300,000.00 in respect to bodily injury or death, and \$50,000.00 in respect to property damage. [CP 138]

The lease made no mention nor imposed any obligation on either landlord or tenant to maintain property insurance for either the building or for the ground floor portion of the building leased by the tenant. [CP 138] The lease imposed an obligation upon tenant to maintain *liability insurance* covering property damage. [CP 138]

4. Waiver of Subrogation.

The waiver of subrogation provision found at paragraph 6C of the lease is limited to damage caused by the fire to the ground floor portion of the building occupied by the tenant at the time of the fire, not the damage to rest of the five floors of the building. *Millican v. Wienker Carpet Service*, 44 Wn.App. 409, 722 P.2d 861 (1986).

Paragraph 6C of the Lease Agreement states:

For and in consideration of the execution of this lease by each of the parties hereto, Landlord and Tenant hereby release and relieve the other

and waive their entire claim of recovery for loss or damage to the property arising out of or incident to fire, lightning, and the perils included in the extended coverage endorsement in, on or about the demised premises, whether due to the negligence of any said parties, their agents or employees or otherwise. Any increased premium charge caused by the provision shall be paid by Tenant. (Emphasis added) [CP 138]

The tenant claims that the landlord waived its claim against the tenant in this lawsuit because the waiver applied to the entire building containing the tenant's leased space, not just tenant's leased space inside the building. Again, the tenant boldly claims, "The word 'property' is clearly distinguished from the phrase 'demised premises' in this provision, and is broader in scope." This could only be the case if this Court suspends the application of the English rules of grammar.

The noun (or object) "property", as used in paragraph 6C, is modified by two prepositional phrases: (1) "arising out of or incident to fire, lightning, and the perils included in the extended coverage endorsement"; and (2) "in, on or about the demised

premises”. Prepositional phrase (1) modifies “property” to specify the type of damage that is the subject of this waiver (the “what”). Prepositional phrase (2) modifies “property” to specify the precise location of the property that is the subject of this waiver (the “where”).

The application of the waiver provision is critically dependent on the location of where the provision is intended to apply to. *Millican v. Wienker Carpet Service*, 44 Wn.App. 409, 722 P.2d 861 (1986). However this Court chooses to define the object “property”, as used in paragraph 6C, prepositional phrase (2) makes it plainly evident that the location as to where the waiver provision is intended to apply to is modified such that the waiver is limited to the “demised premises, *i.e.* the space leased by the tenant inside the building, and not the entire building itself.

It is well understood under Washington law that the *Millican* decision limits the application of the waiver of subrogation principles applicable in either the residential context, *Cascade Trailer Court v. Beeson*, 50 Wn.App. 678, 749 P.2d 761

(1988), or the commercial context, *Rizzuto v. Morris*, 22 Wn.App. 951, 592 P.2d 688 (1979). The *Rizzuto* decision placed a substantial emphasis on the parties' contractual intent. In this case, this Court should follow the money. The lease between the parties imposed no obligation on the landlord to carry any insurance. The lease did explicitly obligate the tenant to carry liability insurance *insuring both the landlord and the tenant* to indemnify for property damage. CP 170. The language employed by the waiver provision contained in paragraph 6C, coupled with the parties' respective insurance obligations contained in paragraph 6B, should plainly and unambiguously convince this Court that the waiver provision contained in paragraph C is limited solely to the space leased by the tenant, not the entire building in which tenant's leased space was a part of.

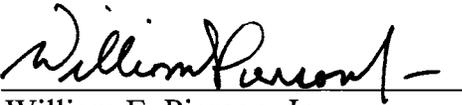
IV. CONCLUSION

This Court should reverse the trial court's decision below granting the tenant's motion for summary judgment and remand this case to the trial court below in order to allow the landlord to

proceed to prosecute its contractual indemnity claim against the
tenant for damages sustained to the building as a result of the fire.

RESPECTFULLY SUBMITTED this 29th day of June, 2009.

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CERTIFICATE OF SERVICE

The undersigned certifies that on this day he caused to be served in the manner noted below, a copy of the document to which this certificate is attached, on the following counsel of record:

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DATED this 29th day of June, 2009.



William E. Pierson, Jr.

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