

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,

Defendants/Respondent

BRIEF OF LARRY ZIEGLER and JANE DOE ZIEGLER

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I. Statement of the Issues.

1. Did the Trial Court properly determine that Respondents Ziegler were not liable to Appellant Elks because Elks failed to prove causation?
2. Did the Trial Court properly view the indemnity provision, taken in context with the rest of the lease agreement, as applying to third party claims only, and not claims by the landlord against the tenant?
3. Did the Trial Court properly determine that the waiver provision of the lease agreement was ambiguous and should be construed against the drafter-landlord as waiving of its claims?

II. Statement of the Case

A. Summary.

This case arises out of a fire that occurred on December 9, 2003, at the Elks building located at 131 E. First Street, Port Angeles, WA.¹ The fire apparently originated in a retail space occupied by Camera Corner, a business operated by Respondent Ziegler (hereinafter Ziegler) who had leased this space in a building owned by Elks.² The fire caused damage to other portions of the Elks's building.³ Elks filed suit against Ziegler on November 27, 2006, seeking damages to portions of the building other

¹ Complaint, ¶ 3.2, CP 197

² Complaint, ¶ 3.3, CP 197; lease agreement at CP 138-144.

³ Complaint, ¶ 3.2, CP 197.

than the leased premises. The amount claimed by Elks was not less than \$1.5 million.⁴

Under the Lease Agreement that Elks drafted, Ziegler was required to obtain insurance for its leased premises only. On the other hand, the Elks procured insurance covering the entire building that in fact covered Elks's loss.⁵

Elks alleged that the cause of the fire was "due to the placement of a refrigerator on an electrical cord" in the premises that Ziegler occupied.⁶ Elks's Complaint alleged two causes of action: (1) that Ziegler breached its duty of care in taking reasonable steps to prevent the fire and (2) that Ziegler breached its contractual duty to indemnify Elks for damages arising from the fire that were "occasioned in whole or in part by any act or omission of the Camera Corner."⁷ At oral argument, Elks conceded that there was insufficient evidence to proceed on its negligence claim and did not object to the Trial Court's dismissal of that claim.⁸

B. Fire Investigation.

The Port Angeles Fire Department responded to the fire and provided an initial report. It stated in conclusion:

⁴ Complaint, ¶ 5.1, CP 199.

⁵ Elk's Responses to Requests for Admissions, CP 166, 175.

⁶ Complaint, ¶ 3.4, CP 198

⁷ Complaint, ¶¶ 4.1-4.4, CP 198

⁸ Memorandum Opinion, CP 25

*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. Future analysis by a testing facility may provide more definitive information.*⁹ (Emphasis added).

Such further analysis and investigation of the origin and cause of the fire was conducted by Ziegler's expert, CASE Forensics, Corp. After an inspection, analysis, and review of the items found at the fire site, CASE Forensics determined that the source of ignition for the fire could not be found.¹⁰ It also determined that no evidence could be found of any malfunction of a refrigerator component or any other component located in the remains of the fire.¹¹ CASE Forensics concluded that, because of lack of evidence of arcing in identified conductors, "it is not probable that a pinched power cord caused this fire."¹²

Ziegler does not agree with Elks that the record contains evidence of a cause or source of the fire. Elks's own expert, Michael Fitz, stated in his original Declaration that he had ruled out "all accidental causes of this fire in the area of origin except an electrical cord that was discovered underneath a refrigerator. . . ."¹³ After further inspection of the cord, Mr. Fitz stated in his Supplemental Declaration that he "cannot state this

⁹ Investigative Report, CP 119.

¹⁰ Engineering Report, attached to Declaration of Kevin Lewis. CP 151-153.

¹¹ Id.

¹² Id. ¶ 4, CP 146.

¹³ CP 108, paragraph c.

electrical cord most probably started this fire at this time.”¹⁴ Elks cannot identify any place in the record that supports its assertion on page 3 of its Brief that “[t]he source of ignition for the fire was identified as one of several electrical components . . . found in the area of origin.” Its citation to Mr. Fitz’s Declaration at CP 60 directly contradicts this. At most, Mr. Fitz’s opinion is “that the fire at the Port Angeles Elks started inside the portion of the Port Angeles Elks on the ground floor, occupied by the Ziegler. . . .”¹⁵

On page 15 of its Brief, Elks again asserts that that “[t]he 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 [sic] the fire.” It cites CP 119 for this assertion. However, this citation refers to the Port Angeles Fire Department Report that stated that “*The cause of the fire is undetermined. . . .*”¹⁶ (Emphasis added).

C. Lease Provisions.

Elks and Ziegler entered into a Lease Agreement, in which Ziegler, doing business as “Camera Corner”, rented a portion of the Landlord’s building located at 135 E. First Street. The initial term was April 1, 1996

¹⁴ CP 60, paragraph 6.

¹⁵ CP 60, paragraph 7.

¹⁶ CP 119.

through March 31, 1997.¹⁷ No other lease agreement is in evidence. In addition to Ziegler, Elks leased space in its building to three other tenants. No present Elks member or employee can recall discussing the lease or the subject of insurance for the building with Ziegler.¹⁸

The lease agreement contained several provisions under Section 6 entitled "Damages and Insurance." The three relevant subsections are set out as follows:

A. Tenant will indemnify Landlord and save him harmless from and against any and all claims actions, damages, liability and expense arising from or out of any occurrence, in upon or at the leased premises, or the occupancy or use by Tenant of the leased premises or part thereof, or occasioned [sic] wholly or in part by an act if omission of the Tenant, its agents, contractors, employees, servants, Lessees or concessionaires. In case Landlord shall, without fault on his part, be made a party to any litigation commenced by or against Tenant, then Tenant shall proceed and hold Landlord harmless and shall pay all costs, expenses and reasonable attorney's fees that may be incurred or paid by the Landlord in enforcing the covenants and agreements of this lease.

B. 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.

¹⁷ Exhibit attached to Declaration of Larry Ziegler, CP 138-144.

¹⁸ Elks's Answer to Interrogatory 5, Exhibit A to Trabolsi Declaration, CP 158.

C. 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 of said parties, their agents or employees or otherwise. Any increased premium charge caused by the provision shall be paid by the Tenant.¹⁹

(Emphasis added).

In its Brief, Elks purports to quote the text of the above portions of the lease agreement. The quotations are inaccurate. On pages 4 and 21 of Elks's Brief, one finds changes in spelling, punctuation, and actual wording that could mislead this Court regarding how poorly the Elks had drafted the original lease agreement. For example, on page 4 of its Brief, Elks added a comma between "claims" and "actions" and changed "accasioned" to "occasioned" for paragraph 6A, first sentence.²⁰ On page 21 of its Brief, Elks changed the phrase "loss or damage to the property arising out of **the** incident to fire. . . ." to "loss or damage to the property arising out of **or** incident to fire. . . ." in its discussion of paragraph 6C. In the same place, Elks added a comma after the word "lightning" and omitted a comma after the word "on" in the phrase "in, on, or about the demised premises." On page 23 of its Brief, Elks changed the phrase "loss

¹⁹ CP 170.

²⁰ Elks's Brief, p. 4.

or damage to the property out of the incident to fire” to “loss or damage to the property **arising out of the incidence of fire.**” The Elks changes to the actual language of the lease belies its argument that the lease language is plainly understood.

Elks does not allege that Ziegler breached its requirement to obtain insurance for the leased premises. In addition, Elks admits that it had insurance on the entire building.²¹

D. Procedural Background.

Ziegler generally agrees with the sequence of pleadings and hearings set out by Elks. However, Ziegler disagrees with Elks’s characterization of Ziegler’s arguments below. On pages 5-6 of its Brief, Elks states that Ziegler brought a motion for summary judgment based on (1) lack of evidence supporting its negligence claim, (2) that the contractual indemnity provision applies only to third party claims, and (3) contractual waiver.²² Elks neglects to mention a fourth and independent ground for dismissal that Ziegler argued below: the failure to provide evidence of causation defeats its indemnity claim as well.²³

Elks acknowledges that it conceded lack of evidence of negligence and causation regarding its negligence claim. It is noteworthy that Elks’s

²¹ Elks’s Response to Request for Admission No. 2, Exhibit B to Trabolsi Declaration, CP 166.

²² Appellant’s Brief, pp. 5-6.

²³ See Defendant’s Motion for Summary Judgment, CP 182-183.

Brief does not address how lack of evidence of causation defeats its indemnity claim, even though the Trial Court Judge squarely addressed the issue in his memorandum opinion:

“In addition, a long line of cases in Washington establish the rule that, in the absence of an express contractual provision to the contrary, indemnification will not be imposed without proof of causation.”²⁴

III. Argument

Elks asserts in its Brief that there were three possible theories that would have allowed the Trial Court to render judgment against Ziegler and that the Trial Court refused to consider these theories.²⁵ The first theory, negligence, was dismissed by the Trial Court after Elks conceded that it had no evidence of causation to support it. The second theory now asserted by Elks is based upon a supposed duty under the lease agreement to return the premises in good condition. Elks did not plead this theory nor did it seriously argue it in the Trial Court below. Regardless, it is negated by section 7 of its lease agreement that excepted the duty to return the premises in good condition in cases of “damage by fire, the elements, or other catastrophe. . . .”²⁶ (See also, *Rizzuto v. Morris*, 22 Wn.App. 951, 958, 592 P.2d 688 (1979), holding that such a clause in a commercial lease

²⁴ CP 28.

²⁵ Appellant’s Brief, p. 7-8.

²⁶ Lease Agreement, ¶ 7, CP 139.

negated a subrogation claim for a fire actually and negligently caused by a tenant). The third theory, contractual indemnity, is the only theory Elks actually relied upon.

It should be noted that Elks, in setting out these three theories, cites *Friedman on Leases*, Vol. 1, §9:10, as authority.²⁷ However, Elks neglected to address the eight cases cited therein that denied liability against tenants absent a showing of causation of fire. (*see, eg.*, footnote 333).

In its Summary Judgment Motion, Ziegler challenged the indemnity theory on three independent grounds: (1) The Elks failed to establish proof of causation required for indemnity to be applied, (2) the indemnity agreement applied only to third parties, and (3) the lease agreement that the landlord drafted was ambiguous, and the contractual waiver provision, interpreted against the drafter, resulted in a waiver of Elks's claims for property damage arising out of the fire. The Trial Court considered each of these defenses and properly denied Elks's claims.

A. Elks cannot demonstrate that the fire was caused by any act or omission on Zieger's part, therefore dismissal was proper.

Elks could not demonstrate causation, therefore Elks's contractual indemnity claim was properly dismissed. Elks's Complaint actually

²⁷ Appellant's Brief, p. 8.

acknowledged that its contractual indemnity claim required proof of causation:

4.3 Defendants, LARRY and JANE DOE ZIEGLER, were under a contractual obligation to indemnify the Elks 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 Camera Corner.²⁸

This is consistent with Washington law. A contractual indemnity clause will not create a right to a cause of action against the indemnitor without some "overt act or omission" on the part of the indemnitor. *Gall Landau Young Constr. Co. v. Hurlen Constr. Co.*, 39 Wn. App. 420, 427-428, 693 P.2d 207 (1985); *Brame v. St. Regis Paper Co.*, 97 Wn.2d 748, 750-751, 649 P.2d 836 (1982); *Jones v. Strom Constr. Co.*, 84 Wn.2d 518, 521-522, 527 P.2d 1115 (1974). Elks actually acknowledges this principle of law by quoting, on page 12 of its Brief, *Continental Cas. Co. v. Seattle* for the proposition that, for an indemnity claim, "**Causation**, not negligence, is the touchstone." 66 Wn.2d 831, 835, 405 P.2d 581 (1965) (emphasis added).

The indemnity clause in the *Brame* case was typical. It required a subcontractor to "indemnify and save harmless the Contractor from and against any and all suits, claims, actions, losses, costs, penalties, and damages, of whatsoever kind or nature, including attorney's fees, arising

²⁸ Complaint, ¶ 4.3 (emphasis added), CP 198.

out of, in connection with, or incident to the Subcontractor's performance of this Subcontract.” *Brame*, 97 Wn.2d at 750-751. The *Brame* court determined that this general language did not create an indemnity claim unless the Plaintiff could demonstrate evidence of an actual act by the subcontractor that caused the harm. *Id.* at 751.

Because the indemnity clause in the Elks lease agreement also uses the term “arising from,” it is essentially the same as that found in the *Brame* case. Under *Brame*, Elks bore the burden of offering evidence that Ziegler actually did something, or failed to do something, to cause the damage claimed. Because there is no evidence of the cause of the fire in this case, there is no basis for Elks’s contractual indemnity claim. The Trial Court properly dismissed it.

Elks cites *Parks v. Western Washington Fair Association*, 15 Wn.App. 852, 553 P.2d 459 (1976), in support of its argument that Ziegler should be found liable because the fire originated in an area under his control. *Parks* involved an indemnity claim by a fair against a snow cone concessionaire for an injury that occurred in the grandstands allegedly caused by the injured party slipping on a dropped snow cone. In that case, a snow-cone concessionaire agreed to:

protect and indemnify and hold harmless the association from any and all claims for damages, demands or suits, arising from injuries or damage sustained or alledged to be

sustained by employees of the concessionaire or by any member of the public where such injuries or damage shall have resulted either directly or indirectly from the activities and business of the concessionaire in connection with this contract.

Id. at 853.

Despite the broad language of the indemnity clause, the Court of Appeals still required proof of causation to find liability: “[W]e hold that there must be some evidence of control by the indemnitor over the instrumentality or conditions *causing* the accident in order to impose liability to indemnify or defend.” *Id.* at 857. The fair association was unable to provide such evidence and the Court denied the indemnity claim. *Id.* at 463.

Elks cites *Nunez v. American Building Maintenance Company*, 144 Wn.App. 345, 190 P.2d 56 (2008) for the proposition that an indemnity contract should be construed to cover all losses, damages or liabilities to which it reasonably appears the parties intended it should apply. This case involved a third party indemnity claim. The plaintiff sued a building owner and a janitorial contractor for injury resulting from a slip and fall on the floor of the building. *Id.* at 349. The building owners sought indemnity from the contractor. *Id.* at 351. The Court of Appeals held that the plaintiff's claim failed because the defendant did not have notice of a

slippery condition and there was *no proof of causation* of her fall. *Id.* at 353 (emphasis added).

The Nunez court noted again that "the focus of indemnification clauses is on causation, not on negligence." *Id.* at 351. Though *Nunez* is distinguishable because it involved a third party indemnity claim, *Nunez* demonstrates that causation is required for an indemnity claim.

Elks also cites *Northern Pacific Railway Co. v. Sunnyside Valley Irrigation District*, 85 Wn.2d 920, 540 P.2d 1387 (1975). In this case a railroad company sought recovery from an irrigation company based upon an indemnity agreement that the irrigation company was to "indemnify and save harmless the company from all loss and damage to its tracks, roadbed, structures, rolling stock and other property, and from injuries to persons, occasioned by the improvements." *Id.* at 921. The irrigation company's canal broke, sending large quantities of water through a drainage culvert it had placed under the railroad companies tracks. *Id.* The Washington Supreme Court held that the installation of the culvert was not a cause of the damage claim, and therefore the indemnity provision was not triggered. *Id.* at 923.

Elks also places great reliance upon *Continental Cas. Co. v. Seattle*, 66 Wn.2d 831, 405 P.2d 581 (1965). In doing so Elks appears to misunderstand Ziegler's defense. Negligence is not the issue, causation is.

In fact, the quote Elks cites could not be more supportive of Ziegler's defense: "Causation, not negligence, is the touchstone." *Id.* at 835-836.

Elks acknowledges that causation is the key to enforcement of an indemnity provision. The Trial Court properly dismissed Elks' indemnity claim because it could not provide any evidence of causation.

B. Because the indemnity provision can only reasonably be understood to apply to third party claims, under the rules of construction of indemnity contracts, Elks's indemnity claim was properly dismissed.

Generally, an indemnity agreement applies only to agreements to protect the indemnitee from third party claims:

Indemnity agreements are essentially agreements for contractual contribution, whereby one tortfeasor, against whom damages in favor of an injured party have been assessed, may look to another for reimbursement.

Stocker v. Shell Oil Co., 105 Wn.2d 546,549 (1986)(citations omitted).

Furthermore, "an indemnitor is entitled to have his undertaking strictly construed, particularly in those cases in which the agreement was prepared by the indemnitee..." *Tyee Construction Co. v. Pacific Northwest Bell Telephone Company*, 3 Wn. App. 37,41,472 P.2d 411 (1970). Indemnity agreements should also "be construed reasonably so as to carry out, rather than defeat, their purpose." *Northern Pacific Railway*

Co. v. Sunnyside Valley Irrigation Dist., 85 Wn.2d 920, 922, 540 P.2d 1387 (1975). Applying both rules, the Trial Court reasonably concluded that the indemnity provision of paragraph 6A applied to claims by third parties only.

Elks argues that paragraph 6A sets out three independent ways that the indemnity clause could be triggered.²⁹ First, it argues that, under the first clause, indemnity is triggered by “any occurrence, in upon or at the leased premises” whatsoever. Second, it asserts that indemnity is triggered by “occupancy or use by the tenant.” Third it asserts it is triggered by “an act or omission of the tenant.” If this is the correct interpretation, the first clause renders the other two clauses superfluous and irrelevant. As stated above, a Court is required to adopt the reasonable interpretation that gives purpose to all provisions of the contract.

The Trial Court judge did precisely that. The second sentence of paragraph 6A specifically addresses third-party claims:

In case Landlord shall, without fault on his part, be made a party to any litigation commenced by or against Tenant, then Tenant shall proceed and hold Landlord harmless and shall pay all costs, expenses and reasonable attorney's fees that may be incurred or paid by the Landlord in enforcing the covenants and agreements of this lease.³⁰

²⁹ Appellant’s Brief, p. 13.

³⁰ CP 139.

This sentence explains the type of indemnity contemplated in the first sentence. That is the only reasonable interpretation because this provision immediately follows the first sentence.

The Trial Court also noted that the insurance provisions under paragraph 6B required insurance coverage for property damage of only \$50,000. It is obvious that such a modest amount would not cover damage to the entire building. It is therefore reasonable to conclude, read as a whole, that the parties intended the indemnity to apply to relatively minor claims brought by customers or other third parties against the tenant.

Finally the waiver provision of paragraph 6C supports the interpretation that the indemnity provision of paragraph 6A applies only to third party claims because, in 6C, the parties actually waive fire claims against each other.

Ruling that paragraph 6A applies to third party claims only is a reasonable interpretation supported by reading the agreement as a whole. Reading the first clause of paragraph 6A as a general liability insurance policy in which the tenant protects the landlord against any and all damage to his property, regardless of cause, renders other portions of the agreement irrelevant. The Trial Court properly strictly scrutinized in favor of the indemnitor and against Elks, who was the drafter of the document.

The case of *Tyee Construction Co. v. Pacific Northwest Bell Telephone Company*, 3 Wn. App. 37, 472 P.2d 411 (1970) is instructive. In that case, a utility company argued that a contractor was responsible under an indemnity provision for damages resulting from a collapse of a utility conduit that the contractor had worked on. *Id.* at 40-41. The indemnity language stated that the contractor would “indemnify and save harmless the Company from any and all loss, damage and liability for injury to persons or property in any manner arising from the conduct of work hereunder.” *Id.* at 41.

The Court of Appeals upheld the trial court’s determination that the indemnity provision only applied to third party claims, *id.* at 42, noting that the contractor was entitled to have the indemnity agreement strictly construed because the utility company prepared it. *Id.* at 41. The court stated as follows:

We believe, with the trial court, that the purpose of the indemnity clause on this occasion was to place responsibility for third-party claims upon Respondent and not, as contended by Appellant, to extend blanket coverage to any mishap of any nature arising from the conduct of the work.

Id. at 42.

Following these principles, the Trial Court properly construed the language of the indemnity provision in paragraph 6A as applying to third

party claims only because (1) of the general rule that indemnity clauses apply to third party claims and (2) because the Elks drafted it and it did not contain a clear expression that Ziegler agreed to insure Elks with blanket coverage for any mishap. The indemnity provision in paragraph 6A contains similar language to that found in the indemnity agreement in *Tyee*. Because this agreement does not contain a clear expression that the provision includes direct claims by the landlord against its tenant, it should be construed as applying only to third party claims. Further supporting this construction is the fact that the only express language regarding the duties of indemnification, is found in the second sentence of paragraph 6A, and that *only* applies to third party claims.

C. Elks waived its right to recover from Ziegler in its lease agreement.

Elks argues that a plain reading of Paragraph 6C indicates that it is not a waiver of mutual claims between the landlord and tenant for fire loss to property. However, the Trial Court correctly recognized that Paragraph 6C is ambiguous and confusing at best. The paragraph is again set out below:

C. 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 of said parties, their agents or employees or otherwise. Any increased premium charge caused by the provision shall be paid by the Tenant.³¹

(Emphasis added).

“Any ambiguities in a lease drafted by a lessor are resolved in favor (of) the lessee.” *Johnny’s Seafood Company v. City of Tacoma*, 73 Wn.App. 415, 420, 869 P.2d 1097 (1994). Section 6C states that both landlord and tenant release 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 of said parties. . . .” The word “property” is clearly distinguished from the phrase “demised premises” in this provision, and is broader in scope.

It bears noting that Section 1 of the lease defines “Premises” as the property located at “135 E. First Street, being a portion of” the rest of the building.³² “Premises”, therefore, means the portion of the building leased by Ziegler. The word “property” in Section 6C, therefore, is reasonably construed to mean the rest of building owned by Elks, and not

³¹ CP 139.

³² CP 138.

the “demised premises,” because Elks chose to use both words in distinction from each other in the same sentence.

Elks argues that the term “property” is specifically defined in the lease agreement.³³ The provision it invokes is paragraph 1, which is entitled “Premises.”³⁴ This paragraph does not define the term “property”, but rather defines what are the “premises.” The lease uses the language “the following described property” to define what is being leased. The term property is not defined by this paragraph. Instead, the term “property” is used as a general term from which the specific “premises” of the lease is defined. A normal reading of this phrase includes the understanding that there is considerable property in the world, and, from such property, the lease involves a certain property requiring description. This understanding is reinforced by the continual use of either “premises” or “demised premises” to describe the specific leasehold.³⁵ It appears that the term “property” only appears in paragraph 1 and in paragraph 6C. In paragraph 6C, as stated above, it is used in contrast to the term “demised premises.” Elks’ argument that “property” means the same thing as

³³ Appellant’s Brief, p. 24.

³⁴ CP 138.

³⁵ See, for example, paragraph 4 (CP 138), paragraphs 9, 10, 11 (CP 140), paragraphs 13, 18 (CP 141), paragraphs 20, 24 (CP 142), and paragraph 25 (CP 143).

“demised premises” is not supported by a fair reading of the lease agreement as a whole.

An additional ambiguity is found in the language of Section 6C that addresses “damage arising out of the incident to fire. . . *in, on or about* the demised premises.” It is not clear whether the “in, on or about” refers to damage or the source of fire. Because of this ambiguity, Section 6C should be construed against Elks, who drafted it, and be read to mean that a complete waiver of claims for damage “about” the demised premises, (meaning the rest of the building) was intended. This is supported by Ziegler’s testimony that he understood the lease agreement to contain a mutual release of claims between him and Elks because of the insurance he maintained on the leased premises only.³⁶ It is undisputed that Elks does not recall any discussion about the terms of the lease.³⁷

Elks argues on page 22 of its Brief that “[n]o principled application of the rules of English grammar could lead a reasonable person to reach” the Trial Court’s conclusion that this paragraph was ambiguous. In order to emphasize its argument, Elks changes the language of paragraph 6C from “arising out of *the incident* to fire” to a better crafted “arising out of

³⁶ Ziegler Declaration, ¶ 4, CP 137.

³⁷ Elks’s Answer to Interrogatory 5, Exhibit A to Trabolsi Declaration, CP 158.

or incident to fire.”³⁸ (Emphasis added). Elks’ statement in its Brief that the “alleged ‘ambiguity’ contained in this provision is manufactured by selectively choosing, without any explanation based on the wording or punctuation actually used in the lease”³⁹ is hardly persuasive when Elks has to reword the actual contractual language to make its point. Changing words and punctuation is strong proof that the lease language was unclear, confusing, and ambiguous.

The confusion found in paragraph 6C is actually acknowledged inadvertently by Elks when it forthrightly states that “[t]he plain intent of this lease language is that the waiver was to apply *to any property* that was damaged ‘in, on or about’ the demised premises.”⁴⁰ This is precisely Ziegler’s point. The waiver applies to *any property* “about the demised premises.” This includes the rest of the building owned by the Elks that is about the demised premises.

Further support for this interpretation is the exception clause in Section 7 of the lease:

Tenant will make all other necessary and proper repairs to the leased premises; and will at the expiration of the term, or sooner termination of this lease quit and surrender the leased premises without notice and in good order, condition and repair; normal wear and tear, *damage by fire*, the elements, or catastrophe *excepted*.

³⁸ Appellant’s Brief, page 22.

³⁹ Appellant’s Brief, page 22.

⁴⁰ Appellant’s Brief, page 23.

Lease Agreement, ¶ 7 in pertinent part.⁴¹

This provision required the tenant to return the property to the landlord “in good order, condition and repair; normal wear and tear, **damage by fire**, the elements, or catastrophe **excepted.**” [Emphasis added].

Rizzuto v. Morris, 22 Wn. App. 951, 592 P.2d 688 (1979), held that such a provision indicated that the intent of the parties was for the landlord to bear risk of fire loss of a leased property. Though *Rizzuto* involved a commercial tenant who leased an entire building from a landlord, the case is instructive regarding interpretation of damage provisions of a lease agreement.

In *Rizzuto*, the tenant’s employee negligently caused a fire that destroyed the entire building. *Id.* at 953. The landlord carried fire insurance for the loss and its insurer paid for the loss. The insurer then brought a subrogation action against the lessee in the named of its insured. *Id.*

The lease in *Rizzuto* contained an exculpatory clause that provided as follows:

At the expiration of said term, the lessee will quit and surrender these said premises in good state and condition as

⁴¹ CP 139.

they now are (ordinary wear and damage by the elements or fire excepted.)

Id. at 954.

The Court of Appeals held that the landlord was not entitled to bring a claim against the tenant. It analyzed the law regarding such claims and stated:

In our view, the trend of modern case law is to relieve the lessee from liability for fire damage caused by his own negligence where the circumstances lead the court to conclude the parties intended such a result.

Id. at 955.

The court adopted the reasoning of many cases from other jurisdictions in applying this principle, and noted that the “natural meaning” of the exemption clause regarding fire damage meant that the parties intended that the lessee would not be liable for damages resulting from fire. *Id.* at 957.

Here, the lease between Elks and Ziegler contains almost identical language to that in *Rizzuto*:

Tenant will make all other necessary and proper repairs to the leased premises; and will at the expiration of the term, or sooner termination of this lease quit and surrender the leased premises without notice and in good order, condition and repair; normal wear and tear, *damage by fire*, the elements, or catastrophe *excepted*.⁴²

⁴² Lease Agreement, ¶ 7 (emphasis added), CP 170.

Applying the rule in *Rizzuto*, the natural language of the fire exception in this paragraph indicates that the parties contemplated that Elks would bear the risk of fire loss for its building. Further support for this interpretation is the fact that Elks carried full insurance to cover its loss⁴³ while Ziegler maintained insurance on the leased premises only.⁴⁴

Reading both the waiver of claims provision of Section 6C, and the exemption from fire damage provision of Section 7, and applying the general rule that landlords cannot make claims against their tenants absent “an express provision to the contrary”, *Cascade Trailer Court v. Beeson*, 50 Wn.App 678, 687-88, 749 P.2d 761 (1988) the Trial Court properly dismissed Elks’s contractual indemnity claims.

Elks cites without argument *Millican v. Wienker*, 44 Wn.App. 409, 722 P.2d 861 (1986). However, the waiver addressed in *Millican* is significantly different from what is at issue in this case.

In *Millican*, a landlord’s insurer sought subrogation against a tenant for damage from a natural gas explosion and resulting fire. *Id.* at 411. The damage claimed by the landlord’s insurer included portions of the building outside the tenant’s leasehold. *Id.* at 410. At issue was a mutual waiver contained in the lease. The waiver released the landlord and tenant respectively of claims for fire damage “provided that such

⁴³ Elks’s Response to Request for Admission No. 2, CP 166.

⁴⁴ Declaration of Larry Ziegler, ¶ 3, CP 136-137.

waiver and release shall apply only in the even such agreement does not prejudice the insurance afforded by such policies.” *Id.* at 411. The waiver did not otherwise describe the property held under the lease.

The *Millican* court held that the waiver only applied to damage to the leasehold itself and not to adjacent property. *Id.* at 419. The *Millican* court stated its rationale:

Thus where a lease that relates to specified premises *does not refer to any other property and does not attempt to state the parties' rights and obligations with respect to any other property*, a waiver of responsibility in the lease cannot be extended to relieve the lessee from liability for damage done to property that is not the subject of the lease.

Id. at 418 (emphasis added).

Here however the Lease’s waiver language does refer to areas outside the leasehold. Specifically, in Paragraph 6C the party waives and releases each other for fire damage to the “property,” arising in, on, or about the “demised premises,” Therefore, the waiver is not limited to the demised premises leased by Ziegler. Therefore the *Millican* holding does not apply to the present case.

Elks also cites numerous out of state decisions applying other state’s laws arguing that the presence of insurance supports liability against Ziegler. This approach ignores clear Washington law. In Washington, the general rule for landlords and tenants regarding liability

for fire damage, is that the landlord is presumed to carry fire insurance to protect itself and is therefore not able to bring a claim against its tenant for loss due to fire: “We adopt the reasonable expectations rationale of the *Sutton* line of cases and hold Cascade is presumed to carry its insurance for the tenant's benefit because the lease did not contain an express provision to the contrary.” *Cascade Trailer Court v. Beeson*, 50 Wn.App 678, 687-88, 749 P.2d 761 (1988). Even in a commercial lease arrangement, “the trend of modern case law is to relieve the lessee from liability for fire damage,” even negligent damage, unless there is a clear agreement to the contrary. *Rizzuto v. Morris*, 22 Wn. App. 951, 955-956, 592 P.2d 688 (1979).

The Trial Court properly determined that paragraph 6C was ambiguous and construed it against Elks, which drafted it. Furthermore, taking the document as a whole, the Trial Court properly determined that the parties agreed to waive claims against each other for property damage arising from fire.

IV. Conclusion

There are three separate and distinct bases to uphold the Trial Court's granting of Ziegler' Motion for Summary Judgment. First, Elks offered no evidence of causation of the fire or that any act or omission on Ziegler's part caused the fire.

Second, because indemnity claims apply generally to third party claims unless the intention of the parties reflected in the contract clearly state otherwise, and the contract at issue does not, the Trial Court properly construed the indemnity provision as applying only to third party claims.

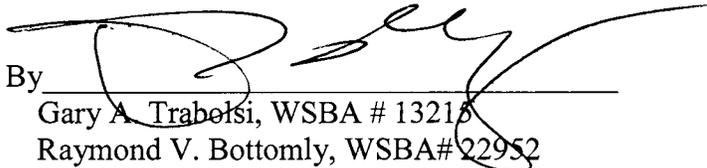
Finally, Elks waived and released Ziegler for claims to damage to its property arising from the fire.

For the foregoing reasons, Respondent Ziegler respectfully requests that the Court affirm the Trial Court's dismissal of all of Elks's claims with prejudice.

Request for Costs. Pursuant to RAP 14.2, Ziegler also requests an award of its costs.

Respectfully submitted this 29 day of May, 2009.

GARDNER BOND TRABOLSI PLLC

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DIVISION II

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STATE OF WASHINGTON

BY _____
DEPUTY

COURT OF APPEALS
THE STATE OF WASHINGTON
DIVISION II

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

Appellant,

v.

LARRY and JANE DOE ZIEGLER,
a marital community,

Respondents.

No. 38160-5-II

DECLARATION OF
SERVICE

I, Kimm Harrison declare as follows:

1. I am now and at all times herein mentioned was a citizen of the United States and resident of the state of Washington, over the age of eighteen years, not a party to the above-entitled action, and competent to testify as a witness.

2. I am employed with the firm of Gardner Bond Trabolsi PLLC, 2200 Sixth Avenue, Suite 600, Seattle, Washington.

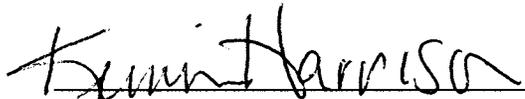
3. On May 29, 2009, I caused to be served upon counsel of record a copy of Brief of Respondents Larry Ziegler and Jane Doe Ziegler and this Certificate of Service on the following:

William E. Pierson
LAW OFFICE OF WILLIAM E. PIERSON, J.R. P.C.
701 Fifth Avenue, Suite 7340
Seattle, Washington 98104
Phone: (206) 254-0915
Fax: (206) 254-0916

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

DATED in Seattle, Washington on May 29, 2009.

GARDNER BOND TRABOLSI PLLC


Kimm Harrison
Legal Assistant