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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

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DEPUTY

No. 40933-0-II

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II

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G. ELDON MARSHALL and GERALDINE (GERRY) MARSHALL,

Appellants,

v.

THURSTON COUNTY

Respondent.

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APPELLANTS' OPENING BRIEF

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## I. INTRODUCTION

The home of the Appellants, G. Eldon and Geraldine Marshall, was flooded with surface stormwater in the winters of 1996, 1997 and 1999. The source of the stormwater was a stormwater diversion device constructed by Thurston County (the County) on a street upland from the Marshall property. The Appellants filed a Claim for Damages (the 2001 Claim) with the County and a lawsuit which, according to the County, was necessary to reach a settlement. In 2003, the parties settled the 2001 Claim and lawsuit for \$8,812, which was the Appellants' out-of-pocket cost to repair their home, yard and driveway. A "Release of All Claims" (the Release) was signed by the Appellants in 2003, which released the County from further liability for the flooding events. The Release covered only the damages caused by the 1996, 1997 and 1999 flooding events. The Release specifically referred to those events as the "incident," a term that was also used in the 2001 Claim to describe those floods.

In the winter of 2009, Appellants' home was flooded again, presumably from the same source. This flooding came at an especially bad time since, in 2009, due to the poor health of Gerry Marshall, the Appellants had moved into a retirement center in Lacey, Washington and

had placed their home up for sale. It was virtually impossible for the Appellants to sell their home since, due to the 2009 flooding event, the Appellants had to advise potential purchasers that the property was again subject to flooding. In 2009, the Appellants filed a claim and this lawsuit against the County. They sought payment for out-of-pocket flood related expenses and damages for the loss in value of their home due to their inability to sell the property.

The County brought this summary judgment action alleging that because of its broad language, the Release barred this action, which seeks damages for the 2009 flooding. It alleges that for payment of the \$8,812 in 2003 for the previous floods, the resulting Release entitled them to flood the Appellants' property in perpetuity without further compensation. This is being sought even though language in the Release incorporates the 2001 Claim, which limits its coverage to the "incidents." That term is defined in the claim as the 1996, 1997 and 1999 floods. No where does the Release protect the County from liability for the 2009 flood.

The trial court granted the County's motion for summary judgment. In its ruling, the trial court held that the Release protected the County from flooding liability emanating from its stormwater diversion

device in perpetuity, including the Appellants' 2009 flood damage. The Appellants appeal that ruling.

## **II. STATEMENT OF THE CASE**

In 1992, the Appellants, G. Eldon and Geraldine Marshall, purchased a residence on Blooms Court, SW (the Property) in Thurston County. CP 76. The topography surrounding the Property consists of hills and lowlands, and it abuts a portion of the Scott Lake Golf Course, which in turn lies adjacent to Scott Lake. CP 76. Prior to purchase, the Appellants inquired with the seller, who had built the residence on the Property in the mid-1980s, regarding flooding in the area of the Property. Appellants were told that the seller had observed the Property for a number of years and that it had no history of flooding. CP 77.

The residence on the Property is a quality home with an asphalt driveway and surface area, which acts as a French drain. The furnace was installed under the residence by the seller, which would not have been done if flooding had been perceived as a problem. CP 77.

On February 8, 1996, January 3, 1997 and December 12, 1999, the Property was flooded with surface water runoff and was damaged. CP 77. As a result, the furnace needed repair, the insulation under the house

dropped to the ground, and a portion of the house settled. CP 84, Exhibit B. In addition, a new drainage system had to be installed. CP 84, Exhibit B. At the time of the flooding events, Appellants were not certain how the flood waters reached the Property. CP 78.

In 2000, the Appellants learned that in 1994 the County had constructed a stormwater diversion device upland from the Property, which was designed to redirect stormwater from Shoreview Drive to a portion of Champion Drive near the Property. CP 77, 84, Exhibit B. This was done via easements acquired by the County for that purpose in 1994. CP 82, Exhibit A.

As stated, the 1996, 1997 and 1999 flooding events caused damage to the Property. The Appellants learned that the water was directed onto the Property from Shoreview Drive and Champion Drive by way of the stormwater diversion device built by the County in 1994. CP 84, Exhibit B. As stated, the Appellants observed no flooding prior to the 1996, 1997 and 1999 flooding events and were advised by their seller that no flooding had occurred prior to their 1992sco purchase of the Property. The first flooding occurred only two years after the diversion device had been installed upland on Shoreview Drive. CP 77.

On October 24, 2001, the Appellants filed the 2001 Claim against the County for damages to the Property brought about by the 1996, 1997 and 1999 flood events. CP 78, 84, Exhibit B. The Claim asked for out-of-pocket repayment of \$350 for furnace and insulation repair, \$180 for the purchase of pumps, and an estimated \$5,749 for installation of a drainage system. CP 84, Exhibit B. It also asked for \$20,000 for loss of value of the Property. The claim document was the County's standard form, and Section (g) of that form called for, among other things, the "DATE OF INCIDENT." The Appellants listed the dates of the 1996, 1997 and 1999 flood events as that "date." CP 78, 84, Exhibit B. The claim form also asked for the location of the "incident." That location was designated by Appellants as 2539 Blooms Court, the Property. In addition, the 2001 Claim explicitly detailed each of the flooding events and asked for monetary damages for those events.

The County agreed to pay the Appellants \$8,812.00 on their claim, which was characterized by the Appellants as their "out-of-pocket" expenses only. CP 79. The County further required that Appellants execute a "Release of All Claims" (the Release) prepared by the County. CP 78, 86, Exhibit C. The Release provided in part as follows:

2. The Releasor does hereby release and forever discharge Releasees from all claims, demands, damages, costs, expenses, liens, actions, or causes of action for and in consideration of tender of a draft in the total sum of Eight Thousand Eight Hundred and Twelve Dollars and no cents (\$8,812.00) from Thurston County. This release is inclusive of damage to property, bodily injury or death arising out of or in any related to the matter set forth in and described in the Releasor's claim for damages filed with the Thurston County Risk Management Division on October 24, 2001. This matter is referred to as Thurston County Claim No. 2001-10-095. This release includes, but is not limited to all future damages, lawsuits, injuries and expenses resulting or alleged to result from such matters.

...

5. The undersigned hereby declares that the terms of this settlement are for the express purposes of precluding forever any further additional claims arising out of or in any way connected with the incident that is the subject of the above-referenced cause of action. It is understood and agreed that the Releasor and Releasees have specifically contemplated the possibility that injuries of an unknown type or extent may exist and the Releasor agrees, for the consideration exchanged, to assume the risk of such unknown injuries becoming evident in the future. CP 86, Exhibit C. [Emphasis mine.]

The purpose of the Release in Paragraph 5 is to specifically preclude forever any further additional claims arising out of or in any way connected with the incident that is the subject of the 2001 Claim. It is obvious that the term "incident" here used refers to the 1996, 1997 and 1999 flooding events.

In order to fully respond to Appellants' Claim, the County further required that the Appellants file a lawsuit alleging the same matter contained in the 2001 Claim. CP 78. This was done, and the County remitted the \$8,812.00 to Appellants. CP 78.

Unfortunately, the flooding was not over. On January 5, 2009, the Property was again flooded from the County diversion system. CP 79. Another claim was filed against the County, which specifically listed the date as noted above, not the dates of the earlier flooding events. CP 88. That claim was rejected by the County, which leads us to the current action.

### **III. ASSIGNMENT OF ERROR**

1. The trial court erred when, in granting summary judgment, it ruled that the "Release of all Claims" barred this action for the 2009 flooding.

#### *Issue Pertaining to Assignment of Error*

a. Did the term "incident," used in both the 2001 Claim and the Release, refer to the flooding events of 1996, 1997 and 1999, or did it refer to the installation by the County of the diversion device on Shoreview Drive in 1994?

#### IV. ARGUMENT

##### A. Legal Requirements For Summary Judgment.

This is a case where the matter was decided on summary judgment by the trial court below. The Court of Appeals must review the Order on Summary Judgment on a de novo basis. *Jones v. Allstate Ins. Co.*, 146 Wn. 2d 291, 45 P.3d 1068 (2002). Summary judgment is proper only if the pleadings, affidavits, and depositions establish that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *American Safety Casualty Insurance Company v. City of Olympia*, 162 Wn.2d 762, 174 P.3d 54 (2007). The Court should grant the motion only if, from all the evidence, reasonable persons could reach but one conclusion. *Lilly v. Lynch*, 88 Wn.App. 306, 945 P.2d 727 (1997). The moving party has the burden of proof that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. CR 56 (C), *Jorgensen v. Massart*, 61 Wn.2d 491, 378 P.2d 41 (1963), *Grundy v. Thurston County*, 155 Wn.2d 1, 117 P.3d 1089 (2005).

**B. Under “Context Rule” In Washington, The Court Should Consider The 2001 Claim To Construe The Parties’ Intent Behind Words And Terms In The Release.**

It should first be noted that release clauses are to be strictly construed and must be clear if the exemption from liability is to be enforced. *Scott v. PacWest Mountain Resort*, 119 Wash.2d 484, 834 P.2d 6 (1992). Further, the Release was prepared by the County and should therefore be strictly construed against it. *King v. Rice*, 146 Wn.App. 662, 191 P.3d 946 (2008).

The trial court should have used the 2001 Claim document to help it determine the parties’ intent vis-à-vis terms set out in the Release. In Washington, courts have specifically been able to use circumstances and other extrinsic evidence to assist in determining the parties’ intent in a contract, even where the terms are not ambiguous. *Berg v. Hudesman*, 115 Wn.2d 657, 801 P.2d 222 (1990). This “context rule” has been tightened somewhat by the court in *Hearst Communication, Inc. v. Seattle Times*, 154 Wn.2d 493, 115 P.3d 262 (2005). The current rule is that the court should now attempt to determine the parties’ intent by focusing on

the “objective manifestation” of the agreement, rather than on the unexpressed subjective intent of the parties.” *Hearst* at 503.

It is clear that the 2001 Claim for Damages is intrinsic evidence to derive the intent behind specific words and terms in the Release. In Paragraph 2 of the Release, the 2001 Claim document is essentially incorporated by reference, and the Release is “inclusive” of damages arising out of that claim. CR 86, Exhibit C. The two documents are clearly interwoven, and the 2001 Claim must be considered extrinsic evidence vis-à-vis the Release for purposes of the rule in *Hearst, supra*. The County agrees with this conclusion and so stated in its Reply Brief to the trial court. CP 95.

**C. The Term “Incident,” Used In Both The 2001 Claim And The Release, Refers Only To the 1996, 1997 and 1999 Flood Events And Not To The 1994 Installation Of the Diversion Device; And Therefore This Action Is Not Barred By The Release.**

It is clear that the following two paragraphs in the Release, CP 86, Exhibit C, require that it be construed to apply only to the 1996, 1997 and 1999 flooding events and not to flooding from the Shoreview Drive diversion device occurring in 2009:

2. The Releasor does hereby release and forever discharge Releasees from all claims, demands, damages, costs, expenses, liens, actions, or causes of action for and in consideration of tender of a draft in the total sum of Eight Thousand Eight Hundred and Twelve Dollars and no cents (\$8,812.00) from Thurston County. This release is inclusive of damage to property, bodily injury or death arising out of or in any way related to the matter set forth in and described in the Releasor's claim for damages filed with the Thurston County Risk Management Division on October 24, 2001. This matter is referred to as Thurston County Claim No. 2001-10-095. This release includes, but is not limited to all future damages, lawsuits, injuries and expenses resulting or alleged to result from such matters. [Emphasis mine.]

...

5. The undersigned hereby declares that the terms of this settlement are for the express purposes of precluding forever any further additional claims arising out of or in any way connected with the incident that is the subject of the above-referenced cause of action. It is understood and agreed that the Releasor and Releasees have specifically contemplated the possibility that injuries of an unknown type or extent may exist and the Releasor agrees, for the consideration exchanged, to assume the risk of such unknown injuries becoming evident in the future. [Emphasis mine.]

The Appellants submit that Paragraph 5 of the Release quoted above is specifically on point and decides the issue before the Court. Notably, the first sentence sets out the purpose of the Release; that is

“precluding forever any further additional claims arising out of or in any way connected with the “incident” that is the subject of the above-referenced cause of action.” The above-referenced cause of action is the 2001 Claim. The “incident” in the 2001 Claim is the flooding which occurred in 1996, 1997 and 1999. Where a writing refers to a separate agreement, that agreement or such of it as referred to should be considered as part of the writing. *Turner v. Wexler*, 14 Wn.App 143, 538 P.2d 877 (1975).

That the term “incident” in both documents refers to the 1996, 1997 and 1999 flood events and not to the 1994 construction of the diversion device is obvious from the 2001 Claim. Subsection (g) of the 2001 Claim asks for the date of the “incident.” Those dates are specifically called out as “2/8/96, 1/3/97 and Dec. 1999.” It follows, therefore, that the corresponding term in the Release means the same thing and that that document is limited only to those flooding events. Had the term “incident” meant installation of the diversion device on Shoreview Drive, the date would have been 1994, the date it was installed.

Further, Subsection (i) of the 2001 Claim calls for the location of the incident, which is designated as 2539 Blooms Court, the address of the

Property and the site of the 1996, 1997 and 1999 flooding events. Had installation of the drainage diversion been the “incident,” its location would have been indicated on a drainage easement between Shoreview Drive and Champion Drive.

The remainder of the fifth paragraph addresses the possibility of “injuries” to the Property from the 1996, 1997 and 1999 floodings, which were unknown at the time the Release was signed. This could include dry rot in the crawl space, further settling of the house or similar injuries that don’t become apparent until passage of a significant amount of time. The paragraph provides that in consideration of the monetary payment, the Appellants would assume those risks.

This paragraph fits on all four corners the position of the Appellants in this case regarding the scope of the Release. The term “incident” means only the 1996, 1997 and 1999 floods. It doesn’t mean the installation of the diversion device in 1994. As such, the Release does not bar this action since its underlying event is the 2009 flood.

Paragraphs 2 and 5 of the Release quoted above are unambiguous and specific and show that the Release applied only to damages occasioned by the 1996, 1997 and 1999 floods. The County will no doubt

point to other, more general wording throughout the Release which appear to extend it to all flooding liability, no matter when it occurs. This latter language creates uncertainty in the Release and could be construed to subject it to more than one meaning. If given effect, these parts would render the Release ambiguous. *Mayer v. Pierce County Med. Bureau, Inc.*, 80 Wn.App. 416, 909 P.2d 1323 (1995).

However, a court should not read an ambiguity into a contract that is otherwise clear and unambiguous. *Mayer, supra*. If a contract can reasonably be interpreted in two ways, one of which is ambiguous and one of which is not, the latter interpretation should be adopted when each clause can be given effect. *Dice v. City of Montesano*, 131 Wn.App. 675, 128 P.3d 1253 (2006). Here, the Appellants' interpretation of Paragraphs 2 and 5 of the Release is clear and unambiguous. The remaining general terms of the Release can be given effect because they can reasonably be read to mean that "future damages, lawsuits, injuries" etc. pertain to those arising from the 1996, 1997 and 1999 flooding events. Therefore, the Release should be read to cover liability only from those events.

If the County's interpretation of the general terms is given legal effect, the Release would be ambiguous on its face. An ambiguous

provision is one fairly susceptible to two different, reasonable interpretations. *Wm. Dickson Company v. Pierce County*, 128 Wash. App. 488, 116 P.3d 409 (2005). The Appellants maintain that this interpretation is in conflict with the clear meaning of Paragraphs 2 and 5 as stated above. However, should the Court adopt the County's position, it would still have to deny summary judgment and remand the matter to the trial court to determine the intent of the parties. *Hiller Corp. v. Port of Port Angeles*, 96 Wn.App. 918, 982 P.2d 131 (1991). *Dickson, supra*. The ruling in *Hiller* and *Dickson* is that contracts which are ambiguous must be remanded to the trial court for determination of the parties' intent.

**D. The Specific Reference To The 1996, 1997 And 1999 "Incident" In The Release Prevails Over Other More General Terms.**

As stated above, the County will no doubt point to the general terms in the Release to argue that the scope of the document includes the 2009 flooding. It is basic contract construction that specific terms prevail over general language which touch the same subject. *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 103 P.3d 773 (2004). As noted above, Paragraphs 2 and 5 of the Release specifically provides that the purpose of the Release is to limit damages caused by the 1996, 1997 and 1999 floods.

However, the County will refer to generalized terms sprinkled throughout the Release to argue that it applies generally to damages in perpetuity. The specific terms in Paragraphs 2 and 5 of the Release prevail over the general language under this rule. Paragraphs 2 and 5 specifically do address the purpose of the Release and it should govern the document.

## V. CONCLUSION

The County argues that the Appellants, in signing the 2003 Release, gave the County an easement to flood the Property in perpetuity for no further compensation. The Release did no such thing. It specifically referred to the 2001 Claim in which Appellants sought compensation for the 1996, 1997 and 1999 flooding events. By doing so, it limited the coverage of the Release to damages resulting from those events. Further evidence of this limitation was language in the Release that it was for the express purpose of precluding further claims arising out of the “incident” that was the subject of the 2001 Claim. That term is specifically defined in the 2001 Claim as being the 1996, 1997 and 1999 flooding events.

By its very terms then, the Release from liability was intended to preclude further County liability for the 1996, 1997 and 1999 flooding

events only. It does not bar the current action, which seeks compensation for the 2009 flood. This Court should reverse the trial court's granting of summary judgment to the County.

RESPECTFULLY SUBMITTED this 13<sup>th</sup> day of September 2010.

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COMES NOW Mark O. Erickson, Attorney for Appellants Marshall, and pursuant to RAP 5.4(b), hereby declares as follows:

1. That a copy of Appellants' Opening Brief in this matter was personally served on the office of the Thurston County Prosecutor, 2145 Evergreen Park Drive SW/Bldg. C, Olympia, WA on September 13, 2010.
2. That a copy of the Appellants' Opening Brief in this matter was served on Respondent's counsel, Mark R. Johnson, 1201 Third Avenue/Suite 2900, Seattle, WA 98101-3028, by overnight mail dated September 13, 2010.

DATED this 13<sup>th</sup> day of September 2010.

Mark O. Erickson  
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