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STATE OF WASHINGTON

NO. 83795-3

**IN THE SUPREME COURT
OF THE STATE OF WASHINGTON**

**SNOHOMISH COUNTY PUBLIC TRANSPORTATION BENEFIT AREA
CORPORATION dba COMMUNITY TRANSIT,**

Petitioner,

vs.

FIRSTGROUP AMERICA, INC., dba FIRST TRANSIT, a foreign corporation,

Respondent.

**APPEAL FROM SNOHOMISH COUNTY SUPERIOR COURT
Honorable Kenneth L. Cowsert, Judge**

ANSWER TO PETITION FOR REVIEW

**REED McCLURE
By Pamela A. Okano
John W. Rankin, Jr.
Attorneys for Respondent**

Address:

**Two Union Square
601 Union Street, Suite 1500
Seattle, WA 98101-1363
(206) 292-4900**

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I. NATURE OF THE CASE

The negligence of Community Transit and a third person caused a traffic accident. Community Transit claims First Transit must contractually indemnify it simply because a fault-free First Transit bus was in the wrong place at the wrong time. Washington law mandates that indemnity agreements use clear and unequivocal language to impose such liability. In an unpublished decision, a unanimous Division I found the indemnity agreement here not clear and unequivocal.

II. ISSUES PRESENTED

Does the panel's decision conflict with *Northwest Airlines v. Hughes Air Corp.*, 104 Wn.2d 152, 702 P.2d 1192 (1985), which did not involve the same indemnity language or decide that a blameless indemnitor must indemnify an at-fault indemnitee under an indemnity agreement that did not clearly and unequivocally address concurrent negligence of the indemnitee and an unrelated third person?

III. STATEMENT OF THE CASE

A. STATEMENT OF RELEVANT FACTS.

Respondent First Transit agreed to provide petitioner Community Transit rush hour commuter bus service between King and Snohomish Counties.¹ (CP 13-15) Their contract included the following (CP 152):

The Contractor shall defend, indemnify and save harmless Community Transit . . . from any and every claim and risk, including, but not limited to, suits or proceedings for bodily injuries . . ., and all losses, damages, demands, suits, judgments and attorney fees, and other expenses of any kind, on account of all personal bodily injuries . . ., property damages of any kind, . . ., in connection with the work performed under this contract, or caused or occasioned in whole or in part by reason of the presence of the Contractor or its subcontractors, or their property, employees or agents, upon or in proximity to the property of Community Transit, . . . except only for those losses resulting solely from the negligence of Community Transit.

...

A 5-vehicle accident involving a Community Transit bus and a First Transit bus occurred on northbound I-5. The First Transit bus had been traveling northward in the HOV lane, followed by the Community Transit bus. The three other vehicles were in the lane to the right. (CP 15)

The last of the three vehicles (vehicle #3) rear-ended the vehicle in front of him (vehicle #2). Vehicle #2 struck the leading vehicle (vehicle

¹Petitioner's full name is Snohomish County Public Transportation Benefit Area Corp.. Respondent's full name is FirstGroup America, Inc.. First Transit is the assignee of Community Transit's original contractor. (CP 269-70)

#1), pushing it into the path of the First Transit bus. First Transit's driver braked quickly, but could not avoid hitting vehicle #1. The following Community Transit bus plowed into the First Transit bus. (CP 15-16)

The negligent parties were the drivers of vehicle #3 and the Community Transit bus. Under respondeat superior principles, Community Transit was negligent. The driver of the First Transit bus and thus First Transit were fault free. (CP 16)

First Transit rejected Community Transit's tender of the claims of the passengers of both buses and the First Transit driver. Community Transit settled the claims. (CP 16-17)

B. STATEMENT OF PROCEDURE.

Community Transit sued First Transit for indemnification. (CP 268-74) On cross-motions for summary judgment, the trial court granted summary judgment to First Transit. (CP 10-11, 89-103, 104-119)

A unanimous Division I affirmed in an unpublished decision, finding "the agreement does not clearly and unequivocally state" an intent to require indemnification for the combined negligence of Community Transit and an unrelated third party. (Slip op. 1) Strictly construing the indemnification agreement as Washington law requires, the panel ruled that (1) the claim was not "in connection with" work performed under the contract; (2) nor was it occasioned in whole or in part by reason of the

First Transit bus's presence; and (3) the exception for losses resulting solely from Community Transit's negligence was not clear and unequivocal. (Slip op. 9-11)

IV. ARGUMENT

This Court does not grant every petition. Review is discretionary and is granted only if a petitioner has shown at least one RAP 13.4(b) criteria. Here, Community Transit cites only RAP 13.4(b)(1), claiming the panel's decision conflicts with *Northwest Airlines v. Hughes Air Corp.*, 104 Wn.2d 152, 702 P.2d 1192 (1985). But the panel's decision is consistent with that case. There is no reason to review.

A. WASHINGTON LAW ON INDEMNITY AGREEMENTS.

To understand why the panel's decision is consistent with *Northwest* requires an understanding of the development of Washington law on indemnity agreements.

Tucci & Sons, Inc. v. Carl T. Madsen, Inc., 1 Wn. App. 1035, 467 P.2d 386 (1970), is illustrative of pre-1974 law. There a subcontractor's employee injured in the course of employment recovered from the general contractor. The general contractor sued the subcontractor under an indemnification agreement for claims "arising out of, in connection with, or incident to the subcontractor's performance of th[e] subcontract." *Id.* at 1036.

The subcontractor was fault free. The court ruled that indemnity was available because the loss “arose out of, in connection with, or incident to” the subcontractor’s performance merely because its employee was performing work when injured. *Id.* at 1037-38.

Thus, *Tucci* stood for two propositions:

- “An intent to indemnify for the indemnitee’s negligence need not be explicitly set forth in a contract.” *Id.* at 1038.

- If the loss would not have occurred “but for” the indemnitor’s performance of the contract, the indemnitor must indemnify the indemnitee for the indemnitee’s own negligence. *See id.* at 1037-38; *Dirk v. Amerco Marketing Co.*, 88 Wn.2d 607, 612, 565 P.2d 90 (1977).

Jones v. Strom Construction Co., 84 Wn.2d 518, 527 P.2d 1115 (1974), changed this law. *Jones* was like *Tucci*: virtually identical indemnity language that did not mention the indemnitee’s negligence, a subcontractor’s employee who would not have been injured but for performing the subcontract, an at-fault general contractor, and a fault-free subcontractor. In *Tucci* the fault-free subcontractor had to indemnify the at-fault general contractor. Not in *Jones*.

Expressly overruling *Tucci*, 84 Wn.2d at 522-23, *Jones* held that the blameless subcontractor was not liable for indemnification:

[The indemnity provision] makes no mention of or reference to [the general contractor's] "performance" of the primary contract. It is, therefore, [the subcontractor's] performance of the subcontract, and losses "arising" from, connected with, or incidental to that performance, which forms the keystone on which indemnity turns. Thus, it is clear that *unless an overt act or omission on the part of [the subcontractor] in its performance of the subcontract in some way caused or concurred in causing the loss involved, indemnification would not arise. [The subcontractor's] mere presence on the jobsite inculpably performing its specified contractual obligations, standing alone, would not constitute a cause or participating cause.*

Id. at 521-22 (emphasis added) (footnote omitted).

Thus, *Jones* rejected *Tucci's* holding that if loss would not have occurred "but for" the indemnitor's performance, the indemnitor had to indemnify for the indemnitee's own negligence. Instead, when indemnity depends on a claim "in connection with" performance, *an overt act or omission* by the indemnitor must cause or concur in causing the loss.² That the subcontractor indemnitor is performing its subcontract is not enough. *See also Brame v. St. Regis Paper Co.*, 97 Wn.2d 748, 749, 751, 649 P.2d 836 (1982).

Northern Pacific Railway Co. v. Sunnyside Valley Irrigation District, 85 Wn.2d 920, 540 P.2d 1387 (1975), further refined *Jones*.

² *Jones* did not apply RCW 4.24.115, which prohibits construction contracts from providing for indemnity for loss caused by or resulting from the sole negligence of the indemnitee. *See* 84 Wn.2d at 519-20.

There railroad tracks were washed away when an irrigation canal broke and a culvert owned by a county could not handle the volume of water. The county had agreed to indemnify the railroad for damage “occasioned by” the culvert. This Court ruled the county was not liable:

The culvert was adequate for normal drain flows . . . It was not designed, expected, nor intended to function adequately in flood conditions or other unusual situations involving large quantities of water such as caused the damage here. The washout of plaintiff’s roadbed occurred independent of the culvert. The deluge resulted from a source only indirectly related to the culvert, and *the washout of the roadbed was clearly not “occasioned” by the culvert.* To extend this hold-harmless provision so far would be unreasonable. . . .

*Insofar as there is ambiguity in the [indemnity provision], we must limit its scope to damage actually “occasioned by [the culvert],” that is, resulting from a cause **directly** related to the culvert.*

85 Wn.2d at 923 (emphases added).

Dirk v. Amerco Marketing Co., 88 Wn.2d 607, 565 P.2d 90 (1977), is even clearer on how indemnity provisions now operate. There the indemnitor, a U-Haul dealer, rented out a van, which broke down. While the dealer was towing it, another vehicle struck it. The dealership contract required the dealership grantor to indemnify for injury arising out of accidents “*occasioned . . . by defects in U-Haul equipment . . .*” *Id.* at 609 (emphasis added).

The van was defective and the dealer negligent. Nonetheless, the

indemnity clause inapplicable. Noting that “occasioned by” is narrower than “arising out of”, “in connection with”, or “incident to”, this Court held that “simple causation in fact [is] insufficient”, explaining:

[A]n indemnity contract will not be construed to indemnify the indemnitee against losses resulting to him through his own negligent acts where such intention is not expressed in *unequivocal terms*. . . . [C]lauses purporting to exculpate an indemnitee from liability for losses flowing from his own acts or omissions are not favored as a matter of public policy and are to be clearly drawn and strictly construed. . . . ***The indemnity provision here did not specifically state that [the dealer] would be indemnified for damage caused by his own acts of negligence.***

. . . [W]e find it difficult to believe that, as a business practice, [the grantor] intended to indemnify [the dealer] for their own acts of negligence ***without specific wording to that effect***

88 Wn.2d at 611-13 (first emphasis in original; additional emphases added). In other words, if parties to an indemnity agreement intend indemnification for the indemnitee’s own negligence in certain circumstances, they must specifically say so. “Occasioned by” is not the equivalent of “but for.”

Scruggs v. Jefferson County, 18 Wn. App. 240, 567 P.2d 257 (1977), also applied a post-*Jones* approach. There a passenger was seriously injured when the car in which he was riding hit a utility pole owned and maintained by a utility company. The accident was caused by

the driver's negligence and the county's failure to post a speed sign. The utility company was not negligent.

The franchise agreement between the utility and the county obligated the former to hold the county harmless for all costs and expenses "by reason of accidents experienced or caused by the construction or operation" of transmission lines or "caused by reason of the exercise by [the utility company] of any of the rights herein granted." *Id.* at 242 (emphasis omitted). The at-fault county sued the blameless utility to recover what the county paid to settle the passenger's claim.

The accident would not have happened or would have been much less severe but for the pole. Nevertheless, the court ruled that the utility did not have to indemnify the county:

At most, the pole was *merely a passive, nonculpable cause-in-fact* of the injuries . . . Consequently, the pole was only *indirectly* related to the County's loss and was not the type of loss the parties intended to cover in the indemnity clause. . . .

Id. at 244 (emphasis added). In sum, where indemnity required "caused by", "but for" was not enough.

What principles can be gleaned from *Jones* and its progeny? First, clauses that purport to indemnify an indemnitee for its own negligence are "not favored and are to be clearly drawn and strictly construed, with any doubts therein to be settled in favor of the indemnitor." *Jones*, 84 Wn.2d

at 521; accord *Dirk*, 88 Wn.2d at 613; see also *Carl T. Madsen, Inc. v. Babler Brothers, Inc.*, 25 Wn. App. 880, 885 n.7, 610 P.2d 958 (1980) (ambiguous indemnity contracts are construed in favor of indemnitor and against indemnitee). Consequently, indemnity contracts “will not be construed to indemnify the indemnitee against losses resulting to him through his own negligent acts where such intention is not expressed in *unequivocal terms.*” *Dirk*, 88 Wn.2d at 612 (emphasis in original).

Second, “occasioned by” or “caused by” requires a direct causal connection. See *Dirk*, 88 Wn.2d at 611; *Sunnyside*, 85 Wn.2d at 923; *Scruggs*, 18 Wn. App. at 244. “But for” is insufficient.

Third, if indemnification is tied to the indemnitor’s performance, the indemnitor must commit an “overt act or omission” before it must indemnify the indemnitee for the latter’s own negligence. *Jones*, 84 Wn.2d at 521-22.

B. NORTHWEST IS CONSISTENT WITH POST-JONES LAW.

Northwest did not change post-*Jones* law. It reaffirmed that “a contract of indemnity will not be construed to indemnify the indemnitee against losses resulting from his own negligence unless this intention is expressed in clear and unequivocal terms.” *Northwest*, 104 Wn.2d at 154-55; see *Griffiths v. Henry Broderick, Inc.*, 27 Wn.2d 901, 904, 182 P.2d 18 (1947) (quoting 27 AM. JUR. 464, § 15). It said indemnity agreements

must be “strictly construed, with any doubts therein to be settled in favor of the indemnitor.” *Northwest*, 104 Wn.2d at 157-58.

Northwest also observed that *at one time*, Washington courts had merely “look[ed] at the entire contract or at the all-encompassing language of the indemnification clause” to determine whether the indemnitor was to indemnify the indemnitee for the latter’s own negligence. 104 Wn.2d at 155. But *Northwest* recognized that Washington courts now require “more specific language . . . to evidence a clear and unequivocal intention to indemnify the indemnitee’s own negligence.” *Id.* In *Northwest* the parties used clear and unequivocal language to require indemnification for the indemnitee’s own negligence under the facts of that case.

In *Northwest*, a tenant’s employee sued the landlord after slipping on oil in a part of the building occupied and controlled by the landlord. The lease required the tenant to indemnify the landlord for claims “arising out of or in connection with the use and occupancy of the premises by Lessee [or] its . . . employees . . . *whether or not caused by Lessor’s negligence.*” 104 Wn.2d at 153 (some original emphasis omitted).

This Court had no trouble concluding the accident arose out of or in connection with the use and occupancy of the premises, noting the parties had intended that the lessees’ employees would use the restrooms and coffee facilities in the area, even though not part of the leased

premises. 104 Wn.2d at 159. In fact, the employee had been carrying a coffee urn. *Id.* at 153.

This Court rejected the argument that *any* indemnity agreement that called for indemnifying the indemnitee for its own negligence was unenforceable. 104 Wn.2d at 156-58. Describing a position much like Community Transit's position here that the language of the indemnity agreement "as a whole" governs (Petition 9), this Court summarized what Washington law on indemnity agreements *used to be*:

Washington initially found . . . a clear and unequivocal intention to indemnify for indemnitee's own negligence *by looking at the entire contract* or at the all-encompassing language of the indemnification clause; the term negligence itself need not actually be used.

104 Wn.2d at 155 (emphasis added).

This Court then explained what Washington law *now* is:

Washington currently requires . . . that more specific language be used to evidence a clear and unequivocal intention to indemnify the indemnitee's own negligence.

104 Wn.2d at 155 (emphasis added). Observing that "for an indemnitor to be found responsible for the indemnitee's own negligence, the agreement must be clearly spelled out", the Court ruled that the indemnity provision at issue clearly required the tenant to indemnify the landlord for the latter's own negligence. *Id.* at 156, 158.

C. THE PANEL’S DECISION DOES NOT CONFLICT WITH *NORTHWEST*.

The *Northwest* indemnity provision required indemnification for injury arising out of or in connection with a lessee’s use and occupancy of the premises, “whether or not caused by Lessor’s negligence”. *Id.* at 153 (emphasis omitted). This phrase unequivocally encompasses situations where the lessor’s negligence results in injury in connection with the lessee’s use and occupancy, as was the case in *Northwest*.

This case is different.

1. *Northwest* Does Not Say Ignore Indemnification Agreement Language.

First, here, unlike in *Northwest*, the indemnity agreement requires First Transit to indemnify Community Transit for claims—

in connection with the work performed under this contract, or caused or occasioned in whole or in part by reason of the presence of the Contractor or its subcontractors, or their property, employees or agents, upon or in proximity to the property of Community Transit, . . . except only for those losses resulting solely from the negligence of Community Transit, its officers, employees and agents.

(CP 152)

Thus, indemnification requires that a claim be (1) in connection with the work performed under the contract, *or* (2) caused or occasioned in whole or in part by reason of the presence of the First Transit or its subcontractors, or their property or agents, *but not* a (3) loss resulting solely from the negligence of Community Transit, its officers, employees

and agents.” In other words, (3) is an exception to (1) and (2). *If the claim does not fall within (1) or (2), (3) is irrelevant.*

Based on the authority of *Jones* and its progeny, the panel found that the claim did not fall within (1) or (2), but that even if it did, the language of (3) was not clear and unequivocal. (Slip op. at 9-11)

Community Transit’s petition does not claim that the panel’s substantive rulings on (1) and (2) meet a criterion for review, except to say that the panel’s “parsing”—*i.e.*, separate analysis—of (1) and (2) “conflicts with [*Northwest*] and leads to an erroneous result.” (Petition 14-15) The petition focuses on (3) and says that the “proper” construction of (3) “ends the inquiry.” (Petition 17) In other words, although on one page the petition says the “actual wording of the particular indemnity agreement as a whole determines whether or not indemnity applies”, another page essentially claims that the panel should have paid no attention to (1) and (2). (Petition 10, 14-15) (emphasis in original)

Community Transit completely misreads *Northwest*. In *Northwest*, unlike *Jones* or this case, the indemnity agreement required the injury to arise out of or in connection with the lessee’s “use and occupancy” of the premises. This Court considered that requirement in addition to the indemnity agreement’s “whether or not caused by Lessor’s negligence” language and determined the injury had in fact arisen out of the lessee’s

use and occupancy. 104 Wn.2d at 153, 159. Thus, Community Transit's claim that the panel did not follow *Northwest* in construing clauses (1) and (2) as well as (3) of the instant indemnity agreement is simply wrong.

Not only is Community Transit's analysis wrong, but it also violates well-established rules that all provisions of a contract must be given effect and that a court may not rule out language the parties have put into the contract. *See Farmers Insurance Co. v. Miller*, 87 Wn.2d 70, 73, 549 P.2d 9 (1976); *Nishikawa v. U.S. Eagle High, LLC*, 138 Wn. App. 841, 849, 158 P.3d 1265 (2007), *rev. denied*, 163 Wn.2d 1020 (2008).

Community Transit also seems to think that because the indemnification agreement here contains the clause "losses resulting solely from the negligence of Community Transit", the "in connection with the work performed under this contract" language of (1) does not require an overt act or omission. (Petition 15) Wrong.

As *Northwest* noted, *Jones* involved an agreement for indemnity "in connection with, or incident to the subcontractor's *performance* of the subcontract. 104 Wn.2d at 156 (quoting *Jones*, 84 Wn.2d at 521) (some italics omitted). The Court ruled there had to be "an act or omission . . . *in performance* of the subcontract" for the indemnification provision to apply. *Id.* at 157 (emphasis added). That an accident would not have occurred but for the subcontractor's performance was insufficient. *Id.*

Similarly, (1) here refers to “in connection with the work performed under this contract”. *Jones* requires an act or omission by First Transit in the performance of its contract. As in *Jones*, the mere fact that some of the injuries would not have occurred but for First Transit’s innocently performing work under the contract is insufficient.

Absent (1), (2) of the indemnification agreement requires a claim to be “caused or occasioned in whole or in part by reason of the presence of the Contractor [First Transit] or its subcontractors, or their property, employees or agents.” As discussed *supra*, “caused by” and “occasioned by” require a more direct causal connection than “but for.” See *Dirk*, 88 Wn.2d at 611; *Sunnyside*, 85 Wn.2d at 923; *Scruggs*, 18 Wn. App. at 244.

The same is true here. The First Transit bus was not at fault. First Transit did not actively contribute to the accident. Rather, like the subcontractor’s employee in *Jones*, the defective van in *Dirk*, and the pole in *Scruggs*, the First Transit bus was simply in the wrong place at the wrong time. The claims paid by Community Transit were not in connection with or occasioned or caused by the First Transit bus.

Community Transit cites a pre-*Jones* decision—*Northern Pacific Railway Co. v. National Cylinder Gas Division*, 2 Wn. App. 338, 467 P.2d 884 (1970). But in that case, the injury was not caused by the negligence of either the indemnitor or indemnitee. *Id.* at 343, 344. The issue was

whether there could be indemnification for an accident that was *not caused by the negligence by either party* to the indemnification agreement. *See id.* at 343, 344. Thus, there was no need for the usual judicial restraint against requiring indemnity for the indemnitee's own negligence without clear and unequivocal language. There was no need to construe what constitutes the sole negligence of the indemnitee. And since the decision was pre-*Jones*, the Court of Appeals could not know that *Jones* would take a stricter view of what constitutes clear and unequivocal language.

2. *Northwest Did Not Involve a Third Person's Negligence.*

Even if Community Transit had argued that the panel's decision on (1) and (2) of the indemnification agreement required review, its argument that the panel's view of (3) somehow conflicts with *Northwest* is baseless.

First, the language in *Northwest* was "whether or not caused by Lessor's negligence". The parties in *Northwest* essentially agreed that the accident was caused by the lessor's negligence. There was no unrelated at-fault third person. 37 Wn. App. 344, 347 n.1, 679 P.2d 968 (1984), *aff'd*, 104 Wn.2d 152, 702 P.2d 1192 (1985).

In contrast, here the indemnification agreement says, "losses resulting solely from the negligence of Community Transit". *Unlike Northwest, the fault of a third person unconnected with either party to the indemnification agreement causally contributed to the accident.*

Whether an agreement is clear and unequivocal is a question of law not subject to stipulation. See *State v. Vangerpen*, 125 Wn.2d 782, 792, 888 P.2d 1177 (1995); *McGary v. Westlake Investors*, 99 Wn.2d 280, 661 P.2d 971 (1983). Here the indemnification agreement is not clear and unequivocal. “[L]osses resulting solely from the negligence of Community Transit” may reasonably be read to refer to either (a) the sole negligence of Community Transit as compared with First Transit alone, *or* (b) the sole negligence of Community Transit as compared with anyone. (CP 152) In other words, “solely” may mean that no one but Community Transit was negligent, or it may mean that as between Community Transit and First Transit, only Community Transit was negligent, even if others not party to the agreement were also negligent.³

Southern Pacific Transportation Co. v. Sandyland Protective Association, 224 Cal. App. 3d 1494, 274 Cal. Rptr. 626 (1990), *rev. denied*, Jan. 23, 1991, recognized that similar language was ambiguous. There a homeowners’ association seeking to construct and maintain a roadway across the railway tracks agreed to indemnify a railroad. After a

³ The paragraph in the indemnity agreement dealing with RCW 4.24.115 is irrelevant because it applies only if RCW 4.24.115 applies, which it does not, and it refers only to the concurrent negligence of the two transit companies, not to the concurrent negligence of one transit company and an unrelated third person.

train struck a car on the roadway as it was trying to cross the tracks, the victims sued the railroad, which sought indemnity from the association.

A California statute precluded indemnity for the “sole negligence or willful misconduct of the [railroad].” 274 Cal. Rptr. at 628. The association was not at fault. However, the railroad claimed it was not solely negligent because the victims had been negligent.

The court ruled that despite the victims’ fault, the railroad was “solely negligent” within the meaning of the statute:

Accordingly, *we construe the phrase “sole negligence . . . of the promisee” to mean that as between the promisee and the promisor, the promisee was solely negligent.* Therefore, absent negligence on the part of the association, a party to the agreement, the negligence, if any, of the plaintiffs, who are third parties, is immaterial.

274 Cal. Rptr. at 629 (emphasis added). Under the California court’s interpretation of “sole negligence”, the exception for “losses resulting solely from the negligence of Community Transit” would apply in this case. Community Transit would not be entitled to indemnity.

Thus, Community Transit is too simplistic when it cites dictionary definitions of “sole” and says all an indemnity agreement has to do is explicitly provide for indemnification for the indemnitee’s own negligence. Where, as here, a third person’s independent negligence is involved, “sole” makes indemnification language unclear and equivocal.

D. COMMUNITY TRANSIT WAS FREE TO USE UNEQUIVOCAL LANGUAGE IN THE INDEMNITY AGREEMENT.

Community Transit claims the panel's unpublished decision "undermines freedom of contract" by "unduly restrict[ing] the ability of businesses to contractually allocate the risk of loss." (Petition 18) This argument is irrelevant to Community Transit's RAP 13.4(b)(1) argument.

In any event, *NOTHING* prevented Community Transit from drafting a clear and unequivocal indemnification provision requiring First Transit to indemnify Community Transit when the latter and third parties were concurrently negligent. If that was what Community Transit intended, it should have clearly and unequivocally said so. It did not.

V. CONCLUSION

Community Transit was free to draft clear and unequivocal language that would have required First Transit to indemnify it in a situation such as here. It did not do so. Far from being in conflict with *Northwest*, the panel's unanimous but unpublished decision is consistent with it. There is no reason for review. The petition should be denied.

DATED this 1st day of December, 2009.

REED McCLURE

By *Pamela A. Okano*
Pamela A. Okano WSBA #7718
John W. Rankin, Jr. WSBA #6357
Attorneys for Respondent