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**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I**

(Snohomish County Superior Court Cause No. 07-2-02976-0)

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

v.

FIRSTGROUP AMERICA, INC. dba FIRST TRANSIT, foreign
corporation, *Respondent*.

APPELLANT'S REPLY BRIEF

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STATUTES

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I. CORRECTION OF FIRST TRANSIT'S STATEMENT OF RELEVANT FACTS

In its description of the accident, First Transit confuses the first and third vehicles in the chain reaction collision. (Respondent's Brief 3) It was Mr. Castillo's vehicle (vehicle #1) that initiated the chain-reaction collision, not vehicle #3. (CP 15-16). First Transit also embellishes the record when it states that the Community Transit bus "plowed into" the First Transit bus. (Respondent's Brief 3)(compare CP 16).

Curiously, First Transit omits any mention of Agreed Statement of Fact # 11: "The accident did not result from the sole negligence of Community Transit." (CP 16) This admitted fact is plainly relevant to whether the indemnity obligation applies.

II. ARGUMENT

First Transit agreed to indemnify Community Transit "except only for those losses resulting solely from the negligence of Community Transit." (CP 14) First Transit admits that Community Transit was not solely negligent. (CP 16) Nevertheless, First Transit tries to avoid its indemnity obligation by arguing that (1) it has no duty to indemnify

because it was not negligent and (2) the contract was not sufficiently unequivocal. (Respondent's Brief 1) Neither argument has merit.

First Transit misreads Washington case law and this indemnity agreement. If the duty to indemnify for the indemnitee's negligence is clearly spelled out, a fault-free indemnitor must still indemnify. The indemnity agreement here unequivocally requires First Transit to indemnify Community Transit "except only" for losses resulting from Community Transit's sole negligence. Based on the agreed facts, First Transit must indemnify.

**A. WASHINGTON INDEMNITY LAW SUPPORTS
COMMUNITY TRANSIT**

First Transit claims that an "overt act or omission" by the indemnitor is required before it must indemnify for the indemnitee's sole negligence. (Respondent's Brief 13) (quoting *Jones v. Strom Constr. Co.*, 84 Wn.2d 518, 521-22, 527 P.2d 1115 (1974)). In other words, First Transit has no obligation to indemnify unless it was negligent. (Respondent's Brief 13 n.3) First Transit's reliance on *Jones* to rewrite this indemnity agreement is misplaced. The Washington Supreme Court clarified *Jones* in *Northwest Airlines v. Hughes Air Corp.*, 104 Wn.2d 152, 702 P.2d 1192 (1985). Even if an indemnitor is not negligent, a clearly worded indemnity agreement must be enforced.

1. Jones Does Not Apply to This Indemnity Agreement

First Transit offers *Jones* as the “seminal” case on interpreting indemnity agreements. (Respondent’s Brief at 13) *Jones* is, however, something of an anomaly. The indemnity clause in that case was part of a construction contract. According to RCW 4.24.115, an agreement in a construction contract to indemnify for an indemnitee’s sole negligence is “against public policy and is void and unenforceable.”

Remarkably, the trial court in *Jones* ruled that RCW 4.24.115 was unconstitutional. *Jones*, 84 Wn.2d at 519-20 n.1. Even more remarkably, no error was assigned to that ruling on appeal. *Id.* (Respondent’s Brief at 8 n.2) Today, the statute would dispose of a sole negligence indemnity claim in a construction contract.

In *Jones*, the sole negligence of a contractor (Strom) resulted in an injury to an employee of the subcontractor (Belden). In the construction contract, Belden agreed:

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 out of, in connection with, or incident to the SUBCONTRACTOR'S performance of this SUBCONTRACT.

Jones, 84 Wn.2d at 521. This indemnity clause made no mention that the subcontractor would indemnify the contractor for the contractor's own negligence. Analyzing the words used, the court stated:

[O]n closer reading and analysis [the clause] ties the losses, which it saves Strom [indemnitee] harmless from, to claims "arising out of," "in connection with," or "incident to" Belden's [indemnitor] "performance" of the subcontract. **It makes no mention of or reference to Strom's "performance"** of the primary contract. It is, therefore, Belden'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 Belden in its performance of the subcontract in some way caused or concurred [] in causing the loss involved, indemnification would not arise.

Id. at 521-22 (emphasis supplied) (footnote omitted). The court's reasoning is rooted in the actual wording of the contract, not broad legal principles.

Jones is therefore limited to the language of the indemnity contract in that case. The court expressly overruled a prior Court of Appeals decision that interpreted the identically worded indemnity provision. *Id.* at 522-23 (overruling *Tucci & Sons, Inc. v. Madsen, Inc.*, 1 Wn. App. 1035, 1036, 467 P.2d 386 (Div. II 1970)).

Significantly, the *Jones* court did not overrule another appellate decision from 1970 that enforced an indemnity provision very similar to §

3.54 of the First Transit - Community Transit contract. *Northern Pac. Ry. Co. v. National Cylinder Gas Div.*, 2 Wn. App. 388, 467 P.2d 884 (Div. I 1970). Unlike the indemnity clause in *Jones*, the contract in *National Cylinder* specifically mentioned the negligence of the indemnitee. The indemnitor agreed to indemnify “except when . . . claims arise out of the sole negligence” of the indemnitee. 2 Wn. App. at 339-40 n.1. The substantive differences between the indemnity clauses in *Tucci* and *National Cylinder* explain why the *Jones* court overruled one and not the other.

2. *Northwest Airlines v. Hughes* Clarified *Jones*

First Transit uses dicta in *Jones* to fashion a general legal principle that applies to all indemnity agreements regardless of the specific wording. “An ‘overt act or omission’ on the part of the indemnitor is necessary before it must indemnify the indemnitee for its own negligence.” (Respondent’s Brief 13) This supposed requirement underpins First Transit’s appellate argument. (Respondent’s Brief at 8, 13, 16, 17, 18, 26 and 28).

The Washington Supreme Court did not apply First Transit’s “overt act or omission” requirement in *Northwest Airlines v. Hughes*. In *Hughes*, a commercial lessee’s employee was injured as

a result of the lessor's sole negligence. The lessee was not at fault.¹ Further, the injury occurred not on the leased premises but in an area controlled by the lessor.

The lessee had agreed to the following indemnity clause:

INDEMNITY. Lessee [Hughes] shall indemnify the Lessor [Northwest] from and against any and all claims, demands, causes of action, suits or judgments (including costs and expenses incurred in connection therewith) for deaths or injuries to persons or for loss of or damage to property arising out of or in connection with the use and occupancy of the premises by Lessee, its agents, servants, employees or invitees whether or not caused by Lessor's negligence.

104 Wn.2d at 153 (emphasis in original). The court enforced the indemnification obligation. It made no difference that the lessee was fault free. "The general rule in Washington, and other states, is that a party may contractually indemnify against loss resulting from that party's own negligence, unless prohibited by statute or public policy." *Id.* at 154. No statute or case prohibited such indemnity clauses in a commercial lease. *Id.* Nor does any statute or case prohibit such indemnity clauses in a transportation service contract.

¹ See discussion in the Court of Appeals' decision. *Northwest Airlines v. Hughes Air Corp.*, 37 Wn. App. 344, 347 and n.1, 679 P.2d 968 (1984) *aff'd* 104 Wn.2d 152, 702 P.2d 1192 (1985).

The only question was whether the intention to indemnify for the indemnitee's own negligence was "clear and unequivocal." *Id.* at 155. The court answered "yes." "The clause involved in this case explicitly refers to injuries 'whether or not caused by Lessor's [Northwest's] negligence'." *Id.* at 156.

The indemnitor in *Hughes* made the same argument as First Transit, that indemnity required an overt act or omission. The *Hughes* court rejected such a broad reading of *Jones* and clarified that it only applied to the indemnity language involved in that case.

Petitioner erroneously asserts that this language requires employer negligence before any indemnification clause will be enforced. Reading this language in context, the "such indemnification agreements" referred to in this passage are agreements which require, by their language, the subcontractor's performance be involved before the clause is applicable. *Jones* held only that the language of the indemnity clause involved in that case could not be construed to require indemnification where the acts of the indemnitee were the sole cause of the injury.

Id. at 157 (emphasis supplied). The court concluded that the true rule of *Jones* is that "for an indemnitor to be found responsible for an indemnitee's own negligence, the agreement must be clearly spelled out. The Northwest-Hughes lease clearly spells out an agreement for indemnity even when Northwest is negligent." *Id.* at 158.

First Transit emphasizes that it was “blameless,” “fault free” and “not at fault **at all**” for the accident. (Respondent’s Brief 1, 7, 24 and 28)(emphasis in original.) So was the indemnitor in *Hughes*. It did not matter. In *Hughes*, the court enforced a clearly worded indemnity provision and declined to use *Jones* to rewrite the parties’ agreement.

The indemnity clause here is similar to the provision enforced in *Hughes*. Both clauses clearly spell out that the indemnitor will indemnify the indemnitee for its own negligence. *Hughes* controls this case and mandates the same result.

3. Almost Identical Indemnity Agreement Enforced

This court previously enforced almost the same indemnity language at issue here. *National Cylinder*, 2 Wn. App. 388 (Div. I 1970). National Cylinder Gas (“NCG”) contracted with a railroad to provide welding services. The indemnity agreement is strikingly similar to § 3.54 of the First Transit-Community Transit contract.

NCG shall indemnify and save harmless the Railroad from any and all claims, suits, losses, damages or expenses . . . arising or growing out of, or in any manner **connected with** the work performed under this contract, **or caused or occasioned in whole or in part by reason of the presence** of the person or of the property of NCG, subcontractors, their employees or agents, **upon or in proximity to the property of the Railroad, except when such claims, suits, etc., arise out of the sole negligence of the Railroad.**

2 Wn. App. at 339-40 n.2 (emphasis supplied). A railroad employee was injured 1,365 feet from the place where NCG was performing its contract. *Id.* at 340. The trial court found that the employee's injury was not caused by any negligence of NCG. *Id.* at 343.

Like First Transit, NCG argued that it had no indemnity obligation because it was not negligent. *Id.* The Court of Appeals disagreed. It noted that the agreement concerned itself not with the NCG's negligence but "solely with the occurrence of an incident which would later give rise to a claim or lawsuit." The Court of Appeals agreed with the trial court that:

the agreement was a clear undertaking based upon causation rather than negligence or fault and had the intention of the parties been otherwise, they could clearly and simply have provided in the agreement that the obligation to indemnify would be subject to fault on the part of [NCG] in connection with some phase of the welding operation. It could also have easily been limited to the welding operation itself rather than specifically including anything in any manner connected with any work performed under the contract.

Id. (emphasis supplied.)

Similarly, Community Transit and First Transit could have clearly and simply provided that indemnity would require some negligence by First Transit. The parties did not. Instead, the indemnity agreement

applies to any loss in any manner connected with any work performed or “occasioned by . . . the presence” of First Transit, its property or employees “upon or in proximity to the property of Community Transit, or any other property upon which” First Transit is performing work under the contract. The only exception is losses resulting from Community Transit’s sole negligence. (CP 14) First Transit’s and NCG’s indemnity agreements are essentially identical and require the same result.

4. First Transit’s Other Case Authority Inapposite

All of the Washington cases cited by the parties can be reconciled by asking the following question: Does the indemnity agreement at issue explicitly provide that the indemnitor must indemnify for the indemnitee’s own negligence? Where the answer is “yes” the courts hold that the indemnity obligation applies. *Hughes*, 104 Wn.2d at 153 (enforcing agreement where Hughes agreed to indemnify for losses “whether or not caused by [Northwest’s] negligence”); *National Cylinder*, 2 Wn. App. at 339-40 n.1 (enforcing agreement where NGC agreed to indemnify for claims “except when such claims . . . arise out of the sole negligence of the RAILROAD”).

Where the answer is “no” courts do not require indemnity. In *Jones*, the indemnity agreement made no mention of the indemnitee’s

negligence or even its performance. *Jones*, 84 Wn.2d at 521. The identical language was considered in *Brame v. St. Regis Paper Company*, 97 Wn.2d 748, 649 P.2d 836 (1982). Both courts determined that the indemnity contracts did not require indemnification for the indemnitee's own negligence.

Not surprisingly, the other cases cited by First Transit reach the same result. *Northern Pac. Ry. Co. v. Sunnyside Valley Irrigation Dist.*, 85 Wn.2d 920, 540 P.2d 1387(1975); *Dirk v. Amerco Mktg. Co.*, 88 Wn.2d 607, 565 P.2d 90 (1977); and *Scruggs v. Jefferson Cy.*, 18 Wn. App. 240, 567 P.2d 257 (Div. II 1977). All of these cases pre-date *Hughes*. None involves an indemnity clause that states that the indemnitor will indemnify for the indemnitee's negligence.

In *Sunnyside*, an irrigation canal broke, water overflowed a culvert and then washed out a roadway. The indemnity agreement simply provided that the district would indemnify a railroad from all loss "occasioned by the improvements [culvert]." 85 Wn.2d at 921. The court concluded that the washed out roadway resulted from the broken canal not anything to do with the culvert. "The culvert itself did not fail to operate effectively as a culvert it only failed to transform itself into a tunnel at the crucial moment." *Id.* at 923. The indemnity agreement did not reference

the railroad's negligence. *Sunnyside* has no bearing on the substantially different indemnity agreement at issue in this case.

Dirk involved an indemnity agreement limited to the **indemnitor's** negligence. Amerco agreed to indemnify a U-Haul dealer for any liability "arising out of accidents occasioned by the negligence of [Amerco] or by defects in U-Haul equipment." 88 Wn.2d at 609 (1977). The dealer sought indemnity even though it caused the accident by negligently towing a defective trailer. The court held that there was no indemnity obligation.

The indemnity provision here did not specifically state that [the dealer] would be indemnified for damages caused by his own acts of negligence. . . . [W]e find it difficult to believe that, as a business practice, Amerco intended to indemnify U-Haul dealers for their own acts of negligence without specific wording to that effect . . .

Id. at 613. Unlike the agreement in *Dirk*, § 3.54 includes specific wording that Community Transit would be indemnified for its own negligence "except only" its sole negligence.

Scruggs also involved an indemnity agreement limited to loss caused by an improvement. Puget Power erected a utility pole and agreed to indemnify the County for any loss "caused by the construction or operation of [the pole]." 18 Wn. App. at 242. A motorist struck the pole and was injured as a result of his own negligence and the County's negligent road design. The court held that the indemnity agreement did

not require Puget Power to indemnify the County. “The clause in question does not explicitly require Puget Power to indemnify the County for losses due to the County’s negligence.” *Id.* at 244.

In contrast to the indemnity clauses at issue in *Jones*, *Brame*, *Sunnyside*, *Dirk* and *Scruggs*, § 3.54 explicitly requires First Transit to indemnify Community Transit for losses due to its own negligence. First Transit’s indemnity obligation is not limited to losses arising from a stationary object like a pole or culvert. Unlike *Dirk*, § 3.54 is not limited to the indemnitor’s negligence. It is expansive and includes all losses “except only” for losses resulting solely from Community Transit’s negligence. As in *Hughes*, the duty to indemnify for the indemnitee’s negligence is clearly spelled out. That is all that Washington law requires.

B. THE INDEMNITY AGREEMENT REQUIRES INDEMNITY HERE

First Transit argues that indemnity is not required per the terms of the parties’ indemnity agreement. (Respondent’s Brief 14-15) Despite stipulating that Community was not solely negligent, First Transit still contends that the “sole negligence” exception to indemnity applies. (Respondent’s Brief 20) First Transit’s position is refuted by apposite case law, the clear wording of the contract and the undisputed facts.

1. Accident Claims “In Connection With” Contract Work

First Transit does not dispute that, as a matter of fact, the claims from the First Transit driver and the passengers on both buses were connected with First Transit’s work under the contract. Instead, First Transit argues that **[t]his is precisely the same argument that the Washington Supreme Court rejected in *Jones*.**” (Respondent’s Brief 18) (Emphasis in original.) The contract in *Jones* also required indemnity for loss “in connection with” the performance of the subcontract. Yet *Jones* held that indemnity would not arise unless “an overt act or omission on the part of Belden . . . caused or concurred in causing the loss.” (Respondent’s Brief 18); *Jones*, 84 Wn.2d at 521-22.

In essence, First Transit argues that *Jones* rewrites any indemnification agreement that contains the phrase “in connection with” to insert a requirement that the indemnitor’s negligence caused or concurred in causing the loss. This is simply wrong. It is quite telling to compare First Transit’s argument with the language of *Hughes*.

In *Hughes*, the indemnitor agreed to indemnify for all claims “in connection with” the use of the leased premises. 104 Wn.2d at 153. No “overt act or omission” of the indemnitor caused or concurred in causing

the loss. As in *Jones*, the indemnitor was blameless. In these respects the facts and the indemnity agreements in *Jones* and *Hughes* are similar, yet the Washington Supreme Court reached different conclusions in each case.

First Transit misses the key difference between the two indemnity agreements. The contract in *Hughes* contained additional language that clearly stated that indemnity would cover the indemnitee's own negligence. The indemnity agreement in *Jones* contained no such language and gave the indemnitor no notice that it would be liable for the indemnitee's negligence. The different wording of the two indemnity agreements explains the different results.

Hughes applies to this case, not *Jones*. Like the contract in *Hughes*, § 3.54 explicitly stated that First Transit would indemnify Community Transit "except only" for its sole negligence. Following *Hughes*, the parties' agreement must be enforced as written.

2. Claims Caused In Part by Presence of First Transit

First Transit does not dispute that the presence of the First Transit bus near the Community Transit bus during the accident sequence was, at least in part, a "but for" cause of the claims from the First Transit driver and the passengers on both buses. Rather, First Transit argues that this is not enough. The First Transit bus, like the utility pole in *Scruggs* or the

subcontractor's employee in *Jones*, was not the cause of the loss but "simply in the wrong place at the wrong time." (Respondent's Brief at 16-17) The lessee's employee in *Hughes* was also in the wrong place at the wrong time, but indemnity applied. What matters is the specific language of the indemnity agreement.

First Transit also relies upon *Scruggs*. In that case, the agreement limited indemnity to losses "caused by construction or operation" of a utility pole. 18 Wn. App. at 242. The comparable language in § 3.54 provides for indemnity for losses "caused or occasioned in whole or in part by reason of the presence of [First Transit] or its . . . employees . . . in proximity to the property of Community Transit." (CP 14) This language is far more expansive than the provision in *Scruggs*.

In *National Cylinder*, the court enforced an indemnity agreement that included language similar to § 3.54. Indemnity covered losses "caused or occasioned in whole or in part by reason of the presence of . . . [indemnitor] . . . upon or in proximity to the property of [indemnitee]. 2 Wn. App. 339-40 n.1. The court concluded that the "agreement was a clear undertaking based upon causation rather than negligence or fault." *Id.* at 343. Similarly, § 3.54 bases indemnity not upon any fault of First Transit but causation tied "in part" to First Transit's presence on or near

Community Transit's property. The undisputed facts show that this second basis for indemnity under § 3.54 was met.

The Illinois Court of Appeals also enforced a comparably worded indemnity agreement. *Burlington N. R.R. Co. v. Pawnee Motor Serv., Inc.*, 525 N.E.2d 910 (Ill. Ct. App. 1988). In *Pawnee*, a trucking company contracted with a railroad and agreed to defend and indemnify for all claims:

arising out of or in any matter connected with the interchange, use or handling of trailers . . . ***or*** caused or occasioned in whole or in part by reason of the presence of the property of Truck Line, its officers, employees, servants, agents, or otherwise, upon or in proximity to the property of Railway, or while going to or departing from the same . . .

525 N.E.2d at 911 (emphasis supplied). An employee of the trucking line sued the railroad for injuries suffered while performing services related to the agreement on the railroad's premises. The railroad tendered defense and indemnity to its contractor.

The court enforced the indemnity agreement as written. "[T]he indemnity provision clearly and unequivocally [sic] states that Burlington was to be indemnified for its own negligence. In fact, the provision specifically refers to situations where injuries occur as the result of a Pawnee employee's mere presence on Burlington's property." *Id.* at 915.

So too § 3.54 specifically refers to situations where losses occur as the result of the mere presence of First Transit's property "in proximity to" Community Transit's property "or any other property upon which [First Transit] is performing any work" under the contract. (CP 14) *Pawnee* is consistent with *National Cylinder* and provides persuasive authority to enforce this clear and unequivocal provision of the indemnity agreement.

3. Sole Negligence Exception Does Not Apply

In § 3.54, First Transit agreed to indemnify for losses "except only for those losses resulting solely from the negligence of Community Transit." (CP 14) First Transit later stipulated that: "The accident did not result from the sole negligence of Community Transit." (CP 16) As a matter of law and undisputed fact, that resolves the question whether the exception for Community Transit's "sole negligence" applies. It does not.

First Transit now seeks to deny the obvious and claim that the sole negligence exception applies to these facts. (Respondent's Brief 20-26). In support of its contradictory position, First Transit (a) finds ambiguity in §3.54 where none exists, (b) cites a California decision interpreting a state statute, and (c) offers its own rewrites of the contract. These arguments are without merit.

First Transit claims that the “sole negligence” provision in the parties’ contract is not unequivocal. (Respondent’s Brief 22) Yet First Transit agreed to a statement of fact that closely tracks the contract language. “The accident did not result from the sole negligence of Community Transit.” (CP 16) If this language is so ambiguous and capable of more than one interpretation, why did First Transit agree to this language not once but twice?

First Transit argues that the indemnity agreement in *Hughes* is unequivocal but § 3.54 is not. (Respondent’s Brief at 22) This is wrong. The phrase “except only for those losses resulting solely from the negligence of Community Transit” is no less clear than the phrase “whether or not caused by Lessor’s negligence.” Both clauses identify the indemnitee by name. Both clauses use the word “negligence” in reference to the indemnitee only. Both clauses notify the indemnitor as to the extent of the indemnitee’s negligence to be indemnified: sole negligence (Northwest), everything but sole negligence (Community Transit). Both clauses are clear and unequivocal.

First Transit’s case authority does not apply. *Southern Pac. Transp. Co. v. Sandyland Protective Assoc.*, 224 Cal. App. 3d 1494, 274 Cal Rptr. 626 (1990). In *Sandyland*, the court interpreted the phrase “sole

negligence” within a California statute regarding indemnity in construction contracts. To assist its interpretation, the court evaluated the Legislature’s probable intent in enacting the statute. 274 Cal. Rptr. at 629. The California Legislature’s statutory intent is simply not relevant to the meaning of similar words used in the indemnity agreement between First Transit and Community Transit.

What is relevant is First Transit’s admission that “[t]he accident did not result from the sole negligence of Community Transit.” (CP 16) Presumably First Transit understood the meaning of “sole negligence of Community Transit.” It means that Community Transit is 100 percent at fault and no one else. There is no other meaning.

First Transit theorizes that the parties “sought to place responsibility for loss **as between the two of them.**” (Respondent’s Brief 23) (Emphasis in original) First Transit cites no authority for this proposition. The written agreement requires First Transit to indemnify for losses “except only for those losses resulting solely from the negligence of Community Transit.” (CP 14) To reach the result desired by First Transit, the court would have to substitute “but only for those losses resulting from the concurrent negligence of both parties” for the actual language used.

The court should enforce § 3.54 as written.

[C]ourts do not have the power, under the guise of interpretation, to rewrite contracts the parties have deliberately made for themselves. *Clements v. Olsen*, 46 Wn.2d 445, 448, 282 P.2d 266 (1955). Courts may not interfere with the freedom of contract or substitute their judgment for that of the parties to rewrite the contract . . .

McCormick v. Dunn & Black, P.S., 140 Wn. App. 873, 891-92 ¶37, 167 P.3d 610 (Div. II 2007).

The indemnitor in *Hughes* also attempted to rewrite the contract to avoid indemnity. The indemnitor argued without authority that the indemnification clause only applied to injuries that occurred on the leased premises. The court rejected that argument because it would require the court to substitute “on the premises” for the actual language of the agreement. “This we will not do. A reasonable interpretation of this language indicates a clear intention to protect Northwest for all liability arising in connection with the lease.” *Hughes*, 104 Wn.2d at 159.

Similarly, a reasonable interpretation of § 3.54 indicates a clear intention to protect Community Transit from all liability in connection with the contract “except only” for losses resulting solely from its own negligence. Under the agreement as written, if Community Transit is 100 percent at fault for the accident then First Transit would have no indemnity obligation. If, however, Community Transit’s share of negligence is

anything less than 100 percent First Transit must indemnify. Whether Community Transit's share of fault is 10 percent, 50 percent or 99.9 percent is irrelevant. The identity of the other tortfeasor is also irrelevant. The "only" exception to indemnity is losses resulting "solely" from Community Transit's negligence. The indemnity agreement is unequivocal and must be enforced as written.

First Transit attempts to manufacture ambiguity by rewriting § 3.54 to supposedly make it more unequivocal. (Respondent's Brief 24-25) The same exercise could apply to the indemnity agreement in *Hughes*. The parties could have drafted the lease agreement to read:

INDEMNITY. Lessee [Hughes], whether negligent or not, shall indemnify the Lessor [Northwest] from and against any and all claims, demands, causes of action, suits or judgments (including costs and expenses incurred in connection therewith) for deaths or injuries to persons or for loss of or damage to property arising out of or in connection with the use and occupancy of the premises by Lessee, its agents, servants, employees or invitees whether or not caused by Lessor's negligence.

Nevertheless, the *Hughes* court read the lease agreement as actually written and found that it was unequivocal and did not require indemnitor negligence before indemnity applied. 104 Wn.2d at 156-57. Similarly, there is no need to add words to § 3.54. As written it is as clearly worded as the same provision in *Hughes*.

4. Indemnity Not Limited to Concurrent Negligence

First Transit argues that its indemnity obligation is really limited to the concurrent negligence of First Transit and Community Transit. The parties allegedly “sought to place responsibility for loss **as between the two of them.**” (Respondent’s Brief 23) (emphasis in original). In other words, indemnity only applies (1) if First Transit was negligent, and (2) no third party negligence was involved. This argument requires a complete rewrite of § 3.54.

Moreover, the parties knew how to draft a concurrent negligence indemnity clause. They did so in the second paragraph of § 3.54. In the event that a court finds that RCW 4.24.115 applies, First Transit’s duty to indemnify is limited to its own share of concurrent negligence. (CP 83) First Transit claims that this second paragraph is irrelevant to this dispute because the contract here is not a construction contract. (Respondent’s Brief 19). This misses the point. In this case, First Transit seeks the benefit of the concurrent negligence indemnity provision in the second paragraph of § 3.54. Yet the contract First Transit signed requires it to indemnify Community Transit “except only for those losses resulting solely” from its own negligence.

III. CONCLUSION

The parties' indemnity agreement clearly spells out that First Transit will indemnify Community Transit "except only for those losses resulting solely from the negligence of Community Transit." (CP 14) This language is unambiguous and unequivocal. Because the indemnity obligation is clearly spelled out, First Transit's lack of negligence is not relevant.

The only relevant question is whether the claims resulted from Community Transit's sole negligence. First Transit agrees that the answer is "no." Therefore, it must indemnify Community Transit for these losses.

The trial court erred in granting summary judgment for First Transit. This court should reverse and remand the case for entry of judgment in favor of Community Transit.

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Respectfully submitted,

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