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

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

**Appellant,**

**vs.**

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

**Respondent.**

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

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**BRIEF OF RESPONDENT**

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## **I. NATURE OF THE CASE**

First Transit was under contract with Community Transit to operate buses. An accident involving a bus operated by Community Transit, a vehicle operated by a third person, and a bus operated by First Transit occurred. Community Transit and the third person were at fault. First Transit was not.

Community Transit sought indemnity from First Transit under their contract. Indemnity clauses requiring the indemnitor to indemnify the indemnitee for the latter's own negligence are disfavored in Washington and enforceable only if unequivocal. The indemnity clause here was not. The trial court granted First Transit summary judgment.

## **II. ISSUES PRESENTED**

Did the indemnity clause unequivocally require the blameless indemnitor to indemnify the indemnitee for losses caused by the negligence of the indemnitee and an independent third party?

## **III. STATEMENT OF THE CASE**

### **A. STATEMENT OF RELEVANT FACTS.**

The parties stipulated to the following facts:

The assignor of respondent FirstGroup America, Inc., dba First Transit entered into a contract with appellant Snohomish County Public Transportation Benefit Area Corp. dba Community Transit to provide

commuter bus service during rush hour between King and Snohomish Counties. (CP 13-15) Pursuant to that contract, the parties agreed to the following indemnity provision (CP 14):

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, its officers, employees and agents. . . .

If a lawsuit in respect to this hold harmless provision ensues, the Contractor shall appear and defend that lawsuit at its own cost and expense, and if judgment is rendered or settlement made requiring payment of damages by Community Transit, its officers, agents, employees and volunteers, the Contractor shall pay the same.

The original contractor subsequently assigned its interest, rights, and duties under the contract to First Transit. (CP 14)

A 5-vehicle accident occurred on northbound I-5. Two of the vehicles involved were a Community Transit bus and a First Transit bus. (CP 15) 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 adjacent lane to the right. (CP 15)

The accident occurred when the last of the three vehicles (vehicle #3) in the lane adjacent to the HOV lane rear-ended the vehicle in front of him (vehicle #2). Vehicle #2 struck the vehicle ahead of him (vehicle #1). Vehicle #1 was pushed into the HOV lane, 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 thus negligent. The driver of the First Transit bus and thus First Transit were fault free. (CP 16)

Community Transit received 42 claims for injury from the passengers of both buses and the First Transit driver. Community Transit tendered these claims to First Transit pursuant to the indemnity clause of the contract. First Transit rejected the tender. (CP 16) Community Transit settled the claims. (CP 16-17)

**B. STATEMENT OF PROCEDURE.**

Community Transit sued First Transit for breach of contract and specific performance. (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)

#### IV. ARGUMENT

In this appeal, Community Transit seeks contractual indemnification from First Transit for losses arising out of the negligence of Community Transit and an independent third party. The parties agree that First Transit was without fault. Washington courts are reluctant to construe indemnity agreements to require the indemnitor to indemnify the indemnitee for the latter's own negligence unless the agreement's language unequivocally requires the indemnitor to do so. Nonetheless, without any citation whatsoever to legal authority,<sup>1</sup> Community Transit claims that the indemnity agreement language here "sets a low threshold for First Transit's indemnity obligation." (Appellant's Brief 11)

The history of negligent indemnitees seeking contractual indemnification for their own negligence from blameless indemnitors is a long one in this State. An understanding of that history is crucial to understanding why Community Transit's "low threshold" argument is contrary to Washington law.

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<sup>1</sup> Indeed, Community Transit does not cite to any legal authority for the first four and a half pages of its legal argument. These are the pages in which it claims that the language of the indemnity agreement requires indemnity here.

**A. WASHINGTON LAW ON INDEMNITY AGREEMENTS.**

“It is well settled that a contract of indemnity 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.” *Griffiths v. Henry Broderick, Inc.*, 27 Wn.2d 901, 904, 182 P.2d 18 (1947) (quoting 27 AM. JUR. 464, § 15). This has long been the rule in Washington. However, how Washington courts have applied that rule has changed over time. *See Northwest Airlines v. Hughes Air Corp.*, 104 Wn.2d 152, 154-55, 702 P.2d 1192 (1985). Understanding that change is crucial.

*Tucci & Sons, Inc. v. Carl T. Madsen, Inc.*, 1 Wn. App. 1035, 467 P.2d 386 (1970), is illustrative of the approach Washington courts took before 1974. In *Tucci* an electrical subcontractor agreed to indemnify the general contractor for claims and losses “arising out of, in connection with, or incident to the subcontractor’s performance of th[e] subcontract.” *Id.* at 1036. An employee of the subcontractor was injured in the course of his employment. He recovered a judgment against the general contractor. The general contractor sued the subcontractor for indemnification.

There was no dispute that the subcontractor had not been negligent. The court ruled that indemnity was available, explaining that merely because the employee was performing work under the subcontract

at the time he was injured, the loss “arose out of, in connection with, or incident to” the subcontractor’s performance of its subcontract. *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 indemnitee’s loss would not have occurred “but for” the indemnitor’s performance of the contract, the indemnitor is contractually obligated to 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).

In 1974, however, the law changed. In *Jones v. Strom Construction Co.*, 84 Wn.2d 518, 527 P.2d 1115 (1974), a masonry subcontractor’s employee was injured when the floor he was working on collapsed. The sole cause of the collapse was the lack of shoring under the floor. The decision not to use shoring was made by the general contractor.

The subcontractor had agreed to indemnify the general contractor for claims and losses “arising out of, in connection with, or incident to” the subcontractor’s performance of the subcontract. *Id.* at 521. This

language was virtually identical to the language of the indemnity provision in *Tucci*.

Thus, *Jones* involved the same situation as *Tucci*: similar indemnity language, a subcontractor's employee who would not have been injured but for the performance of 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 for its own negligence. Not in *Jones*.

Expressly overruling *Tucci*, the *Jones* court held that the blameless subcontractor was not obligated to indemnify the responsible general contractor:

[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.*

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

Thus, *Jones* rejected *Tucci*'s holding that if the indemnitee's loss would not have occurred "but for" the indemnitor's performance of the contract, the indemnitor was contractually obligated to indemnify the

indemnitee for the indemnitee's own negligence.<sup>2</sup> See also *Brame v. St. Regis Paper Co.*, 97 Wn.2d 748, 649 P.2d 836 (1982). Instead, *Jones* held that there must be *an overt act or omission* by the indemnitor that caused or concurred in causing the loss.

In addition, the *Jones* court rejected *Tucci's* holding that an indemnity agreement intended to allow indemnification for the indemnitee's own negligence did not have to expressly say so:

[I]t does not appear reasonable or in keeping with the overall purpose and intent of the subcontract, to isolate and read the indemnity clause in such a fashion as to virtually cast [the subcontractor] into the role of an insurer of [the general contractor's] performance of its separate and nondelegated primary contractual obligations. . . . In any event, the indemnity clause in issue is not wholly free of ambiguity . . . .

84 Wn.2d at 522.

The Supreme Court clarified what *Jones* meant in *Northern Pacific Railway Co. v. Sunnyside Valley Irrigation District*, 85 Wn.2d 920, 540 P.2d 1387 (1975), and *Dirk v. Amerco Marketing Co.*, 88 Wn.2d 607, 565 P.2d 90 (1977),

In *Northern Pacific*, the indemnitor county built a culvert under the

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<sup>2</sup> *Jones* did not apply RCW 4.24.115, which prohibits provisions in 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.

indemnatee railroad company's tracks. When an irrigation canal broke, water rushed through the culvert. Because the culvert could not handle the large volume of water, the tracks were washed away.

The county had agreed to indemnify the railroad from all loss or damage to its tracks "occasioned by" the culvert. 11 Wn. App. at 949. In a decision issued before *Jones*, Division III had held that the county had a duty to indemnify because "[a]ny use of the culvert that results in damage or loss to the plaintiff is covered." *Northern Pacific Railway Co. v. Sunnyside Valley Irrigation District*, 11 Wn. App. 948, 953, 527 P.2d 693 (1974).

The Washington Supreme Court reversed. Noting that the indemnity provision required damage "occasioned by" the culvert, the court explained:

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 extent 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* provides an even clearer example of how indemnity provisions now operate in Washington. There the indemnitor, a U-Haul dealer, rented a van to a customer. The van broke down. When the dealer sought to tow it away, it was struck by another vehicle. A trial court later found the van was defective and that the dealer was negligent. Despite his culpability, the dealer sought indemnification under a clause in his dealership contract that required the grantor of the dealership to hold the dealer harmless from liability of injury “arising out of accidents occasioned . . . by defects in U-Haul equipment . . . .” 88 Wn.2d at 609.

The Supreme Court ruled that the indemnity clause did not apply. Noting that “occasioned by” was narrower than the “arising out of”, “in connection with”, and “incident to” language of the indemnity provision in *Jones*, 88 Wn.2d at 611, the court explained:

[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 indemnitor 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 or the payment of a special premium as protection against all liability.

88 Wn.2d at 612-13 (first emphasis in original; second emphasis added). In other words, even though the indemnification agreement covered accidents occasioned by defects in the van, the defect in the van caused it to be towed, and the towing led to the accident, that was insufficient to require indemnification. Furthermore, if parties to an indemnity agreement intend to provide for indemnification for the indemnitee's own negligence, they must specifically say so in their agreement.

*Scruggs v. Jefferson County*, 18 Wn. App. 240, 567 P.2d 257 (1977), also applied a post-*Jones* approach to indemnity agreements. There a passenger in a car was seriously injured when the car in which he was riding failed to negotiate a curve and hit a utility pole. The pole was owned and maintained by a utility company under a franchise agreement with the county. The accident was caused solely by the negligence of the car's driver and by the county's failure to post a speed sign at the curve. The utility company was not negligent.

The franchise agreement obligated the utility company 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 company to recover indemnification for \$150,000 the county paid to settle the passenger’s claim.

Obviously the accident would not have happened or would have been much less severe but for the pole. Nevertheless, the court ruled that the utility company was not liable 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).

What principles can be gleaned from *Jones* and its progeny? First, “clauses which purport to exculpate an indemnitee from liability for losses flowing solely from his own acts or omissions 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.

Second, a corollary to this principle is that “an 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*.” *Dirk*, 88 Wn.2d at 612 (emphasis in original). Hence, “ambiguous indemnity contracts are construed in favor

of the indemnitor and against the indemnitee.” *Carl T. Madsen, Inc. v. Babler Brothers, Inc.*, 25 Wn. App. 880, 885 n.7, 610 P.2d 958 (1980).

Third, even though an indemnity agreement may not mention the words “negligence”, “fault”, or any similar word, that does not mean that the indemnitor must indemnify the indemnitee for the latter’s own negligence if the indemnitor has not itself been partially at fault or more than passively contributory to the accident. An “overt act or omission” on the part of the indemnitor is necessary before it must indemnify the indemnitee for its own negligence.<sup>3</sup> *Jones*, 84 Wn.2d at 521-22.

Significantly, Community Transit relies on a pre-*Jones* case, *Northern Pacific Railway Co. v. National Cylinder Gas Division*, 2 Wn. App. 338, 467 P.2d 884 (1970), to interpret the indemnity provision. (Appellant’s Brief 18) Although *Jones* is the seminal Washington decision on the interpretation of indemnity agreements, Community Transit cites it only in passing and does not even mention *Brame, Dirk, Northern Pacific*, or *Scruggs*. (Appellant’s Brief 17, 21)

Thus, Community Transit’s brief is based on a woefully incomplete view of Washington law. As will be discussed, when the

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<sup>3</sup> “Act or omission” is generally interpreted to refer to negligence or wrongfulness. See, e.g., *Lone Star Industries, Inc. v. Atchison, Topeka & Santa Fe Railway Co.*, 666 S.W.2d 376, 379 (Tex. App. 1984).

indemnity provision here is construed consistent with *Jones* and its progeny, the trial court's summary judgment in First Transit's favor must be affirmed.

**B. THE INDEMNITY AGREEMENT DOES NOT REQUIRE INDEMNITY HERE.**

Indemnification under the parties' indemnity provision has two requirements:

(1) the loss must have been "in connection with the work performed under [the] contract, or caused or occasioned in whole or in part by reason of the presence of [First Transit] . . . or [its] property, employees or agents, upon or in proximity to the property of Community Transit"; and

(2) the loss must not have resulted "solely" from Community Transit's negligence. If *either* requirement is not met, summary judgment in favor of First Transit must be affirmed. As will be discussed, neither element exists here.

(CP 14)

**1. The Loss Was Not "In Connection with the Work" or "Caused or Occasioned . . . by . . . [First Transit's] Presence".**

To qualify for indemnity, Community Transit must first show, consistent with the post-*Jones* principles discussed in section A *supra*, that the claims it paid were either "*in connection with* the work performed

under [the] contract” “*caused by or occasioned* in whole or in part *by* reason of the presence of [First Transit], or [its] property, employees or agents, upon or in proximity to the property of Community Transit.” (CP 14) (emphasis added). This it cannot do.

Community Transit claims it is entitled to indemnity because “[t]he claims are for injuries suffered while First Transit was providing contracted bus service and occurred to persons on the First Transit bus or on a bus that collided with the First Transit bus.” (Appellant’s Brief 10) In other words, Community Transit is claiming that “but for” First Transit’s performance of its contract—its bus traveling along I-5, the claims would not have occurred.

But *Jones* and its progeny make clear that indemnity is not available under such indemnity contract language just because some or all of the claims would not have arisen “but for” the indemnitor’s performing its contract. For example, in *Jones*, the contract at issue provided for indemnity for loss “‘arising out of,’ ‘*in connection with,*’ or ‘incident to’” the subcontractor’s performance of the subcontract. 84 Wn.2d at 522 (emphasis added). But for the employee’s performance of work on the subcontract, the accident would have never happened.

Nevertheless, the court ruled that the fact that the injured employee was performing work called for under the subcontract was not enough.

Instead, the court ruled, indemnity required an overt act or omission on the part of the subcontractor.

*Dirk* held that “occasioned by” was even narrower than “in connection with.” 88 Wn.2d at 607. In that case, the dealership grantor was to indemnify the dealer for injury “arising out of accidents occasioned . . . by defects in U-Haul equipment.” *Id.* at 609. But for a defect in U-Haul equipment, the accident would have never occurred. But the court ruled that the mere fact that the accident arose out of the towing of the defective van was not “occasioned by” the defect in the van.

*Scruggs* involved an indemnity provision for accidents “caused by” a utility company’s exercise of its rights under a franchise agreement with the county. As part of its exercise of such rights, the utility company had had placed and erected a utility pole. But for the non-negligent placement and erection of that pole, the accident would have been less severe than it was. But the mere fact that the county had to pay for damages resulting from a car hitting that utility pole did not mean the accident was “caused by” the presence of the pole.

The same is true here. The First Transit bus was not at fault. First Transit did not actively contribute to the accident. First Transit and its driver did not commit any overt act or omission as required by *Jones*. 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 argues otherwise. But nowhere in that argument does it cite *any* legal authority. (Appellant's Brief 11-13). Given the post-*Jones* case law discussed *supra*, there is no controlling legal authority it could cite.

Community Transit argues that it showed that the claims were "in connection with the work performed under" the contract because at the time of the accident, "First Transit was providing contracted commuter service for Community Transit." (Appellant's Brief 11) This is the same argument that the general contractor unsuccessfully made in *Jones*.

Community Transit also argues that the claims were "caused by" "the presence' of First Transit's property (bus) and employee [the driver] 'in proximity to the property of Community Transit' (bus)". (Appellant's Brief 12) This is the same argument that the county unsuccessfully made in *Scruggs*.

Community Transit does not claim that First Transit committed an overt act or omission, as required by *Jones*. Instead, it argues that "[a]t the time of the multiple vehicle accident, First Transit was providing

contracted commuter service for Community Transit” and that “[t]he claimed injuries either would not have happened or would have been less severe *but for* the presence of the First Transit bus.” (Appellant’s Brief 11, 13) (emphasis added)

In short, what Community Transit is arguing is that “but for” the presence of the First Transit bus—but for the performance of First Transit’s contract, the losses would not have occurred. *This is precisely the same argument that the Washington Supreme Court rejected in Jones when it overruled Tucci.*

Indeed, comparing Community Transit’s arguments with the language of *Jones* is quite telling. Community Transit claims that “[i]ndemnity does not require First Transit’s negligence” because all that the indemnity provision requires is that the loss be “in connection with the work performed”. (Appellant’s Brief 14) In *Jones*, the indemnity agreement simply required that the loss be “in connection with” the performance of the subcontract. 84 Wn.2d at 521. Yet *Jones* ruled that “unless an *overt act or omission on the part of [the indemnitor]* 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 added) (footnote omitted).

Community Transit also argues that the second paragraph of the parties' indemnity agreement shows that the parties intended to obligate First Transit to indemnify Community Transit even in situations where First Transit was not at fault.<sup>4</sup> (Appellant's Brief 15) But that paragraph has nothing to do with this case. It applies only when the agreement is subject to RCW 4.24.115, a statute that applies only to indemnity agreements in construction contracts and that specifically deals with the concurrent negligence of the indemnitor and the indemnitee. The parties agree that the contract here is not a construction contract. (Appellant's Brief 15) And in any event, this case does not involve the concurrent negligence of the indemnitor and the indemnitee because First Transit was not negligent.

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<sup>4</sup> The second paragraph reads:

Should a court of competent jurisdiction determine that this agreement is subject to RCW 4.24.115, then in the event of liability for damages arising out of bodily injury to persons or damages to property caused by or resulting from the concurrent negligence of the Contractor and Community Transit . . . the Contractor's liability hereunder shall be only to the extent of the Contractor's negligence. It is further specifically and expressly understood that the indemnification provided herein constitutes Contractor's waiver of immunity under industrial insurance, Title 51 RCW, solely for the purpose of the indemnification. This waiver has been mutually negotiated by the parties.

(CP 83)

Community Transit's case is premised on wishful thinking, not on what the law is in Washington. The trial court correctly granted First Transit summary judgment. This court should affirm.

**2. The Sole Negligence Exception Applies.**

Even if Community Transit met the "in connection with", "occasioned by", or "caused by" tests by showing an overt act or omission on the part of First Transit, it would still not be entitled to indemnification. This is because the indemnity provision contains an exception for "those losses resulting solely from the negligence of Community Transit." (CP 14) If a loss falls within this exception, Community Transit must bear it and cannot obtain indemnity from First Transit.

Again, "an 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*." *Dirk*, 88 Wn.2d at 612 (emphasis in original). Community Transit claims it is entitled to be indemnified for its own negligence simply because a third party's negligence also contributed to the loss. While this might be possible under an unequivocally worded indemnity provision, the indemnity provision here is not unequivocal.

*Northwest Airlines v. Hughes Air Corp.*, 104 Wn.2d 152, 702 P.2d 1192 (1985), demonstrates how an indemnity clause should be worded

when the parties intend to allow the indemnitee to be indemnified for its own negligence. In that case, a portion of a building was leased. An employee of the tenant was injured when he slipped on oil in a portion of the building that was still controlled and occupied by the landlord. The employee sued the landlord.

The landlord sought indemnification from the tenant. The lease contained an indemnification provision requiring the tenant to indemnify the landlord for all 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).

The Washington Supreme Court summarized the history of Washington law on indemnity agreements as follows:

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.

*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 (citations omitted; emphasis added). Then, 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.

The indemnity provision in *Northwest* required indemnification "whether or not caused by Lessor's negligence". *Id.* at 153 (emphasis omitted). This phrase unequivocally encompasses situations where the lessor is negligent, where it is not, and anything in between. In contrast, the phrase, "losses resulting solely from the negligence of Community Transit" is not unequivocal because it reasonably could be read to refer only to the sole negligence of Community Transit as compared with First Transit alone, as opposed to the negligence of Community Transit as compared with anyone. (CP 14)

*Southern Pacific Transportation Co. v. Sandyland Protective Association*, 224 Cal. App. 3d 1494, 274 Cal. Rptr. 626 (1990), *rev. denied*, Jan. 23, 1991), is illustrative. There a homeowners' association agreed to indemnify a railroad as part of an agreement in which the railroad allowed the association to construct and maintain a roadway across the railway's tracks. Occupants of a car were injured when a train struck the car as it was trying to cross the tracks on the association's roadway.

The victims sued the railroad. The railroad sought indemnity from the association. However, a California statute precluded indemnity for the

“sole negligence or willful misconduct of the [railroad].” 274 Cal. Rptr. at 628. The railroad claimed that it was not solely negligent because the victims had been negligent. In that event, the statute would preclude indemnity. The association was not at fault.

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

The manifest purpose of the Legislature in enacting section 2782 was to prevent one party to a construction contract from shifting the ultimate responsibility for its negligence to a nonnegligent party. That purpose would not be advanced by a construction of the statute that would allow a shifting of responsibility to a nonnegligent party upon a showing that the tort claimant and the promisee were comparatively negligent. 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).

The California court’s reasoning is equally applicable here. First Transit and Community Transit sought to place responsibility for loss *as between the two of them*. Thus, when First Transit was solely at fault and Community Transit was not at fault at all, First Transit would indemnify Community Transit. Or when First Transit and Community Transit were

both at fault, First Transit would indemnify Community Transit. Only when Community Transit was solely at fault would First Transit not indemnify it.

Nothing in the parties' indemnity agreement unequivocally says that the parties intended that First Transit would indemnify Community Transit when First Transit was not at fault *at all*. If the parties had intended to require indemnification where First Transit was not at fault at all, they easily could have said so in unequivocal terms. For example, the provision could have been drafted to read:

The Contractor, *whether negligent or not*, 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, its officers, employees and agents. . . .

Nor does the parties' agreement unequivocally say that the parties intended First Transit to indemnify Community Transit when an independent third party's negligence contributed to the loss. The parties could have easily drafted the indemnity provision to read:

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; its officers, employees and agents, *alone or in combination with the negligence of any person or organization other than First Transit, its officers, employees, and agents . . .*

Nonetheless, Community Transit claims that “First Transit agrees that the claimed injuries [here] were not the result of Community Transit’s sole negligence” and that the indemnity provision does not require fault on the part of First Transit. (Appellant’s Brief 13-14) Neither argument has merit.

No one disputes that the losses here were caused by the combined negligence of Community Transit and an independent third party driver of another vehicle. In that sense, the accident did not result from the sole negligence of Community Transit. But that is not what is significant. What is significant is whether the parties intended that the phrase “resulting solely from the negligence of Community Transit” means

resulting solely from Community Transit's negligence as compared to First Transit alone.

Second, the mere fact that the indemnity provision did not specifically require fault on the part of First Transit is immaterial. In *Jones*, the subcontractor agreed to indemnify the general contractor for claims and losses "arising out of, in connection with, or incident to" the subcontractor's performance of the subcontract. 84 Wn.2d at 521. That indemnity agreement did not mention the indemnitor's negligence either. But the Washington Supreme Court ruled that indemnity required "an overt act or omission" by the indemnitor. 84 Wn.2d at 521-22. Community Transit does not contend that First Transit committed any overt act or omission.

**C. COMMUNITY TRANSIT'S OTHER ARGUMENTS ARE BASELESS.**

Community Transit argues that the indemnity provision does not violate public policy because RCW 4.24.115 does not apply here. (Appellant's Brief 14-15) First Transit agrees that RCW 4.24.115—which applies only to indemnity provisions in the construction context—does not apply.

But Community Transit's contention that the indemnity provision here is therefore "enforceable under Washington Law" misses the point. (Appellant's Brief 14) The point is not whether a clearly worded

indemnity agreement outside the construction context is enforceable in Washington. The point is whether a Washington court will require a fault-free indemnitor to indemnify the indemnitee for its own negligence as well as the negligence of another where the indemnity provision is not unequivocally worded to say so. The answer is “no.”

Community Transit also contends that “it is clear that Community Transit intended (and First Transit agreed to) as sweeping an indemnity as possible.” (Appellant’s Brief 19) That is what the indemnitee in *Jones* thought too. As the court there observed, “[a]t first blush, the clause appears to be broad and sweeping in its language and coverage.” 84 Wn.2d at 521. That did not save the clause from being insufficiently clear. Furthermore, as discussed *supra*, the parties’ sole negligence exception is not unequivocal either since it could reasonably be read to refer to the sole negligence of Community Transit as compared with First Transit alone. *See Southern Pacific*, 274 Cal. Rptr. at 629.

Community Transit lists a number of risks that it claims it would have been reasonable for the parties to have allocated in the indemnity provision. That puts the cart before the horse. The issue is not what the parties reasonably *could* have agreed to, it is whether the parties *unequivocally did agree* that First Transit would indemnify Community

Transit for the latter's own negligence along with a third person's negligence when First Transit was completely blameless.

**V. CONCLUSION**

An indemnitor is not obligated to indemnify the indemnitee for the latter's own negligence unless the language of the indemnity agreement is clear and unequivocal. Furthermore, a blameless indemnitor cannot be liable unless it committed an overt act or omission that contributed to the loss.

The language of the indemnity agreement here is not clear and unequivocal. The indemnitor, First Transit, was blameless and committed no act or omission contributing to the loss.

Consequently, the trial court was right when it granted First Transit summary judgment. This court should affirm.

DATED this 22<sup>d</sup> day of December, 2008.

**REED McCLURE**

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