

70433-8

70433-8

No. 70433-8-I



COURT OF APPEALS,
DIVISION I OF THE STATE OF WASHINGTON

SEAWAY PROPERTIES, LLC,

Appellant,

v.

CIAO BELLA FOODS, LLC,

Respondent.

BRIEF OF APPELLANT SEAWAY PROPERTIES, LLC

Richard L. Martens, WSBA # 4737
Steven A. Stolle, WSBA # 30807
Martens + Associates | P.S.
705 Union Station
705 Fifth Avenue South, Ste. 150
Seattle, Washington 98104-4436
(206) 709-2999

Attorneys for Appellant Seaway Properties, LLC

ORIGINAL

TABLE OF CONTENTS

I. INTRODUCTION 1

II. ASSIGNMENTS OF ERROR 2

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 2

 A. Issues Pertaining to Assignment of Error No. 1 2

 1. Whether the established “action, inaction... or negligence” of Helen Heuer, a customer or invitee of Ciao Bella, triggered Ciao Bella’s duty to indemnify and hold Seaway harmless under Section 23.2 of the lease agreement 2

 2. Whether Section 23.2 was triggered by reason of the “condition or use of the premises” by the tenant, Ciao Bella 2

 3. Whether inclusion of a waiver of the indemnitor’s statutory immunity under the Industrial Insurance Act, RCW Title 51, limits the indemnity obligation under Section 23.2 of the lease to only injuries to which Title 51 applies 2

 B. Issues Pertaining to Assignment of Error No. 2 3

 1. Whether Seaway’s reliance on a certificate of insurance provided by Ciao Bella constituted an “acceptance” of non-insured status on the insurance policy and a waiver of Ciao Bella’s breach of the requirement of Section 10 of the lease to name Seaway as an additional insured on Ciao Bella’s policies 3

2.	Whether the trial court’s finding that Seaway’s discovery of a typographical error in a certificate of insurance demonstrates that Seaway reviewed the pertinent terms of the insurance policy issued by Fireman’s Fund and voluntarily waived the insurance requirements of the lease	3
IV.	STATEMENT OF THE CASE	3
A.	Helen Heuer’s Fall Outside Café Revo.	3
B.	Seaway’s Claim for Breach of the Duty to Name Seaway as an Additional Insured on the Ciao Bella Policies	4
C.	Seaway’s Claim for Breach of the Indemnity Provisions of Section 23.2 of the Lease Agreement	6
V.	SUMMARY OF ARGUMENT	10
VI.	ARGUMENT.	13
A.	The Standard of Review for the Trial Court’s Findings of Fact and Conclusions of Law	13
B.	Contractual Indemnity Provisions are Construed Like Other Contract Provisions to Effect Their Intended Purpose	14
C.	The Trial Court’s Conclusions of Law Nos. 13, 14, and 15 Erroneously Render Section 23.2 of the Lease Agreement Ineffective	16
1.	The trial court’s Conclusion of Law No. 13 omits consideration of a provision	

	of the parties' contract	17
2.	The "by reason of the condition or use of the Premises" Provision of Section 23.2 applies	18
3.	The indemnity provision is not limited to claims subject to Washington's Industrial Insurance Act, Title 51 RCW	24
4.	The testimony of the parties was that the indemnity provision was intended to broadly protect Seaway	28
D.	Seaway Did Not Waive Ciao Bella's Breach of Section 10 of the Lease Agreement	29
E.	Seaway is Entitled to Prevailing Party Attorney's Fees and Costs on Appeal	34
VII.	CONCLUSION	35

TABLE OF AUTHORITIES

WASHINGTON STATE CASES

<i>224 Westlake, LLC v. Engstrom Properties, LLC</i> , 169 Wn. App. 700, 281 P.3d 693 (2012).....	14, 34
<i>Cambridge Townhomes, LLC v. Pac. Star Roofing, Inc.</i> , 166 Wn.2d 475, 209 P.3d 863 (2009).....	27
<i>City of Everett v. Estate of Sumstad</i> , 95 Wn.2d 853, 631 P.2d 366 (1981).....	15
<i>Endicott v. Saul</i> , 142 Wn. App. 899, 176 P.3d 560 (2008).....	14
<i>Hearst Comm., Inc. v. Seattle Times Co.</i> , 154 Wn.2d 493, 115 P.3d 262 (2005).....	15
<i>Hollis v. Garwall, Inc.</i> , 137 Wn.2d 683, 974 P.2d 836 (1999).....	15
<i>In re Marriage of Schweitzer</i> , 132 Wn.2d 318, 937 P.2d 1062 (1997).....	15
<i>J.W. Seavey Hop Corp. of Portland v. Pollock</i> , 20 Wn.2d 337, 147 P.2d 310 (1944).....	16
<i>Jones v. Best</i> , 134 Wn.2d 232, 950 P.2d 1 (1998).....	34
<i>Jones v. Strom Constr. Co.</i> , 84 Wn.2d 518, 527 P.2d 1115 (1974).....	14, 20-24
<i>Lynott v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.</i> , 123 Wn.2d 678, 871 P.2d 146 (1994).....	15

<i>McDowell v. Austin Co.</i> , 105 Wn.2d 48, 710 P.2d 192 (1985).....	16
<i>McLean Townhomes, LLC v. America 1st Roofing & Builders, Inc.</i> , 133 Wn. App. 828, 138 P.3d 155 (2006).....	25-27
<i>Northwest Airlines v. Hughes Air Corp.</i> , 104 Wn.2d 152, 702 P.2d 1192 (1985).....	20, 22-24
<i>Pac. Star Roofing, Inc.</i> , 166 Wn.2d 475, 209 P.3d 863 (2009).....	27
<i>Postlewait Constr. Inc. v. Great American Ins. Cos.</i> , 106 Wn.2d 96, 720 P.2d 805 (1986).....	31
<i>Ross v. Harding</i> , 64 Wn.2d 231, 391 P.2d 526 (1964).....	34
<i>Seattle-First Nat'l Bank v. Westlake Park Assocs.</i> , 42 Wn. App. 269, 711 P.2d 361 (1985).....	26
<i>Snohomish County Publ. Transp. Benefit Area Corp. v. FirstGroup America, Inc.</i> , 173 Wn.2d 829, 271 P.3d 850 (2012).....	14-16, 22-24, 26
<i>State v. Smith</i> , 117 Wn.2d 263, 814 P.2d 652 (1991).....	27
<i>State v. Westling</i> , 145 Wn.2d 607, 40 P.3d 669 (2002).....	27
<i>Sunnyside Valley Irrigation Dist. v. Dickie</i> , 149 Wn.2d 873, 73 P.3d 369 (2003).....	14
<i>Universal/Land Constr. Co. v. City of Spokane</i> , 49 Wn. App. 634, 745 P.2d 53 (1987).....	16

<i>Veach v. Culp</i> ,	
92 Wn.2d 570, 599 P.2d 526 (1979).....	14
<i>Wagner v. Wagner</i> ,	
95 Wn.2d 94, 621 P.2d 1279 (1980).....	15, 18, 26
<i>Wash. Publ. Util. Districts' Util. Sys. v. Publ. Util. Dist. No. 1 of Clallam Co.</i> ,	
112 Wn.2d 1, 771 P.2d 701 (1989).....	16, 26
<i>Wenatchee Sportsmen Ass'n v. Chelan County</i> ,	
141 Wn.2d 169, 4 P.3d 123 (2000).....	14
WASHINGTON STATUTES AND RULES	
RAP 18.1(b).....	35
RAP 18.1(j).....	35
RCW 51.....	3, 7, 9, 11, 12, 25, 27

I. INTRODUCTION

This case arises from personal injury claims brought against both appellant Seaway Properties, LLC (“Seaway”), and respondent Ciao Bella Foods, LLC d/b/a Café Revo (“Ciao Bella”) as the result of a fall by a business invitee of Ciao Bella, which operated a restaurant business in West Seattle pursuant to a written lease agreement with the property owner, Seaway.

Ciao Bella’s business invitee, Helen Heuer, had a lunch reservation at the restaurant, but while walking between the parking lot and the restaurant entrance, she deviated from the natural path to the sidewalk, instead walked across a raised concrete platform, stepped off the platform adjacent to the restaurant, fell, and was injured. She filed negligence claims against both Ciao Bella and Seaway. Seaway cross-claimed against Ciao Bella for contractual indemnity under the lease agreement and for breach of the insurance requirements in the lease. Ms. Heuer eventually settled her claims, and the two co-defendants proceeded to a bench trial on the cross-claims.

The trial court entered findings of fact and conclusions of law, concluding that the indemnity provision of the lease agreement did not

apply to the claims brought by Ms. Heuer and that, although Ciao Bella breached the insuring provision of the contract, Seaway had waived that claim. Because those conclusions were in error, this appeal followed.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in concluding that Section 23.2 of the lease agreement between Seaway and Ciao Bella did not apply to the Heuer claims and Ciao Bella, therefore, had no duty to indemnify or hold Seaway harmless from those claims.

2. The trial court erred in concluding that, although Ciao Bella breached Section 10 of the lease by failing to add Seaway as an additional named insured on Ciao Bella's policy, Seaway waived the breach.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. Issues Pertaining to Assignment of Error No. 1.

1. Whether the established "action, inaction...or negligence" of Helen Heuer, a customer or invitee of Ciao Bella, triggered Ciao Bella's duty to indemnify and hold Seaway harmless under Section 23.2 of the lease agreement. (Conclusion of Law No. 13)

2. Whether Section 23.2 was triggered by reason of the "condition or use of the premises" by the tenant, Ciao Bella. (Conclusion of Law No. 14)

3. Whether inclusion of a waiver of the indemnitor's statutory

immunity under the Industrial Insurance Act, RCW Title 51, limits the indemnity obligation under Section 23.2 of the lease to only injuries to which Title 51 applies. (Conclusion of Law No. 15)

B. Issues Pertaining to Assignment of Error No. 2

1. Whether Seaway's reliance on a certificate of insurance provided by Ciao Bella constituted an "acceptance" of non-insured status on the insurance policy and a waiver of Ciao Bella's breach of the requirement of Section 10 of the lease to name Seaway as an additional named insured on Ciao Bella's policies. (Conclusion of Law No. 9)

2. Whether the trial court's finding that Seaway's discovery of a typographical error in a certificate of insurance demonstrates that Seaway reviewed all of the pertinent terms of the insurance policy issued by Fireman's Fund and voluntarily waived the insurance requirements of the lease. (Finding of Fact No. 32)

IV. STATEMENT OF THE CASE

A. Helen Heurer's Fall Outside Café Revo.

The factual record in this case is largely undisputed. On January 8, 2010, Helen Heurer was on her way to a luncheon at Café Revo in West Seattle. She had a reservation and had agreed to meet a group of ladies from her church there for a luncheon. CP 31 FF 35. After parking in a parking lot located on the property and designated as parking for

customers of the two commercial tenants, including Café Revo, Ms. Heuer exited her car and headed toward the restaurant. CP 31 FF 36. But, instead of walking down the parking lot to the city sidewalk to approach the entrance to the restaurant, Ms. Heuer turned and walked across a concrete platform located between the parking lot and the restaurant. CP 31 FF 39-40. She then intentionally stepped down from the end of the platform, but apparently misjudged the height, fell, and was injured. CP 31 FF 41.

On March 18, 2011, Ms. Heuer filed suit against both Ciao Bella, which operated Café Revo, and Seaway, as the property owner, alleging that one or both defendants were negligent and their negligence was a proximate cause of her injuries. CP 1-3. Both defendants answered, denying liability, and Seaway asserted cross-claims against Ciao Bella for breach of duties to obtain insurance for Seaway and defend, indemnify, and hold Seaway harmless pursuant to the written lease agreement between the parties. *See* CP 4-15; CP 16-20; Ex. 5 §§10, 23.2.

In particular, Seaway asserted two separate contractually based cross-claims: one for failure to obtain required insurance for Seaway and one for breach of the duty to defend, indemnify, and hold Seaway harmless from the Heuer claims. *See* CP 9-12; Ex. 5 §§10, 23.2. A third cross-claim for implied indemnity was later dropped. CP 36 at CL 16.

///

B. Seaway's Claim for Breach of the Duty to Name Seaway as an Additional Insured on the Ciao Bella Policies.

The insurance provision at issue is in Section 10 of the lease.

Section 10 provides, in pertinent part:

Tenant, during the entire Primary Term . . . shall keep in full force and effect: (i) Commercial General Liability insurance. . . . Tenant shall **name** Landlord and any designees of Landlord as additional insureds under all of Tenant's insurance policies and all such policies shall be issued as primary policies and on an occurrence basis.

Ex. 5 p. 8 § 10 (emphasis added). The trial court confirmed that “[u]nder Section 10 of the Lease Agreement, Ciao Bella owed Seaway a contractual duty to name Seaway as an additional insured on its applicable insurance policies, including its policy issued by Fireman’s Fund Insurance Company.” CP 34 at CL 7; *see also* CP 28-29 FF 24-29. The evidence established that Ciao Bella’s insurer, Fireman’s Fund, told Seaway in response to its tender that Seaway is *not* an additional insured under Ciao Bella’s insurance policy. CP 32 at FF 49. The trial court also considered a “sample” blanket insured endorsement submitted by Ciao Bella, but found that “even if the endorsement offered as Exhibit 11 were properly authenticated as a part of the Fireman’s Fund policy issued to Ciao Bella, its plain language does not purport to ‘name’ Seaway as an additional insured on the policy as required by Section 10 of the Lease Agreement.

Rather, at most, it might be construed to confer status as an unnamed additional insured.” CP 29 FF 29. The trial court also found that both Seaway and Ciao Bella “believed that the insurance policy obtained by Ciao Bella complied with Section 10.” CP 30 FF 33.

The trial court concluded that Ciao Bella breached Section 10 of the lease by failing to name Seaway as an additional named insured on the policy. CP 34 at CL 8. The trial court then further concluded that – because Ciao Bella provided the proof of insurance required under Section 4.1 of the contract and Seaway did not raise the issue of not being made an additional named insured on Ciao Bella’s policy – Seaway had waived the breach by “acceptance of the proposed policy.” CP 34-35 CL 9. This conclusion was based on the trial court’s finding that Seaway had once found a typographical error in a certificate of insurance provided to Seaway and brought it to Ciao Bella’s attention, after which it was corrected. *See* CP 30 FF 31-32. So, apparently, even though the trial court found that Seaway did not know of the breach, it nevertheless waived the breach in advance by its review of the certificate of insurance. *Compare* CP 30 FF 31-33, *with* CP 34-35 CL 9.

C. Seaway’s Claim for Breach of the Indemnity Provisions of Section 23.2 of the Lease Agreement.

The defense, indemnity, and hold harmless provision is found in

Section 23.2 of the Lease Agreement. *See* Ex. 5. Section 23.2 that Ciao

Bella will :

“indemnify, defend, and hold Landlord . . . harmless from each and every loss, cost, damage and expense, including reasonable attorneys’ fees and court costs, arising out of any accident or other occurrence on or to the Premises, Building or Common Areas, causing injury to or death of persons or damage to property, whether real or personal, **by reason of the condition or use of the Premises, or arising out of any action, inaction, negligence** or willful misconduct by Tenant . . . or any agents, vendors, customers or invitees of Tenant, excepting only for such loss, cost, damage and expense resulting from the gross negligence or willful misconduct of the Landlord . . .”

Ex. 5 §23.2 (underlining and bold added). The trial court concluded that the indemnify provision, like the rest of the lease agreement, was valid and enforceable. *See* CP 24 FF 1; CP 33 CL 2. Nevertheless, the trial court concluded that Ciao Bella had no duty to Seaway under the indemnity provision. It provided three rationales: (1) Ms. Heuer’s accident did not occur by reason of “the use of the premises,” (2) Ciao Bella was not at fault for the accident, and (3) the indemnity provision applied only to claims to which the Washington Industrial Insurance Act, RCW Title 51, applied. *See* CP 35-36 CL 13, 14, & 15.

The trial court analytically divided the indemnity provision into a

“first portion” and “second portion,” the first portion being the “by reason of the condition or use of the premises” triggering language, and the second portion being the “arising out of any action, inaction, negligence or willful misconduct” triggering language, quoted above in bold. CP 35 CL 13 & 14.

Addressing the “second portion” first, the trial court noted that it had already found that Ms. Heuer’s unfortunate accident “did not arise from any action, inaction, negligence or willful misconduct of Ciao Bella.” CP 35 CL 13. Based on this, the trial court then concluded that “the second portion of Section 23.2 is inapplicable.” *Id.* The trial court apparently did not consider any of the potential actors listed after “Tenant” in the “second portion” of the provision, including “customers or invitees of Tenant.” *See id.; compare*, Ex. 5 § 23.2.

Next addressing the triggering language of the “first portion” of Section 23.2, the trial court concluded that Mr. Heuer’s accident did not arise from either her use of the premises or Ciao Bella’s use of the premises because, “[t]o hold otherwise would mean that the duty to indemnify would be linked to the subjective intent of the injured party.” CP 35-36 CL 14.

Significantly, the trial court found that Ms. Heuer had a lunch reservation at Café Revo, “where she planned ahead to meet other women

from her church group.” CP 31 FF 35. It also found: (1) Ms. Heuer fell in a common area of the property as defined in the lease (CP 35 CL 12); (2) At the time of her injury, Ms. Heuer was a business invitee of Ciao Bella, the Tenant (CP 32 FF 43); and (3) Ms. Heuer’s injuries did not arise from either gross negligence or willful misconduct by Seaway (CP 34 CL 5). Finally, the trial court concluded Ms. Heuer’s injuries “were the result of her own sole negligence.” CP 33 CL 3.

Nevertheless, the trial court concluded that “it does not appear that Section 23.2 was ever intended to operate in the manner suggested by Seaway in this case” because the indemnity provision also includes a waiver by the Tenant, Ciao Bella, of its immunity under Washington’s Industrial Insurance Act, RCW Title 51. CP 36 CL 15. While not explicitly limiting application of Section 23.2 to claims arising from injuries covered by Title 51, the trial court concluded based on the waiver language that “Ciao Bella did not breach its duty under Section 23.2.” *Id.* That is a *non-sequitur*.

Thus, the trial court ruled against Seaway on its two cross-claims against Ciao Bella, concluding that the indemnity provision of Section 23.2 did not apply to the Heuer claims and that, although Ciao Bella breached the duty to name Seaway as an additional insured on the Fireman’s Fund insurance policy issued to Ciao Bella, Seaway waived that

claim.

V. SUMMARY OF ARGUMENT

At the conclusion of the bench trial of this matter, the trial court committed reversible error in two separate fundamental respects.

First, the trial court analyzed certain portions of Section 23.2 of the least agreement while disregarding other pertinent portions to ultimately conclude that Ciao Bella owed no duty to indemnify and hold Seaway harmless against the claims asserted by Helen Heuer. These errors are present in Conclusions of Law Nos. 13, 14, and 15.

In Conclusion No. 13, the trial court concluded that “the second portion of Section 23.2 is inapplicable” based on the finding that “Ms. Heuer’s accident did not arise from any action, inaction, negligence or willful misconduct of Ciao Bella,” but from Ms. Heuer’s own sole negligence. However, the same “second portion” of Section 23.2 provides a duty to indemnify Seaway if the claim arises from the “action, inaction [or] negligence” of tenant’s customers or invitees, and the trial court found that Ms. Heuer was an invitee of Ciao Bella at the time of her accident. Therefore, as a matter of law, the “second portion” of Section 23.2 undeniably did apply to trigger Ciao Bella’s duty to indemnify and hold Seaway harmless from Ms. Heuer’s claims, and Conclusion of Law No. 13 is in error.

In Conclusion No. 14, the trial court misconstrued the “by reason of the condition or use of the premises” language in Section 23.2 to mean “condition or use of the premises” by either Ms. Heuer or Ciao Bella in a manner that “contributed to Ms. Heuer’s injury.” While the trial court reasoned that “[t]o hold otherwise would mean that the duty to indemnify would be linked to the subjective intent of the injured party,” this simply begs the question. Under governing Washington law, the duty to indemnify was triggered because Ms. Heuer was on the property as an invitee of Ciao Bella only because of Ciao Bella’s use of the premises as a restaurant, triggering the duty to indemnify Seaway. Nothing more was required. Therefore, Conclusion of Law No. 14 is in error.

In Conclusion No. 15, the trial court makes its ultimate error of law in concluding that “Ciao Bella did not beach its duty under Section 23.2” based on the inclusion of a waiver of Ciao Bella’s Title 51 immunity. In reaching this conclusion, the trial court read in limiting language that is simply not there, effectively inserting the term “employee” between the word “any” and the phrase “accident or other occurrence.” The trial court also ignored the indemnity provision for “damage to property, whether real or personal,” which can have nothing to do with claims under Title 51 because the statute concerns only personal injuries to workers. Similarly, if the indemnity is limited to only claims to which Title 51 applies, the

indemnity would almost never be invoked, as such claims for workplace injuries would rarely, if ever, be brought against the landlord of the business. Thus, the broad indemnity provision bargained for by Seaway is rendered almost entirely meaningless by the trial court's *sua sponte* construction.

In sum, the trial court's interpretation and construction of Section 23.2 of the lease in Conclusion of Law Nos. 13, 14, and 15 was erroneous as a matter of law, as the indemnity provision is written in the broadest possible terms to apply to "any accident or occurrence on or to the Premises, Building, or Common Areas." Therefore, this Court should reverse the trial court with direction to enter judgment in favor of Seaway for Ciao Bella's breach of Section 23.2 of the lease.

The second fundamental error by the trial court was in concluding in Conclusion of Law No. 9 that Seaway waived any claim against Ciao Bella for breach of Section 10 of the lease because Seaway reviewed the certificate of insurance (not the insurance policy) provided by Ciao Bella and never complained that Seaway was not an additional named insured on the referenced Ciao Bella insurance policy issued by Fireman's Fund. Respectfully, review of an Acord certificate of insurance is not the same as reviewing the insurance policy, and does not factually support a conclusion that Seaway (1) knew of the breach and (2) knowingly and

intentionally waived compliance with Section 10. This is all the more true where, as here, the trial court explicitly found that Seaway did not know of the breach.

Settled Washington law on waiver requires that the asserted waiver be knowing and intentional. In this case, the trial court found that Seaway was unaware that it might not have been named an additional insured on Ciao Bella's insurance policy issued by Fireman's Fund until after the commencement of the litigation. Thus, Conclusion of Law No. 9 and the supporting Finding of Fact No. 32 were both in error, as the finding is not supported by substantial evidence and neither that finding nor the other findings of fact support the conclusion that Seaway voluntarily waived its claim for breach of the insuring provisions of Section 10 of the lease. Therefore, this Court should reverse the trial court's ruling on waiver, and remand with direction to enter judgment in favor of Seaway for Ciao Bella's breach of Section 10 of the lease.

VI. ARGUMENT

A. The Standard of Review for the Trial Court's Findings of Fact and Conclusions of Law.

After a bench trial, this Court reviews challenged findings of fact to determine whether they are supported by substantial evidence and whether the findings of fact support the challenged conclusions of law.

224 Westlake, LLC v. Engstrom Properties, LLC, 169 Wn. App. 700, 704-05, 281 P.3d 693 (2012), *citing Endicott v. Saul*, 142 Wn. App. 899, 909, 176 P.3d 560 (2008). Substantial evidence is “defined as a quantum of evidence sufficient to persuade a rational fair-minded person the premise is true.” *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 879, 73 P.3d 369 (2003), *citing Wenatchee Sportsmen Ass’n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000). “Questions of law and conclusions of law are reviewed de novo.” *Sunnyside Irrigation*, 149 Wn.2d at 880, *citing Veach v. Culp*, 92 Wn.2d 570, 573, 599 P.2d 526 (1979).

On this appeal, Seaway challenges Finding of Fact No. 32 and Conclusion of Law Nos. 9, 13, 14, and 15.

B. Contractual Indemnity Provisions are Construed Like Other Contract Provisions to Effect Their Intended Purpose.

As the Washington Supreme Court recently reaffirmed, “indemnification agreements are to be interpreted in the same way as other contracts.” *Snohomish County Publ. Transp. Benefit Area Corp. v. FirstGroup America, Inc.*, 173 Wn.2d 829, 835, 271 P.3d 850 (2012), *citing Jones v. Strom Constr. Co.*, 84 Wn.2d 518, 520, 527 P.2d 1115 (1974). In doing so, Washington courts apply the “context rule,” which allows admission of the surrounding circumstances and other extrinsic

evidence “to determine the meaning of *specific words and terms used*” and not to “show an intention independent of the instrument” or to “vary, contradict, or modify the written word.” *Hearst Comm., Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503, 115 P.3d 262 (2005) (emphasis original), quoting *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 695-96, 974 P.2d 836 (1999). Thus, the context rule cannot be used to establish an intention by the parties independent of the contract. See *In re Marriage of Schweitzer*, 132 Wn.2d 318, 327, 937 P.2d 1062 (1997). Rather, the court imputes “an intention corresponding to the reasonable meaning of the words used.” *Hearst*, 154 Wn.2d at 503, citing *Lynott v. Nat’l Union Fire Ins. Co. of Pittsburgh, Pa.*, 123 Wn.2d 678, 684, 871 P.2d 146 (1994). Specifically, “an interpretation of a contract that gives effect to all provisions is favored over an interpretation that renders a provision ineffective, and a court should not disregard language that the parties have used.” *Snohomish County*, 173 Wn.2d at 856, citing *Wagner v. Wagner*, 95 Wn.2d 94, 101, 621 P.2d 1279 (1980). Consistent with this, “the subjective intent of the parties is generally irrelevant if the reasonable intent can be determined from the words used.” *Id.* at 504, citing *City of Everett v. Estate of Sumstad*, 95 Wn.2d 853, 855, 631 P.2d 366 (1981). The court should give the words used “their ordinary, usual, and popular meaning unless the entirety of the agreement clearly demonstrates a contrary intent.” *Id.*,

citing *Universal/Land Constr. Co. v. City of Spokane*, 49 Wn. App. 634, 637, 745 P.2d 53 (1987). Finally, the court is “not to interpret what was intended to be written but what was written.” *Id.*, citing *J.W. Seavey Hop Corp. of Portland v. Pollock*, 20 Wn.2d 337, 348-49, 147 P.2d 310 (1944). A “contract will be given a practical and reasonable interpretation that fulfills the object and purpose of the contract rather than a strained or forced construction that leads to an absurd conclusion, or that renders the contract nonsensical or ineffective.” *Wash. Publ. Util. Districts’ Util. Sys. v. Publ. Util. Dist. No. 1 of Clallam Co.*, 112 Wn.2d 1, 11, 771 P.2d 701 (1989).

“[A]n indemnity agreement is often one tool among many employed to allocate risks between parties.” *Snohomish County*, 173 Wn.2d at 836, citing *McDowell v. Austin Co.*, 105 Wn.2d 48, 54, 710 P.2d 192 (1985). The allocation of risk takes place at the time of contracting usually long before the loss occurs.

C. The Trial Court’s Conclusions of Law Nos. 13, 14, and 15 Erroneously Render Section 23.2 of the Lease Agreement Ineffective.

The trial court’s ruling divides the indemnity provision of Section 23.2 analytically into two subsections, the first comprised of the “by reason of the condition or use of the Premises” clause, and the second the “arising out of any action, inaction, negligence or willful misconduct”

clause. *See* Conclusion of Law Nos. 13 and 14; *compare* Trial Exhibit 5, Sec. 23.2. Seaway will follow the trial court's lead in addressing the second portion first.

1. The trial court's Conclusion of Law No. 13 omits consideration of a provision of the parties' contract.

The trial court's Conclusion of Law No. 13 begins with a restatement of two uncontroversial findings that (1) Ms. Heuer's fall was not the result of any action, inaction, or negligence of Ciao Bella and (2) it was the result of Ms. Heuer's own actions or inactions. CP 35 CL 13. However, the legal conclusion that "the second portion of Section 23.2 is inapplicable" is inconsistent with the second finding because the remainder of the second portion of section 23.2 includes "any action, inaction, [or] negligence . . . by . . . customers or invitees of Tenant." *Compare id.*, with Ex. 5 at § 23.2. The trial court simply failed to consider the entire provision.

Helen Heuer was an invitee of Ciao Bella at the time of her fall on the property. CP 32 FF 43. She had a reservation and was there to attend a luncheon with other ladies from her church. CP 31 FF 35. Thus, it was not necessary for her fall to be the result of any action, inaction, or negligence of Ciao Bella, as her own action, inaction, or negligence made the second portion of Section 23.2 applicable, which, in turn, triggered

Ciao Bella's indemnity obligations under Section 23.2. *See* Ex. 5 § 23.2. Because all of the language used in the second portion of Section 23.2 must be given full force and effect and not disregarded or read out of the parties' agreement, the trial court's Conclusion of Law No. 13 that the second portion of Section 23.2 is inapplicable is error. *See, e.g., Wagner*, 95 Wn.2d at 101.

Once the clause requiring Ciao Bella to defend, indemnify, and hold Seaway harmless for personal injuries "arising out of any action, inaction, [or] negligence . . . by . . . any . . . customers or invitees of Tenant . . ." is considered, the second portion of Section 23.2 applies and Ciao Bella was required to indemnify and hold Seaway harmless from plaintiff's claims.

2. The "by reason of the condition or use of the Premises" provision of Section 23.2 applies.

Analytically, the first portion of Section 23.2 of the lease is actuated by the "by reason of the condition or use of the Premises" clause addressed in Conclusion of Law No. 14. CP 35-36. While the trial court provided a reasoned rationale for concluding that "her", i.e., Helen Heuer's, use of the Premises was not a cause of her injury, "her" use is not the "use" at issue. *Compare id., with* Ex. 5 § 23.2. Respectfully, it is not Ms. Heuer, a mere invitee, who makes "use" of the premises, but the

lessee, Ciao Bella, which makes use of the Premises to operate its restaurant business. And Ciao Bella's use of the premises is what makes Ms. Heuer a business invitee.

The trial court also concluded, "[s]imilarly, no 'use' of the premises by Ciao Bella contributed to Ms. Heuer's injury other than the mere presence of Ciao Bella's (sic) at the location." CP 36 CL14.

The trial court was at least correct to the extent it concluded the referenced "use" is a use by Ciao Bella, as this interpretation is compelled by review of the entire lease and the other specific lease provisions, including Section 4.2, referring to permits "required for **Tenant's specific or intended use of the premises . . .**"; Section 4.4, which refers to "**Tenant's occupancy and use of the premise**"; Section 5.1, stating that **Tenant "shall occupy and use the Premises** exclusively for the purposes set forth . . ."; Section 5.2, **Tenant shall not change its "use of the Premises"** without prior consent; Section 5.3, **Tenant shall use and occupy the Premises . . .**"; Section 5.5.8.1, **Tenant agrees to "maintain all queuing, which occurs due to the use of the Premises,** in an orderly fashion . . .; Section 5.5.8.2, **Tenant agrees to "keep all crowds that may gather due to the use of the premises** under control . . ." Thus, reading the contract as a whole, "use of the Premises" clearly means the use by

Ciao Bella in operating Café Revo. *See* Ex. 5. However, the trial court was wrong in reasoning that the “mere presence” of Ciao Bella at that location was insufficient to trigger the duty to indemnify. CP 35 CL 14. It is the whole reason why Ms. Heurer was there as an invitee.

A similar lease provision was considered by the Washington Supreme Court almost thirty years ago with the exact language of “arising out of or in connection with the use and occupancy of the premises by Lessee . . .” *Northwest Airlines v. Hughes Air Corp.*, 104 Wn.2d 152, 153, 702 P.2d 1192 (1985). In that case, Hughes leased a portion of a building owned and partially occupied by Northwest. A Hughes employee slipped and fell, not in the portion leased by Hughes, but in the portion occupied by Northwest.

In affirming liability under the lease’s indemnity agreement in *Northwest*, the Supreme Court distinguished *Jones v. Strom Construction*, pointing out that the indemnity clause in that case was triggered by claims “‘arising out of,’ ‘in connection with,’ or ‘incident to’ [*subcontractor’s*] ‘performance’ of the subcontract.” *Northwest Airlines*, 104 Wn.2d at 156 (italics by the court), *quoting Jones v. Strom Constr. Co.*, 84 Wn.2d 518, 521, 527 P.2d 1115 (1974). In the *Jones* case, the issue was indemnification for the indemnitee’s own sole negligence when the indemnity provision was silent as to the indemnitor’s performance, i.e., the

obligation to indemnify for the indemnitor's sole negligence was not clearly spelled out in the agreement. *Jones*, 84 Wn.2d at 521-22. Under those particular circumstances, the court held that the subcontractor's "mere presence on the jobsite inculpably performing its specified contractual obligations, standing alone, would not constitute a cause or participating cause [of plaintiff's injury]." *Jones*, 84 Wn.2d at 522. Thus, the language of the indemnity provision at issue in *Jones* was insufficient to require the subcontractor to indemnify the contractor for claims arising from the contractor's sole negligence. While that appears consistent with the trial court's rationale in this case, the rationale in *Jones* does not apply here.

The *Jones* case is easily distinguished from this case, in which the circumstances of the respective plaintiffs' claims and the language of the indemnity provision at issue are different. First, this is a commercial lease, not a construction contract, and this was never a case of Seaway seeking indemnity for its own sole negligence, as plaintiff's complaint alleged that both Seaway and Ciao Bella were negligent, and both Seaway's and Ciao Bella's answers alleged that plaintiff was in whole or in part at fault for her own injury. *See* CP 1-3; CP 7 (second affirmative defense); *see also*, CP 31 FF 39-41; CP 35 CL 13. Second, the language of the indemnity provision is different, clearly spelling out that Ciao Bella

is required to indemnify Seaway even if the claim arises from the “action, inaction, [or] negligence” of certain categories of people or entities other than Ciao Bella. Ex. 5 § 23.2 (“arising out of any action, inaction, negligence or willful misconduct by Tenant, *or any subtenant, if permitted, or any agents, vendors, customers or invitees of tenant*”) (italics added). Thus, unlike the *Jones* case, which required more than the subcontractor indemnitor’s “mere presence on the jobsite inculpably performing its specified contractual obligations,” this case fits in with the more recent *Northwest Airlines* and *Snohomish County Public Transportation* cases, which did not require any culpable conduct by the indemnitor before enforcing the indemnity agreement.

The indemnity provision in *Northwest* was similar to the provision here and was similarly part of a commercial lease agreement. As quoted by the Washington Supreme Court, that provision provided:

*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.*

Northwest, 104 Wn.2d at 153 (italics by the court). The Supreme Court

held that “a reasonable interpretation of this language indicates a clear intent to protect Northwest from all liability arising in connection with the lease of a portion of the building to Hughes.” *Id.* at 159. The Court distinguished *Jones*, stating that “*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.

More recently, the Washington Supreme Court examined another indemnity provision requiring indemnity for claims “by reason of” the presence of the indemnitor, its contractors, agents, employees or property “upon or in proximity to the property of [the indemnitee].” *Snohomish County Publ. Transp. Benefit Area Corp. v. FirstGroup America, Inc.*, 173 Wn.2d 829, 832, 271 P.3d 850 (2012). In the *Snohomish County* case, the parties stipulated that the indemnitor was not negligent. *See id.* at 833. Thus, the “mere presence” of the indemnitor was sufficient to trigger the indemnity obligation.

In light of the above, the trial court erred in interpreting the language “by reason of the . . . use of the Premises” to require that a use by Ciao Bella beyond its mere operation of the restaurant “contributed to Ms. Heuer’s injury” in order to trigger its duty to indemnify. CP 35-36 CL 14. In addition, the trial court’s concern with liability for indemnity flowing

from “the mere presence of Ciao Bella at that location,” while a valid concern under the language and circumstances at issue in *Jones*, is misplaced in the context of this commercial lease agreement, which is in substance no different than the language approved and enforced by the Washington Supreme Court in the *Northwest* and *Snohomish County* cases. *Id.*

Accordingly, Conclusion of Law No. 14 was legal error, being inconsistent with the *Northwest* and *Snohomish County* cases, and Ms. Heuer’s injury was “by reason of the use of the Premises” by Ciao Bella.

3. The indemnity provision is not limited to claims subject to Washington’s Industrial Insurance Act, Title 51 RCW.

In Conclusion of Law No. 15, the trial court *sua sponte* construed Section 23.2 to apply only to claims asserted under Washington’s Industrial Insurance Act, RCW Title 51, because Section 23.2 includes a waiver of Title 51 immunity. CP 36 CL 15. Respectfully, this is erroneous as a matter of law, as it is totally contrary to a fairly settled body of law.

First, under the trial court’s construction of Section 23.2, the provision would apply only to claims against the landlord, Seaway, brought for job-related personal injuries of Ciao Bella’s employees, which are the only potential plaintiffs for which a waiver of Ciao Bella’s Title 51

immunity would be necessary to enforce the indemnity provision. *See* RCW 51.24.030(1); *compare* CP 36 CL 15, *with* Ex. 5 § 23.2. Under these circumstances, the indemnity provision would rarely, if ever, apply because the vast majority of injuries suffered by food service workers, such as Ciao Bella’s employees – cuts, burns, slip and falls on wet or greasy floors, and back injuries from falling or lifting – could not conceivably give rise to a viable claim against the absentee landlord, Seaway.

Second, the trial court’s construction of Section 23.2 effectively writes out half the subject of the indemnity – property damage. *See* Ex. 5 § 23.2. Pertinent to claims for property damage, Section 23.2 provides for indemnity of claims “arising out of any accident or occurrence on or to the Premises, Building, or Common Areas causing . . . damage to property, whether real or personal, . . .” *Id.* If the Tenant’s waiver of Title 51 immunity limits the scope of the indemnity provision to only claims brought under Title 51 – which only concerns claims for personal injury – all of the references to damage to property in Section 23.2 are rendered entirely meaningless, without any application or effect. *See, e.g.,* RCW 51.24.030. Such a construction of the contract is erroneous as a matter of law. *See McLean Townhomes, LLC v. America 1st Roofing & Builders, Inc.*, 133 Wn. App. 828, 138 P.3d 155 (2006) (“Courts may not adopt a

contract interpretation that renders a term absurd or meaningless.”), *citing Seattle-First Nat’l Bank v. Westlake Park Assocs.*, 42 Wn. App. 269, 274, 711 P.2d 361 (1985); *see Snohomish County*, 173 Wn.2d at 856 (“an interpretation of a contract that gives effect to all provisions is favored over an interpretation that renders a provision ineffective, and a court should not disregard language that the parties have used.”), *citing Wagner v. Wagner*, 95 Wn.2d 94, 101, 621 P.2d 1279 (1980); *Wash. Publ. Util. Districts’ Util. Sys. v. Publ. Util. Dist. No. 1 of Clallam Co.*, 112 Wn.2d 1, 11, 771 P.2d 701 (1989) (“contract will be given a practical and reasonable interpretation that fulfills the object and purpose of the contract rather than a strained or forced construction that leads to an absurd conclusion, or that renders the contract nonsensical or ineffective.”).

The trial court’s construction of the indemnity provision here is not unlike that in *McLean Townhomes*, in which the defendant subcontractor obtained dismissal of the general contractor’s claim for indemnity against construction defect claims by arguing the indemnity provision applied only to tort-based claims. This Court reversed, dispatching the subcontractor’s contention as follows:

P.J. Interprize contends that the inclusion of specific references to tort-based claims in its indemnification provision obviates the references to covered claims that precede it. It would have us read the contract as though,

in the first sentence above-quoted, the word “tort” was placed between the word “all” and the word “claims.” However, this would dramatically alter the meaning of the phrase “any and all claims.” Although the parties could have drafted the provision in the manner urged by P.J. Interprize, they did not.

McLean Townhomes, 133 Wn. App. at 832; *see Cambridge Townhomes, LLC v. Pac. Star Roofing, Inc.*, 166 Wn.2d 475, 487, 209 P.3d 863 (2009) (same). Similarly here, the trial court’s interpretation of the indemnity provision in this case effectively inserted the word “worker” between the words “any” and “accident” in Section 23.2 of the parties’ commercial lease, and replaced “injury to or death of persons” with “injury to or death of workers.” Ex. 5. While the parties could have written the provision that way, they did not, just as they could have omitted claims for property damage, but included them. *See* Ex. 5 § 23.2.

The word “any” has been held to mean “every” and “all.” *State v. Westling*, 145 Wn.2d 607, 611, 40 P.3d 669 (2002), *citing State v. Smith*, 117 Wn.2d 263, 271, 814 P.2d 652 (1991). Because the indemnity provision as written applies to “any accident or other occurrence” whether for personal injury or injury to property, the trial court’s construction and interpretation of Section 23.2 of the lease as limited to those claims allowed under the Washington Workers Compensation Act, RCW Title

51, was manifestly unreasonable and erroneous as a matter of law.

4. The testimony of the parties was that the indemnity provision was intended to broadly protect Seaway.

Seaway believes that Section 23.2 is clear and unambiguous in providing a very broad duty by Ciao Bella to indemnify Seaway for any accident or occurrence related to Ciao Bella's operation of Café Revo that is not the result of any gross negligence or willful misconduct by Seaway. *See Ex. 5 § 23.2.* Nevertheless, if this Court disagrees and believes there is any ambiguity with regard to the intended scope of indemnity, Seaway's owner, Ms. Strayer testified to it.

A. Reading through this [Section 23.2], it's to – so I won't be held liable for things that happen on the property while they are renting it; that they are going to be responsible for – for anything that happens while they are renting it and that I won't be responsible; that they'll cover any costs or damages.

Q. Okay, and is that – is that important to Seaway?

A. Yes.

Q. And why?

A. Well, because I – you know, I'm not the one using the property. I'm not there. It's there for their purposes. They are renting it for their restaurant, so they are – you know, renting the property and it's theirs while they're renting it, so they are responsible for

it.

RP 17 ln. 20 - 18 ln. 8. So, Ms. Strayer's intent on behalf of Seaway was that Section 23.2 would protect Seaway against any accidents or occurrences related to the operation of the restaurant. *See id.* Ms. Sofia Goff testified at trial on behalf of Ciao Bella, but was not asked about her intent with regard to, or understanding of, Section 23.2. *See generally*, RP 109-87. So, to the extent the Court decides consideration of parol evidence is appropriate, the only testimony by the parties is for a broad indemnity provision protection Seaway, as an absentee owner, for any accidents or occurrences on or to the property related to Ciao Bella's operation of the Café Revo restaurant. *Compare* RP 17-18, with Ex. 5 § 23.2. No contrary evidence exists.

D. Seaway Did Not Waive Ciao Bella's Breach of Section 10 of the Lease Agreement.

The issue at trial with regard to Section 10 of the lease agreement was whether Ciao Bella had complied with its contractual obligation to name Seaway as an additional insured on its applicable insurance policies, specifically a CGL policy issued by Fireman's Fund Insurance Company. While Ciao Bella maintained that a "sample" blanket insured endorsement it submitted was sufficient to fulfill its "additional insured" obligation under Section 10, Seaway maintained at trial, and the trial court agreed,

that Section 10 required Ciao Bella to “name” Seaway as an additional insured on the policy, and mere status as an additional insured was insufficient. *See* CP 29 FF 25-29.

The advantage of being an additionally named insured was that Fireman’s Fund could not have denied that Seaway was an insured on the policy and would have had to defend and indemnify Seaway the same as it did Ciao Bella. While it is true that, if Fireman’s Fund had accepted Seaway’s tender of defense and indemnity, the distinction between being *named* as an additional insured and simply having the *status* of an additional insured would be effectively moot, that is not what happened. Fireman’s Fund denied Seaway’s tender and denied that Seaway was even an additional insured on the policy, obliging Seaway to rely on the insurance it purchased to defend it and, if necessary, indemnify it against Ms. Heuer’s claims. *See* CP 32 FF 48-49.

The trial court entered Findings of Fact Nos. 24 through 33 concerning the insurance requirements of Section 10 of the lease. *See* CP 28-30. In these, the trial court specifically discussed the “SAMPLE” blanket endorsement submitted as Exhibit 11 at trial, noting that “even if the endorsement offered as Exhibit 11 were properly authenticated as part of the Fireman’s Fund policy issued to Ciao Bella, its plain language does not purport to ‘name’ Seaway as an additional insured on the policy as

required by Section 10 of the Lease Agreement.” CP 29 FF 29. The trial court also found that “Seaway contracted under Section 10 of the Lease Agreement to be a named additional insured on Ciao Bella’s policy, which could have been effected by Ciao Bella obtaining a named insured endorsement actually naming Seaway as an additional insured on the pertinent Fireman’s Fund insurance policy.” CP 29 FF 29.

Significantly, the trial court also found that “[t]he fact that Seaway did review the terms of the policy is demonstrated by the uncontested testimony that during a subsequent renewal, Mr. Crooks pointed out a typographical error in the certificate of insurance wherein the policy limit was listed as \$100,000 rather than \$1,000,000.” CP 30 FF 32. But this finding of fact is not supported by substantial evidence because the certificate of insurance is not part of the policy of insurance. *See* Ex. 10. Rather, it is a separate document prepared by the insured’s insurance broker, not the insurance company. *See id.* Under Washington law a certificate of insurance is unequivocally not the same as an insurance policy. *See, e.g., Postlewait Constr., Inc. v. Great American Ins. Cos.*, 106 Wn.2d 96, 100-101, 720 P.2d 805 (1986) (Holding “the purposes of issuing an insurance certificate is to inform the recipient thereof that insurance has been obtained; the certificate itself, however, is not the equivalent of an insurance policy.”). So it does not follow either logically

or factually that because someone reviewed the certificate of insurance, he also reviewed the terms of the policy.

Also, the trial court already found that “[n]either of the parties to the Lease Agreement, Seaway and Ciao Bella, had any particular expertise in the understanding or interpretation of contracts or insurance matters.” CP 24 FF 4. The trial court did not find that, if Seaway had reviewed the policy, it would have understood that it was not named as an additional insured. All the trial court found was that Seaway’s manager, Todd Crooks, once found an obvious typo in the certificate of insurance. CP 30 FF 32.

The testimony of Seaway’s owner, Dahli Strayer, was that she looked to the certificate of insurance to tell if the renter had complied with the requirement of Section 10 to name Seaway as an additional insured on the renter’s policy. RP 13 Ins. 8-18. Unfortunately, as someone the trial court found is without “particular expertise in the understanding or interpretation of contracts or insurance matters,” Ms. Strayer thought the certificate showed she was an additional insured because she saw her “name on it” as the certificate holder. RP 13 Ins. 4-18. It is no surprise, then, that there is no finding by the trial court that either Mr. Crooks or Ms. Strayer had any idea that Seaway was not named as an additional insured on Ciao Bella’s policy prior to Fireman’s Fund’s denial of

Seaway's tender. Rather, it entered a finding to the contrary. *See* CP 30 FF 33.

In its conclusions of law, the trial court first concluded that Ciao Bella both owed the duty to name Seaway as an additional insured on its Fireman' Fund policy and that it breached that duty. CP 34 CL 7 & 8. Nevertheless, based on Finding of Fact 32 and the noticing of a typographical error in the certificate of insurance, Seaway was limited to this "proof" under Section 4.1 of the lease "as a means for ensuring compliance with Section 10. Accordingly, while the Court finds that Ciao Bella technically breached section 10, the breach was waived by Seaway's acceptance of the proposed policy." CP 35 CL 9.

In effect, the trial court ruled that because Seaway reviewed the certificate of insurance and did not notice any issue with its status as an additional named insured, it waived the breach by Ciao Bella. *See id.* Respectfully, this was an error of law and should be reversed.

The law of waiver is well-settled in Washington

A waiver is the intentional relinquishment of a known right. It may result from an express agreement or be inferred from circumstances indicating an intent to waive. To constitute implied waiver, there must exist unequivocal acts or conduct evidencing an intent to waive; waiver will not be inferred from doubtful or ambiguous factors. The intention to relinquish the right or advantage

must be proved, and the burden is on the party claiming waiver.

224 Westlake, LLC v. Engstrom Properties, LLC, 169 Wn. App. 700, 714, 281 P.3d 693 (2012), quoting *Jones v. Best*, 134 Wn.2d 232, 241-42, 950 P.2d 1 (1998) (citations omitted). “Where there is ‘no evidence whatever’ that a party had knowledge of the facts of a violation until after litigation began, there is no waiver.” *224 Westlake*, 169 Wn. App. at 714, quoting *Ross v. Harding*, 64 Wn.2d 231, 240, 391 P.2d 526 (1964).

In this case, there was no finding by the trial court that Seaway knew before the litigation commenced that Ciao Bella had failed to name Seaway as an additional insured on the Fireman’s Fund insurance policy issued to Ciao Bella, nor that it would have been apparent from the certificate of insurance. *See* Ex. 10. In fact, the trial court found that Seaway did not know that Ciao Bella breached Section 10. CP 30 FF 33. Absent a finding of knowledge of the breach, the burden of establishing waiver cannot be met. The conclusion of waiver was, therefore, erroneous as a matter of law. Accordingly, this Court should reverse the trial court’s Conclusion of Law No. 9 that Seaway waived Ciao Bella’s breach of the insuring provisions of Section 10 of the lease and remand with direction to enter judgment in favor of Seaway on that claim.

///

E. Seaway is Entitled to Prevailing Party Attorney's Fees and Costs on Appeal.

Pursuant to the attorney fee provision in its Lease Agreement with Ciao Bella, Seaway is entitled to its prevailing party attorney's fees and costs on appeal. *See* Ex. 5 § 24. Therefore, in accordance with RAP 18.1(b), Seaway requests an award of its attorney's fees and costs incurred on the present appeal or a direction to the trial court to determine those fees and costs after remand in accordance with RAP 18.1(j).

VII. CONCLUSION

While the honorable trial court undoubtedly meant well, this case would likely not be on appeal if the trial court had not conducted a *sua sponte* interpretation and construction of Section 23.2 of the lease agreement without the benefit of any briefing or argument by the parties to conclude it did not apply to the Heuer claims. That fundamental conclusion in Conclusion of Law Nos. 13, 14, and 15 should be reversed with direction to the trial court to enter judgment in favor of Seaway on its claim for breach of Section 23.2 of the lease.

Similarly, the trial court's Conclusion of Law No. 9 that Seaway waived Ciao Bella's breach of the duty to name Seaway as an additional insured on the policy issued by Fireman's Fund should be reversed because it is not supported by the findings of fact and Seaway could not,

and did not, waive a breach it never knew about until after the litigation commenced. Therefore, this Court should reverse the trial court's ruling on waiver and remand with directions to enter judgement in favor of Seaway on its claim for breach of Section 10 of the lease.

RESPECTFULLY SUBMITTED this 26th day of November, 2013.

Martens + Associates | P.S.

By 
Richard L. Martens, WSBA # 4737
Steven A. Stolle, WSBA #30807
Attorneys for Appellant Seaway
Properties, LLC

CERTIFICATE OF SERVICE

I certify that on the day and date indicated below, I caused the foregoing to be filed with the clerk and a copy delivered on behalf of Appellant Seaway Properties, LLC, directed to the following counsel:

Counsel for Respondent

Cial Bella Foods, LLC.

Gordon G. Hauschild, Esq.
Wood Smith Henning &
Berman, LLP
520 Pike Street, Ste. 1205
Seattle, Washington 98101

- U.S. Mail
- Hand Delivery (ABC Legal)
- Facsimile
- Overnight Delivery
- E-mail with Recipient's Approval

By forwarding said documents via ABC Legal Messenger as indicated above on this date.

SIGNED THIS 26th day of November, 2013, in Seattle, Washington.

By 
Matthew Morgan
Paralegal for Martens + Associates | P.S.