No. 37900-1

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

ALCOA, INC., a corporation; ARCONIC INC., a corporation; and ALCOA CORP., a corporation,

Petitioner,

v.

BNSF RAILWAY COMPANY, a corporation,

Respondent.

PETITION FOR REVIEW

FREY BUCK, P.S.

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A. INTRODUCTION

The Court of Appeals interpreted a contract to require Alcoa[1] (the defendant below)[2] to indemnify respondent BNSF (the plaintiff below) for BNSF's own negligence despite the lack of specific contract language showing such intent. In so doing the appellate court ignored this Court's clear precedent on the topic as set forth most recently in *Snohomish County Pub. Transp. Benefit Area Corp. v. FirstGroup Am., Inc*., 173 Wn.2d 829, 271 P.3d 850 (2012). Further, it ignored standard contract interpretation principles, and wrongly used purported "specific" contract language to nullify other, specific contract terms.

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[1] "Alcoa" has been used for convenience throughout this litigation. Alcoa Inc. subsequently became known as Arconic, Inc. That entity is now known as Howmet Aerospace, Inc. The Wenatchee facility where the underlying events occurred was segregated to Alcoa Corporation in 2016. Alcoa Corporation and Howmet are separate, unaffiliated companies.

[2] BNSF and Alcoa were both defendants in an action brought by an injured BNSF employee. They agreed to cooperate in settling those claims and reserving their claims against each other. BNSF later sued Alcoa, hence the identification of defendant and plaintiff below.

Snohomish County is dispositive on the issue. It reviewed four decades of precedent analyzing contractual indemnification provisions. Its review established that every time this Court required the indemnitor to indemnify the indemnitee for its own negligence the contractual language specifically referenced the indemnitee's "negligence":

> In each case, the indemnity provision explicitly identified losses due to (a) "negligence" of (b) the named indemnitee and stated that such losses gave rise to the duty to indemnify.

Id. at 851. Conversely, where, as here, the contract did not specifically reference the indemnitee's "negligence" this Court noted that the indemnitor was *not* obliged to indemnify the indemnitee's own negligence.

Division III does not hide the fact its holding applies an approach not supported by this Court's precedent. Indeed, it explicitly states its ruling "follow[s] the *reasoning* of prior Washington decisions rather than rely on their negligence-oriented discussions of differently-designed indemnification

provisions." Op. at 10. While it may have attempted to apply this Court's reasoning, however, it ignored this Court's actual holdings. The appellate court's failure to apply the stringent "clear and unequivocal" standard requiring language unquestionably showing the parties' intent to indemnify the indemnitee's own "negligence" is clear error.

B. IDENTITY OF PETITIONER

Alcoa asks for review of the Court of Appeals decision terminating review set forth in Part C.

C. COURT OF APPEALS DECISION

Division III of the Court of Appeals filed its opinion on September 27, 2022. A copy of that opinion is in the Appendix at pages A-1 to A-19.

D. ISSUES PRESENTED FOR REVIEW

1. Did the Court of Appeals err when it upheld an indemnity provision that did not explicitly identify losses due to "negligence" of the named indemnitee?

2. Did the Court of Appeals err by failing to construe ambiguous language in Section 5 of the agreements against its drafter, BNSF?

3. Did the Court of Appeals err in finding the broad, general language of Section 5 more specific than the unquestionably clear indemnification language of Section 7?

E. STATEMENT OF THE CASE

The Court of Appeals opinion sets forth the facts and underlying procedure in this case. Op. at 2-7. Here, however, a cursory explanation of the incident will suffice to set the stage for this petition.

Plaintiff BNSF provided the rail transportation to and from Alcoa's Wenatchee, Washington plant. BNSF delivered raw materials and removed finished products from the Alcoa plant by rail. One night BNSF delivered cars and left them in a position where they blocked Alcoa's access to essential work locations. Alcoa moved the cars to gain access and left one railcar near a line that BNSF used to deliver raw materials. That evening, the same BNSF crew that had delivered the railcars the night before pushed cars into the Alcoa plant. The BNSF conductor, whose only job was to assure that the track ahead of

the push was clear of hazards, recognized that there was a car adjacent to the track. He did not, however, verify that there was sufficient clearance to allow safe passage. A student conductor riding on the lead car of the push, in violation of BNSF's own policies, was crushed between the railcars and seriously injured.

While the Court of Appeals opinion provides most of the relevant facts, it omits certain critical facts that impact this Court's review decision.

It is undisputed that BNSF owned and operated the railroad tracks that service Alcoa's facility for inbound raw materials and outbound finished aluminum products. BNSF was Alcoa's only option for rail service. CP 458-59. The parties entered into an Industrial Track Agreement ("ITA") in October 1978. The ITA is mostly comprised of standard boilerplate language drafted by BNSF, including Section 5, which includes broad, generalized indemnification language premised upon Alcoa's activities:

Section 5. [Alcoa] shall not place, or permit to be placed,

> or to remain, any material, structure, pole or other obstruction within 8-1/2 feet laterally of the center or within 23 feet vertically from the top of the rail of said track; provided, that if by statute or order of competent authority greater clearances shall be required than those provided for in this Section 5, then [Alcoa] shall strictly comply with such statue or order. However, vertical or lateral clearances which are less than those herein before required to be observed but are in compliance with statutory requirements will not be or be deemed to be a violation of this Section. [Alcoa] agrees to indemnify [BNSF] and save it harmless from and against any and all claims, demands, expenses, costs and judgments arising or growing out of loss of or damage to property or injury to or death of persons occurring directly or indirectly by reason of any breach of the foregoing or any other covenant contained in this agreement.
> …
> [BNSF's] operations over the track with knowledge of an unauthorized reduced clearance shall not be or be deemed to be a waiver of the foregoing covenants of [Alcoa] contained in this Section 5 or of [BNSF's] right to recover for such damages to property or injury to or death of persons that may result therefrom.

Division III's factual recitation omits the importance of BNSF's role as the drafter of the contract and, specifically, Section 5. CP 458. Any ambiguity in the above language must be construed against BNSF.

The only section of the contract that was negotiated is Section 7. CP 462. Unlike Section 5, this section contains

specific language that directly and unequivocally addresses circumstances involving BNSF's own concurring, joint and/or sole negligence:

> Section 7. [Alcoa] agrees to indemnify and hold harmless [BNSF] for loss, damage, injury or death from any act or omission of Industry, its employees or agents, to the person or property of the parties hereto and their employees, and to the person or property of any other person or corporation, while on or near said track, and if any claim or liability shall arise from the joint or concurring negligence of both parties hereto it shall be borne by them equally. Notwithstanding anything herein contained to the contrary, nothing herein is to be construed as an indemnification against the sole negligence of [BNSF], its officers, employees and agents.

A flap of paper is literally glued over the ITA's boilerplate Section 7 with a different, specifically negotiated Section 7. CP 462. By the plain language of Section 7 the parties agreed to bear equally all damages resulting from their "joint or concurring negligence." (emphasis added). Section 7 further provides that in the event of BNSF's sole negligence, Alcoa owes it no indemnification duty at all: "nothing herein is to be construed as an indemnification against the sole negligence of [BNSF], its officers, employees and agents." (emphasis added). Section 7 is the only provision of the ITA that specifically

addresses circumstances where BNSF is negligent, whether jointly or solely. Moreover, it is the only section that addresses injury to an "employee" of the parties being injured "on or near" the tracks. The injured student conductor was an employee of BNSF.

F. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Division III's decision conflicts with this Court's holding in *Snohomish County* and its predecessors. For indemnification to exist, "[t]he agreement must speak to the negligence of the indemnitee." 173 Wn.2d at 839. Section 5 does not. Division III erred as follows:

First, it impermissibly found clear and unequivocal intent to indemnify BNSF's own negligence where the language of Section 5 makes no reference to BNSF's negligence.

Second, in reviewing Section 5, it failed to construe its ambiguous language against its drafter, BNSF, and failed, as

this Court has specified, to resolve any doubts in favor of the indemnitor.

Last, it incorrectly concluded Section 5's broad, general language that does not utilize the term "negligence" is more specific than Section 7's language that uniquely and unquestionably addresses BNSF's joint, concurring and/or sole negligence.

(1) Division III Misapplied the Standard Outlined in *Snohomish County* When It Upheld an Indemnity Provision That Does Not Explicitly Identify Losses Due to "Negligence" of the Named Indemnitee.

Snohomish County aptly summarizes why Section 5 cannot support Division III's conclusion that Alcoa must indemnify BNSF, even for its own acts/negligence.

Snohomish County involved a contract to provide transit services to the county (Community Transit). The contract provided the following indemnification language:

> 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.

173 Wn.2d at 832 (emphasis added). This Court noted that the central issue was whether the contract in question "'clearly and unequivocally shows the parties' intent that First Transit would be required to indemnify Community Transit for losses resulting from Community Transit's own negligence." *Id.* 833-34. This Court cited *Jones v. Strom Constr. Co.*, 84 Wn.2d 518, 527 P.3d 1115 (1974), *Nw. Airlines v. Hughes Air Corp.*, 104 Wn.2d 152, 702 P.2d 1192 (1985), and *McDowell v. Austin Co.*, 105 Wn.2d 48, 710 P.2d 192 (1985), and reiterated that such clauses are not favored, that any doubts are resolved in favor of the indemnitor, and that such indemnification attaches only where "intention is expressed in clear and unequivocal terms."

Id. 836-37. Further citing *Nw. Airlines*, this Court noted that "we will not find clear and unequivocal intent in broad and all-encompassing contract language that does not include *specific language showing clear and unequivocal intent* to indemnify the indemnitee's own negligence." *Id.* (emphasis added). This Court noted that while "formulaic" language is not required, what is required is "language unquestionably showing the parties' intent to indemnify in the event of losses resulting from the indemnitee's negligence." *Id.* 837.

This Court went on to analyze the relevant precedent. It noted that the *Jones* contract, like the contract in this case, lacked language that addressed an intent to indemnify the indemnitee's own negligence: "The general contractor's conduct was never even addressed in the indemnity provision," which was why the indemnification language was not enforceable. *Id.* at 838. Conversely, it reviewed *Nw. Airlines*, noting that it had specific language that indemnification applied "whether or not caused by the Lessor's negligence," which did

provide the sort of specificity required. *Id.* at 837. So too this Court considered *McDowell*, which had sufficient specificity because by "expressly referring to the 'act or omission' of the indemnitee, 'negligent or otherwise,' the indemnity agreement showed clearly and unequivocally the intent to indemnify in the event losses were the result of the indemnitee's own negligence." *Id.* at 839 (emphasis added). Significantly, this Court held that "the important question is whether the agreement clearly provides for indemnification when losses result from the indemnitee's negligence. The agreement must speak to the negligence of the indemnitee." *Id.* (emphasis added). Ultimately, this Court upheld the indemnification clause, reasoning that by excluding only the Community Transit's "sole negligence," the parties necessarily explicitly included "concurrent negligence," despite not using that actual term. *Id.* at 840.

Perhaps most significant in the *Snohomish County* case is the majority's rejection of the dissent's commentary about

returning to pre-*Jones* case law. The majority made clear that the standard *requires* reference to the indemnitee's negligence for such a clause to be enforceable, notwithstanding the dissent's protestations to the contrary. *Id*. at 852. The majority noted that each case that enforced the indemnification agreement despite the indemnitee's negligence, did so because the clause specifically addressed the indemnitee's negligence. In every case where the indemnitee's negligence was not mentioned specifically, the clause was not enforced:

> The dissent's characterization of *Jones* and subsequent cases as stating an extremely narrow rule is simply not borne out by the language in *McDowell* and *Northwest Airlines* that was found to indemnify against the indemnitee's own negligence.
> …
> In each case, the indemnity provision explicitly identified losses due to (a) "negligence" of (b) the named indemnitee and state that such losses gave rise to the duty to indemnify.
> …
> There is specific reference to the negligence of the indemnitee in each of the three cases.

Id. at 851 (emphasis added).

Division III ignores this requirement of a specific reference to "negligence" to render such a clause enforceable. The appellate court's error lies in a misreading of *Snohomish County*, *McDowell*, and *Nw. Airlines*.

First, citing *Snohomish County*, the appellate court states:

> Formulaic language such as a statement that X indemnifies Y for Y's own negligence is not required[.]

While true in part, this single sentence, taken out of context, misstates *Snohomish County's* actual requirement:

> Under this standard, we will not find clear and unequivocal intent in broad and all-encompassing contract language that does not include specific language showing clear and unequivocal intent to indemnify the indemnitee's own negligence. But formulaic language expressly stating that "X indemnifies Y for Y's own negligence" is not mandatory either, and in cases where we have enforced agreements for indemnification in the event of the indemnitee's own negligence, such precise language was not present. What is required is language unquestionably showing the parties' intent to indemnify in the event of losses resulting from the indemnitee's negligence.

173 Wn.2d at 836-37. Language need not be formulaic, but, at a minimum, to unquestionably show the parties' intent, it must

identify the indemnitee's negligence. Here it unquestionably does not.

Second, the appellate court cites *McDowell* for the proposition that "concurrent negligence" need not be mentioned. Op. at 8. Again, it is true that such magic words are not specifically required, but *Snohomish County* does mandate that the indemnification provision identify an obligation to indemnify for indemnitee's own "negligence." Division III ignores the language in the *McDowell* contract that specifically referenced "negligence": "…an act or omission, negligent or otherwise, by [indemnitee]…[.]" 105 Wn.2d at 50. The appellate court's reliance on *McDowell* to support its "triggering" standard runs contrary to this Court's analysis and holding in *Snohomish County*.

Last, the appellate court cites *Nw. Airlines* for the proposition that "the term negligence itself need not actually be used." However, that language is again taken out of context. The relevant language from this Court reads as follows:

> Washington initially found, and some state courts currently find, 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 be actually used.
>
> Washington currently requires, as do some other states, that more specific language be used to evidence a clear and unequivocal intention to indemnify the indemnitee's own negligence.
> …
> The clause involved in this case explicitly refers to injuries "whether or not caused by Lessor's [Northwest's] negligence." Even under the more stringent requirement, the involved indemnification clause clearly includes coverage for the indemnitee's negligence.

104 Wn.2d at 155-56 (internal citations omitted) (emphasis added). Read in its entirety, Washington has adopted a stricter standard that requires explicit reference to "negligence."

It is undisputed that Section 5 makes no reference to BNSF's "negligence" and Division III's holding that "section 5's trigger is liability directly or indirectly arising out of a breach of Alcoa's track-clearing or other covenants" is explicitly rejected by *Snohomish County*:

> …[W]e have said that "clear and unequivocal" does not mean general, broad, inclusive language comparable to the rejected language in *Jones*, i.e., "arising out of, in connection with, or incident to." That kind of language does not tell a court "clearly and unequivocally" that the parties' considered the effect of the negligence of the indemnitee and intended to indemnify for the indemnitee's own negligence.
> …
> The indemnity agreement here specifically references negligence of the indemnitee and, reasonably construed, explicitly shows the parties' intent to indemnify for the indemnitee's negligence but not its sole negligence.

173 Wn.2d at 853. Division III's ruling parrots the dissent that was rejected by the majority in *Snohomish County*. An indemnity provision cannot be clear and unequivocal and unquestionably show the parties' intent where the term "negligence" or its equivalent does not even exist. It was error to uphold and enforce the general, broad language contained in Section 5 of the ITA, particularly where the later Section 7 directly and unambiguously addresses circumstances of joint or concurring negligence.

Indeed, Division III's "triggering" analysis wholly misses the target when it comes to indemnification clauses purporting

to cover the indemnitee's own negligence. Under such circumstances the trigger is not the *indemnitor's acts*, it is rather the contract's clear and unequivocal language showing the parties agreed to address *the indemnitee's own actions/negligence* that is required. Absent such clear intent, Washington precedent forbids extension of the indemnification terms to the indemnitee's own negligence.

The appellate court's flawed triggering analysis is further highlighted by its reliance on extra-jurisdictional case law construing similar contract provisions. Division III cites[3] to *Anthony v. La. & Ark. Ry. Co.*, 316 F.2d 858 (8th Cir. 1963) and *Burlington N. R.R. Co. v. Stone Container Corp.*, 934 P.2d 902, 905 (Colo. Ct. App. 1997) but ignores the fact those cases apply a different standard than exists under Washington law. This Court in *Nw. Airlines* expressly recognized that the law in Washington on this issue is different from Colorado and other

[3] Op. at 9.

states where BNSF may have prevailed on this issue in the past. 104 Wn.2d at 155-57.

Finally, the appellate court seems to indicate that because there is language in Section 5 that BNSF does not waive its indemnification even if operating "with knowledge" of a track obstruction somehow suggests that the parties agreed that such indemnification applied even in the event of BNSF's own negligence. Notably, no Washington court has indicated that operating with knowledge of a known result would qualify as *negligence* as opposed to *intentional conduct*. Indeed, that would contradict the fundamental concept of negligence. See, e.g, *Adkisson v. Seattle,* 42 Wn.2d 676, 682, 258 P.2d 461 (1953) (act with "knowledge of danger and willfulness" is not negligent; negligence require inadvertence).

Moreover, operating with knowledge in no way clearly and unequivocally establishes that the parties intended that Alcoa should indemnify BNSF for its own negligence as required for a valid indemnification clause. Again, it is difficult

to imagine such intent given the parties' explicit agreement on splitting damages resulting from their concurrent negligence as set forth in Section 7.

The language of Section 5 does not clearly, unequivocally, or unquestionably show the parties' intent to indemnify BNSF for its own negligence.

Review is merited under RAP 13.4(b)(1). Additionally, as this issue is one that affects contracting parties across our State, review is also merited under RAP 13.4(b)(4).

(2) Division III Failed to Construe Section 5's Ambiguous Language Against its Drafter, BNSF.

The appellate court's opinion also ignores *Snohomish County* by construing an uncertainty in Section 5 in favor of indemnification. *Snohomish County* specifically noted that any doubt as to the parties' intent to indemnify for the indemnitee's own negligence be resolved in favor of the indemnitor. 173 Wn. 2d at 836. This end is bolstered by longstanding Washington precedent; it is a well-established rule of construction that any

ambiguity in the contract is construed against the drafter. *Berg v. Hudesman,* 115 Wn.2d 657, 677, 801 P.2d 222 (1990); *see also Carl T. Madsen v. Babler Bros*., 25 Wn. App. 880, 885 fn. 7, 610 P.2d 958 (1980) ("Not only must an ambiguous contract be construed against the drafter, but ambiguous indemnity contracts are construed in favor of the indemnitor and against the indemnitee.") (internal citations omitted). Washington employs this rule of construction so that the drafter cannot take advantage of ambiguities it could have prevented with greater diligence. *Emter v. Columbia Health Servs.,* 63 Wn. App. 378, 384, 819 P.2d 390 (1991); *Cont'l Ins. Co. v. PACCAR,* 96 Wn.2d 160, 167, 634 P.2d 291 (1981) (party who created the contract is in better position to prevent ambiguous language or mistakes). There is no dispute here that BNSF drafted Section 5. If BNSF had wanted indemnity under Section 5 to apply regardless of its own negligence, it should have expressly so stated. Construing this doubtful language in Alcoa's favor, BNSF decided against using explicit, clear, and unequivocal

exculpatory language because Alcoa likely would have objected given the express – and contrary – language of Section 7.

If the language in the contract is not enough, the mere fact that two separate trial courts disagreed with Division III's result establishes its ambiguous nature. Division III erred in failing to construe the language against BNSF. *See Calkins v. Lorain Division of Koehring Co*., 26 Wn. App. 206, 210, 613 P.2d 143 (1980) ("[w]e construe the ambiguous provision in favor of [Calkins's employer], and hold that it did not indemnify [the lessor] for liability arising out of the condition of the crane.") Applying the correct construction, the only conclusion is that Section 5 is unenforceable, and Section 7 applies. Review is merited. RAP 13.4(b)(1), (2).

(3) Division III Erred Where It Concluded Section 5's General, Broad Language Was More Specific Than the Clear Indemnification Language Contained in Section 7 of the ITA.

Division III's conclusion that Section 5's language about fouling supersedes Section 7's joint, concurrent, or sole

negligence language is contrary to Washington law. While Washington law recognizes a rule of interpretation favoring "specific over general" language when the language is inconsistent, this rule is limited; it applies only when the language is actually inconsistent. *Seattle-First Nat'l Bank v. Westlake Park Assocs.,* 42 Wn. App. 269, 273-74, 711 P.2d 361 (1985). Moreover, Washington favors an interpretation that gives effect to all the words of a contract over one that renders some of the language meaningless or ineffective. *Id.* at 273. Washington requires the construction of the contract to give each part some effect. *Id.* Thus, Washington courts will not apply the specific versus general rule where it would render some of the language meaningless or ineffective. *Id.*

In *Westlake*, the parties disputed whether a mortgage foreclosure would trigger the lessor's rights to cancel the lease where the termination clause provided that the lessor could terminate if the lessee's leasehold estate was taken "by process of law, proceedings in bankruptcy, insolvency, receivership or

other involuntary method." *Id.* at 270. Like the argument made by BNSF and adopted by the appellate court, the lessee argued that the court "should apply the rule of the Restatement (Second) of Contracts, § 236(c) (1932) that when general and specific language are inconsistent, the specific language qualifies the more general." *Id.* at 274. The lessee, citing other contract provisions that specifically addressed mortgage foreclosures without termination of the lessee's interest, argued that the specific provisions on mortgage foreclosures should control over the general language of the termination clause that did not specifically mention mortgage foreclosures. The *Westlake* court soundly rejected the lessee's argument and instead required an interpretation that gives effect to all clauses:

> Courts can neither disregard contract language which the parties have employed nor revise the contract under a theory of construing it. An interpretation which gives effect to all of the words in a contract provision is favored over one which renders some of the language meaningless or ineffective.

Id. at 274. Applying those rules, the court declined to hold that the specific language on mortgage foreclosures could be interpreted to render the general language in the termination clause superfluous. *Id.* at 274-75. The court also explained "specific language qualifies the more general" only when the provisions are "inconsistent." *Id.* It held the specific clauses governing mortgage foreclosures could be read as consistent with the termination clause; construing the termination clause "to apply to mortgage foreclosures does not preclude a lessee from mortgaging the lessee's interest" because the lessor's right to terminate is optional. *Id.* at 273-74. Thus, the court held that the "specific over general" rule was inapplicable because the clauses were not wholly inconsistent. *Id.* at 274.

This case is no different. An interpretation that gives effect to all contract clauses is favored over one that renders some of the language meaningless or ineffective. Under *Westlake,* Section 5's specific fouling language cannot be interpreted to render Section 7's specific terms related to

BNSF's own negligence "meaningless" and "superfluous." *Id.* at 273-74. There is no inconsistency between the language of Section 5 and Section 7. Section 5 provides that BNSF is indemnified for damages caused by *Alcoa's acts*, but makes no mention of what happens if some or all of those damages were caused in whole or in part by *BNSF' s own negligence*. Under Section 5, if BNSF is sued solely because of Alcoa's acts/negligence, BNSF is entitled to full indemnification. Section 7, however, addresses the unique circumstance of BNSF's joint, concurrent, or sole negligence proximately causing the alleged injury or damages - and specifically addresses claims involving injury to a party's own employees. Under *Westlake,* Sections 5 and 7 are not "inconsistent," so the "specific over general" rule does not apply. *Id.* at 273.

Finally, even if the "specific over general" rule did apply, Section 7's specific language about indemnification in circumstances involving BNSF's own negligence and injury to BNSF's own employees on or near the track would control over

Section 5's lack of specific language on these issues. Adopting Division III's analysis, Section 7's specific language regarding BNSF's own negligence and injury to its employees would displace Section 5's general language that applies only to Alcoa's actions and that does not refer to BNSF's own negligence or its employee's injuries. Review is merited. RAP 13.4(b)(1), (2).

G. CONCLUSION

Division III's opinion is error as its triggering analysis and reliance on extra-jurisdictional case law flies in the face of this Court's well-established standard outlined in *Snohomish County*. An indemnification provision that does not even identify the indemnitee's "negligence" does not, nor can it, unquestionably show the parties' intent to indemnify the indemnitee's own "negligence." Section 7 should be enforced, not Section 5.

Moreover, Division III failed to construe ambiguous language in the parties' contract against its drafter and

misapplied Washington contract interpretation principles. Review is merited. RAP 13.4(b)(1), (4).

The Court should grant review and reinstate the trial court's summary judgment in favor of Alcoa.

DATED this 27th day of October, 2022.

I certify that this petition contains 4,604 words, in compliance with RAP 18.7.

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Certificate of Service

The undersigned certifies under the penalty of perjury according to the laws of the United States and the State of Washington that on this date I caused to be served in the manner noted below a copy of this document entitled **PETITION FOR REVIEW** on the following individuals:

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APPENDIX

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

BNSF RAILWAY COMPANY, a corporation, Petitioner, v. ALCOA, INC., a corporation; ARCONIC, INC. a corporation; and ALCOA CORP., a corporation, Respondents.	)	No. 37900-1-III UNPUBLISHED OPINION

SIDDOWAY, C.J. — At issue is the construction of contractual indemnity language under which BNSF Railway Company (BNSF) claims to be entitled to full indemnification even if its own negligence was a partial cause of its loss.

For a contract to indemnify an indemnitee from its own negligence has never been found to be against public policy by Washington courts. *Snohomish County Pub. Transp. Benefit Area Corp. v. FirstGroup America, Inc.*, 173 Wn.2d 829, 834, 271 P.3d 850 (2012) (citing *Nw. Airlines v. Hughes Air Corp.*, 104 Wn.2d 152, 156, 702 P.2d 1192 (1985)). But Washington, like most other states, "appl[ies] the 'general rule that a contract of indemnity will not be construed to indemnify the indemnitee against losses resulting from his own negligence unless this intention is expressed in clear and

unequivocal terms.'" *Id.* at 836 (quoting *NW Airlines*, 104 Wn.2d at 154). No "'magic words'" are required. *Id.* at 854.

In an approach not presented in prior Washington decisions, the parties' contract, under which BNSF provided railway service to an Alcoa[1] facility, imposed on Alcoa a duty to keep the tracks and close environs free of obstructions. Having created the duty, the provision added Alcoa's agreement to indemnify BNSF from claims arising out of injury or death to persons occurring directly or indirectly by reason of any breach. Finally, the provision included language that BNSF's operation with knowledge of Alcoa's breach would not be deemed a waiver of Alcoa's duty or BNSF's right to recover for resulting damages.

The trial court ruled as a matter of summary judgment that this approach was not sufficiently clear and unequivocal to create an enforceable obligation to indemnify BNSF if it was concurrently negligent. We disagree. Imposing the contractual obligation on Alcoa was a sufficiently clear and unequivocal allocation of the risk. We reverse the decision and remand with directions to enter summary judgment in favor of BNSF.

FACTS AND PROCEDURAL BACKGROUND

Alcoa owns a facility for aluminum smelting, casting, and rolling in Malaga, Washington, commonly known as the Alcoa Wenatchee Works. BNSF and Alcoa each

[1] Like the parties, we refer to defendant/respondents Alcoa, Inc., Arconic, Inc. and Alcoa Corp. collectively as "Alcoa."

own and operate some of the railroad tracks that serve Alcoa's facility. The tracks bring raw materials into the Alcoa facility and carry out finished aluminum products.

BNSF's and Alcoa's maintenance and operation on the subject tracks has been governed since 1978 by an industrial track agreement (ITA). Section 5 of the ITA, which is identified in the contract's margin as dealing with "Clearances," provides in relevant part:

> **Section 5.** Industry [Alcoa] shall not place or permit to be placed, or to remain, any material, structure, pole or other obstruction within 8 1/2 feet laterally of the center or within 23 feet vertically from the top of the rail of said track . . . . Industry agrees to indemnify Railroad [BNSF] and save it harmless from and against any and all claims, demands, expenses, costs and judgments arising or growing out of loss of or damage to property or injury to or death of persons occurring directly or indirectly by reason of any breach of the foregoing or any other covenant contained in this agreement.
>
> . . . .
>
> Railroad's operation over the track with knowledge of an unauthorized reduced clearance shall not be or be deemed to be a waiver of the foregoing covenants of Industry contained in this Section 5 or of Railroad's right to recover for such damages to property or injury to or death of persons that may result therefrom.

Clerk's Papers (CP) at 66-67. In industry parlance, an obstruction placed within the required clearance area is referred to as being "foul of the track."

In addition to the indemnification provided by the track-clearance provision, section 7 of the ITA, which is identified in the contract's margin as dealing with "Liability," is a general indemnification clause. It provides in relevant part:

> **Section 7.** Industry agrees to Indemnify and hold harmless Railroad for loss, damage, injury or death from any act or omission of Industry, its employees or agents, to the person or property of the parties hereto and their employees, and to the person or property of any other person or corporation, while on or near said track, and if any claim or liability shall arise from the joint or concurring negligence of both parties hereto it shall be borne by them equally. Notwithstanding anything herein contained to the contrary, nothing herein is to be construed as an indemnification against the sole negligence of Railroad, its officers, employees and agents.

CP at 67.

On the night of November 24, 2014, BNSF employees delivered three tank cars containing pitch to track 6 in the Alcoa yard. The next day, one of Alcoa's employees separated and moved the three cars because they blocked access to an ore shed. Alcoa admits that one of the pitch cars was moved to a position that was foul of adjacent track 9.

Later that evening, a BNSF crew moved a 12-car train from the BNSF yard to the Alcoa yard by "shov[ing]" it—meaning to push it, using a locomotive at the rear of the train. CP at 438. When railcars are being shoved, the conductor or another crew member advances in front, in radio contact with the engineer, to watch for potential hazards and obstructions to ensure safe passage of the train and its personnel.

Conductor Jay Narozny and student conductor Adam Link rode on the lead car during the "shove" down track 9. They rode on the sides of the lead car, which is

generally not permitted by BNSF work rules.[2] As the 12-car train approached the track 6 switch, Mr. Narozny could see that a pitch car had been moved; seconds later he realized it was too close. He yelled to Mr. Link, "[c]ar was foul," and yelled, "[S]top, stop, stop" on his radio. CP at 472-73. The engineer and brakeman were unable to stop the train in time to avoid a collision. Mr. Link was pinched between the lead car and the pitch car on the adjacent track and suffered serious injury.

Mr. Link and his wife filed suit against Alcoa and BNSF. They sued Alcoa for premises liability and loss of consortium, and sued BNSF for negligence under the Federal Employers' Liability Act (FELA),[3] a statute that does not permit recovery for loss of consortium. The two companies asserted cross claims against each other but ultimately reached a joint settlement with the Links, reserving rights against one another. Because loss of consortium was not recoverable against BNSF, the parties agreed that 18.725 percent of the total settlement amount would be allocated to the consortium claims and Alcoa would advance that portion of the settlement, which was otherwise initially borne equally. Both BNSF and Alcoa reserved the right to seek contribution or indemnity from the other in a later proceeding, with all issues to be reviewed de novo.

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[2] Work rules provide that "BNSF workers must not ride the side of equipment unless safe and necessary to do so. This includes ensuring there is sufficient clearance to ride the side of the equipment, especially on industry track where a customer's workers can move cars and equipment." CP at 521.

[3] 45 U.S.C. § 51-60.

BNSF then brought the action below, seeking to recover its losses and expenses incurred in the Link lawsuit. Alcoa filed counterclaims. In cross motions for summary judgment brought thereafter, BNSF argued that under section 5 of the parties' agreement, Alcoa must fully indemnify BNSF regardless of evidence that BNSF's employees' negligence might have contributed to the losses. It also moved for summary judgment on Alcoa's affirmative defenses and counterclaims.

Alcoa sought a ruling that section 5 was unenforceable and, in any event, section 7 controlled the parties' rights of indemnification. It argued the parties were jointly negligent and section 7 required the parties to equally bear the losses, including the cost of settling the consortium claim.

The trial court ruled that section 5 was "not applicable" and "unenforceable" because it "does not clearly spell out that BNSF would be indemnified for damages caused by its own negligence" and whether BNSF was negligent was disputed and required trial. CP at 686. It ruled that section 7 of the ITA governed the parties' liability to the Links and, in the event both parties were found negligent, they must bear equally the resulting liability, including for loss of consortium.

BNSF sought discretionary review of the trial court's summary judgment rulings, supported by a stipulation of the parties that the trial court's order involved controlling

questions of law as to which there is substantial ground for disagreement.[4] Our commissioner granted discretionary review.

ANALYSIS

BNSF contends in this interlocutory appeal that the trial court erroneously ruled that section 5 of the ITA is unenforceable and, having refused to enforce section 5, erroneously ruled that section 7 imposes an obligation on BNSF to share the cost of settling the Links' loss of consortium claim. Where material facts are undisputed and there is no extrinsic evidence presented on the issue, the meaning of a contract may be decided as a matter of law. *Snohomish County*, 173 Wn.2d at 834. Following summary judgment, review of these purely legal questions is de novo. *Fluke Corp. v. Hartford Acc. & Indem. Co.*, 145 Wn.2d 137, 143, 34 P.3d 809 (2001) (citing *Island County v. State*, 135 Wn.2d 141, 160, 955 P.2d 377 (1998)).

Except for limited contexts not at issue here, no public policy is violated by an indemnification contract that requires the indemnitor to be responsible for losses resulting

[4] The trial court dismissed Alcoa's affirmative defenses, including (1) that BNSF committed gross negligence or reckless misconduct, (2) that Alcoa had just cause for its actions, and (3) that BNSF's conduct was an intervening, superseding cause for the injuries to Mr. Link. The trial court also granted summary judgment for BNSF on Alcoa's counterclaim for contribution under chapter 4.22 RCW. These rulings are not appealed.

from an indemnitee's negligence—even an indemnitee's sole negligence.[5] *NW Airlines*, 104 Wn.2d at 158. But Washington courts have long applied two countervailing principles when construing such provisions.

One is that a contract of indemnity will not be construed to indemnify the indemnitee against losses resulting to him through his own negligent acts unless that intention is expressed in clear and unequivocal terms. *Griffiths v. Henry Broderick, Inc.*, 27 Wn.2d 901, 904, 182 P.2d 18 (1947), *overruled on other grounds by Jones v. Strom Constr. Co.*, 84 Wn.2d 518, 527 P.2d 1115 (1974); *and see Snohomish County*, 173 Wn.2d at 836. An indemnity clause that is contended to exculpate an indemnitee from liability for its own negligence will be strictly construed, with any doubts settled in favor of the indemnitor. *NW Airlines*, 104 Wn.2d at 157-58 (citing *Jones*, 84 Wn.2d at 520). "Formulaic language" such as a statement that "'X indemnifies Y for Y's own negligence'" is not required, however. *Snohomish County*, 173 Wn.2d at 836. "Concurrent negligence" need not be mentioned. *McDowell v. Austin Co.*, 105 Wn.2d 48, 52-53, 710 P.2d 192 (1985); *accord NW Airlines*, 104 Wn.2d at 155-56 (stating, even where the clause at issue spoke of the indemnitee's negligence, "the term negligence itself need not actually be used").

[5] Only RCW 4.24.115, addressing certain categories of construction, property development and motor carrier contracts, provides that contracts indemnifying the indemnitee from its sole negligence are void, and indemnification from the indemnitee's or its agents' concurrent negligence is limited.

The countervailing principle is that contracts of indemnity "'"must receive a reasonable construction so as to carry out, rather than defeat, the purpose for which they were executed."'" *Snohomish County*, 173 Wn.2d at 835 (quoting *McDowell*, 105 Wn.2d at 54 (quoting *Union Pac. R.R. Co. v. Ross Transfer Co.*, 64 Wn.2d 486, 488, 392 P.2d 450 (1964))). Stated differently, since an agreement to indemnify against an indemnitee's own negligence is a matter of permissible agreement, "'the highest public policy is found in the enforcement of the contract which was actually made.'" *Nw. Airlines*, 104 Wn.2d at 158 (quoting *Govero v. Standard Oil Co.*, 192 F.2d 962, 965 (8th Cir. 1951) (quoting *Santa Fe, Prescott & Phx. Ry. Co. v. Grant Bros. Constr. Co.*, 228 U.S. 177, 188, 33 S. Ct. 474, 57 L. Ed. 787 (1913))).

The legal question presented is whether Alcoa's track-clearance covenant and its associated promise to indemnify and save BNSF harmless clearly and unequivocally demonstrates the parties' intent that BNSF was fully indemnified in the event of loss resulting from Alcoa's breach of the covenant. Two courts construing materially identical provisions have found them to provide full indemnity whether or not negligence by the railroad was a contributing cause to an injury. *Anthony v. La. & Ark. Ry. Co.*, 316 F.2d 858 (8th Cir. 1963) (applying Arkansas law); *Burlington N. R.R. Co. v. Stone Container Corp.*, 934 P.2d 902, 905 (Colo. Ct. App. 1997) ("fact finder could properly find that the employee's injuries arose, at least indirectly, from [Stone Container]'s

breach of the [a]greement" in which case the duty of indemnification was owed). Alcoa argues that those decisions were not applying Washington law, however, and Washington cases call for a different result.

Section 5 not only contains a promise of indemnification, it begins with Alcoa's promise to keep the tracks clear. In this respect, it is unlike all of the Washington decisions cited by Alcoa. Section 5 does not provide indemnification for BNSF that is specific to negligence—it is broader in one sense and narrower in another. It is broader insofar as it extends to any claim, demand, expense, cost, or judgment for property loss or personal injury damage, and narrower insofar as the loss or damage must occur directly or indirectly by reason of Alcoa's breach of its track-clearance or other covenants. For the reasons that follow, we hold that the parties' approach of contractually allocating this particular risk of loss to Alcoa clearly and unequivocally demonstrates an intent that BNSF be fully indemnified in the event of a claim, even if its negligence was a contributing cause of injury.

Because of this different, explicit allocation of a risk approach, it is important to follow the *reasoning* of prior Washington decisions rather than rely on their negligence-oriented discussion of differently-designed indemnification provisions.

I. UNDER CASE LAW STRICTLY CONSTRUING THE TRIGGERING EVENT OF AN INDEMNIFICATION CLAUSE, THE TRIGGERING EVENT IN THIS CASE CLEARLY AND UNEQUIVOCALLY OCCURRED

A number of Washington decisions enforce the requirement that the intent to indemnify an indemnitee against its own negligence be clear and unequivocal by strictly construing the event that triggers the right to indemnity. Alcoa relies on language from some of these cases, but the reasoning of the cases does not help it.

In *Jones*, a masonry subcontractor's employee was injured when the flooring on which he was working collapsed due to a lack of shoring beneath. The contractor, not the subcontractor, was responsible for providing adequate shoring. The contractor nevertheless sought indemnity under a provision stating that the subcontractor agreed to indemnify the contractor from various categories of claims or loss "'arising out of, in connection with, or incident to the SUBCONTRACTOR'S performance of this SUBCONTRACT.'" 84 Wn.2d at 521.

The court attached importance to the triggering event being only the subcontractor's performance, not the contractor's performance. Finding the subcontractor's performance of its subcontract to be "the keystone on which indemnity turns," the court held that "unless an overt act or omission on the part of [the subcontractor] in its performance of the contract in some way caused or concurred in

causing the loss involved, indemnification would not arise." *Id.* at 521-22 (footnote omitted).

Three dissenting justices complained that this was *too* strict a construction, since even the subcontractor conceded that its worker's performing work at the jobsite was a cause-in-fact of the accident. In their view, it "does violence to the clear contractual intent of the parties to read into the indemnity provision a 'proximate cause' requirement." *Id.* at 525-26. Yet the majority in *Jones*, and later Washington decisions, defend a narrow reading of the triggering event as justified by the need for clear and unequivocal language that the parties intended indemnification to apply.

The approach was followed in *Dirk v. Amerco Marketing Co. of Spokane*, 88 Wn.2d 607, 565 P.2d 90 (1977), in which Dirk, a Moses Lake gas station operator and authorized U-Haul dealer, sought indemnification from Amerco for his cost of settling a lawsuit over an auto accident. The accident occurred when Dirk and his son, having obtained authorization from Amerco to do so, were using Dirk's pickup and a chain to tow a disabled U-Haul van from the interstate highway. The indemnification provision in the parties' contract provided that Amerco would hold its dealers harmless from liability for property damage or personal injury "arising out of accidents occasioned by the negligence of [Amerco] or by defects in U-Haul equipment . . . being rented or used under a duly executed U-Haul Rental Contract." *Id.* at 609. The trial court found that

Amerco had not been negligent, Dirk *had* been negligent, the U-Haul van had been defective, but the accident was not "occasioned by . . . defects in U-Haul equipment." *Id.* It reasoned that "'occasioned by'" should be strictly construed to mean "'caused by,'" and the accident was not caused by the defect in the U-Haul van. *Id.* at 610. The trial court held that the triggering clause did not clearly and unequivocally cover the event for which Dirk sought indemnification. The Supreme Court affirmed.

Strict construction of the triggering event was also the approach followed in *Calkins v. Lorain Division of Koehring Co.*, 26 Wn. App. 206, 613 P.2d 143 (1980). Plaintiff Calkins's employer had leased a crane from an affiliate of Lorain. The crane lacked a fail-safe mechanism that could prevent the crane from lowering its load to a point that could cause injury. Calkins was injured when a tank weighing several tons lowered onto his foot. Calkins sued the crane lessor, who settled with Calkins and then sued Calkins's employer. The crane lessor relied on an indemnity provision stating that "'[l]iability for injury, disability and death of workmen . . . *caused by the operation, handling or transportation of the equipment* . . . shall be assumed by the Lessee, and he shall indemnify the Lessor against all such liability.'" *Id.* at 207 (emphasis added).

The lessor argued that the trigger for indemnification—"'operation, handling, or transportation of the equipment'"—was broad enough to cover the crane's condition, but the trial court and appellate courts disagreed. *Id.* at 210. Applying strict construction,

this court held "[w]e construe the ambiguous provision in favor of [Calkins's employer], and hold that it did not indemnify [the lessor] for liability arising out of the condition of the crane." *Id*.

The Court of Appeals observed in *Calkins* that if an indemnification clause states that it includes indemnity for concurrent negligence, its coverage will be clear. In *McDowell*, the Supreme Court discussed that language in *Calkins* and clarified that a statement that indemnity extends to concurrent negligence will be sufficient, but is not necessary. An indemnity agreement will not "be held unenforceable for failing to expressly mention concurrent negligence." 105 Wn.2d at 53.

Applying the reasoning of these cases to section 5 of the ITA, its trigger for indemnification is claims for loss occurring directly or indirectly "by reason of any breach of the [track-clearing covenant] or any other covenant contained in this agreement." CP at 66. The trigger clearly and unequivocally applies to the Links' lawsuit over the accident with the pitch car that Alcoa placed foul of the track.

II. CLEAR AND EQUIVOCAL INTENT DOES NOT DEPEND ON A REFERENCE TO INDEMNITEE NEGLIGENCE OR OTHER FORMULAIC LANGUAGE

Washington decisions finding a clear and unequivocal intent to indemnify against an indemnitee's own negligence have found that intent in a variety of indemnification approaches.

Most relevant here is *McDowell*, which involved a subcontract between the Austin Company, as general contractor, and Canron Corporation, a steel erector, that included an indemnity provision applicable to liability for personal injury to persons employed by Canron or its subcontractors. The indemnity provision operated in favor of Austin and the project owner, the Boeing Company. It provided (we retain the emphasis added by the Supreme Court):

> (b) Subcontractor [Canron] agrees to indemnify and save harmless Owner and Austin against *all liability* for personal injury, including death resulting therefrom, sustained by any person directly or indirectly employed by Subcontractor or its subcontractors, *caused* or alleged to have been caused, directly or indirectly, by an act or omission, negligent or otherwise, *by Owner or Austin* or persons directly or indirectly employed by them, and to assume the defense of any action brought by persons so injured or their personal representatives against Owner or Austin to recover damages for such injuries.

105 Wn.2d at 49-50 (alteration in original). Relying on this court's decision in *Calkins*, Canron argued that because the provision did not make clear that Canron would be required to indemnify Austin and the owner for joint and several liability, which would include liability for the indemnitees' concurrent negligence, it was unenforceable. *Id.* at 52; *and see McDowell v. Austin Co.*, 39 Wn. App. 443, 450, 693 P.2d 744 (1985) (discussing Austin's joint and several liability).

The Supreme Court disagreed. It pointed out that "[p]arties are free to establish liability instead of negligence as the triggering mechanism of an indemnity contract."

105 Wn.2d at 51. And because the language of the Austin-Canron indemnification agreement "provided fair notice to Canron that it would be liable for 'all liability' to Canron's employees caused by Austin's conduct," it was "not necessary" to include language stating that Canron would be an insurer for Austin's liability. *Id.* at 53.

The same analysis applies here. The parties were not required to, and did not, provide that negligence was the triggering mechanism for indemnification under section 5. Instead, section 5's trigger is liability directly or indirectly arising out of a breach of Alcoa's track-clearing or other covenants. The indemnification language of section 5 assures BNSF breach of contract damages, which include incidental and consequential loss. *See, e.g.*, 2 RESTATEMENT (SECOND) OF CONTRACTS § 347 (AM. LAW INST. 1981).[6]

By contrast, to construe section 5 as Alcoa does effectively writes Alcoa's track-clearing covenant out of the contract. It also gives no meaning to section 5's nonwaiver

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[6] "[T]he injured party has a right to damages based on his expectation interest as measured by

> (a) the loss in the value to him of the other party's performance caused by its failure or deficiency, plus
>
> (b) any other loss, including incidental or consequential loss, caused by the breach, less
>
> (c) any cost or other loss that he has avoided by not having to perform."

2 RESTATEMENT § 347. "Incidental losses include costs incurred in a reasonable effort, successful or not, to avoid loss," and "[c]onsequential losses include such items as injury to person or property resulting from defective performance." *Id.* cmt. c.

paragraph. Alcoa argues that the nonwaiver language has no application to the Links' damages because BNSF does not contend it was operating with knowledge of an unauthorized reduced clearance at the time of the accident. But the nonwaiver language reinforces Alcoa's contractual duty and BNSF's associated contractual "right to recover for such damages to property or injury to or death of persons that may result [from a breach]." CP at 67. "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 840 (citing *Wagner v. Wagner*, 95 Wn.2d 94, 101, 621 P.2d 1279 (1980)); *and see Ross*, 64 Wn.2d at 490 ("We prefer interpretation of the contract that gives effective operation to all its language.").

III. SECTION 5, NOT SECTION 7, APPLIES AS THE MORE SPECIFIC INDEMNIFICATION OBLIGATION AND BECAUSE ALCOA'S CONSTRUCTION WOULD MAKE THE INCLUSION OF SECTION 5 A USELESS GESTURE

"It is a well-known principle of contract interpretation that 'specific terms and exact terms are given greater weight than general language.'" *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 354-55, 103 P.3d 773 (2004) (citing 2 RESTATEMENT § 203(c)). Because section 5 addresses indemnity for a liability that results directly or indirectly from a breach of the track-clearing covenant, it is the more specific. The more general section 7 serves to address indemnity and contribution when liability arises from some

other act or omission by Alcoa, its employees and agents. *See Anthony*, 316 F.2d at 866 (reasoning that "[d]oubtless" the contribution provisions in the parties' spur track agreement "are intended to cover situations not covered by the indemnity provisions," such as where an injury "had been caused by an obstruction negligently placed near the tracks but outside the specified track clearances").

As touched on above, if section 5 does not apply to liability for a claim like the Links' claim, it will never apply. Alcoa suggests that section 5 could apply "to circumstances of Alcoa's sole behavior/negligence," Resp't's Opposition Br. at 29-30, but as the Supreme Court pointed out in *Ross*, one can perceive of "no other kind of claim for which the Railroad could be indemnified" under a provision like section 5, "except one founded in whole or in part upon the Railroad's own negligence." 64 Wn.2d at 490.

IV. CONCLUSION

In *Snohomish County*, the Supreme Court observed that "[p]arties have broad control over the provisions of their private contractual indemnity agreements." 173 Wn.2d at 856. Noting that the parties in that case were "commercial parties and nothing indicates any overreaching or one-sided bargaining power," it saw "no good reason not to enforce their agreement according to its terms." *Id.* at 855. Unlike parties in cases whose language it relies on, Alcoa agreed to assume a specific contractual duty and a broad, liability-based, indemnity obligation. We see no good reason to relieve it of the

contractual liability it assumed and allow it to bear a lesser liability for comparative negligence.

We reverse the trial court's summary judgment ruling that section 7 of the ITA applies to the Links' lawsuit and settlement, and remand with directions to enter summary judgment in favor of BNSF.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Siddoway, C.J.

WE CONCUR:

Fearing, J.

Lawrence-Berrey, J.

FREY BUCK, P.S.

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