

70433-8

70433-8

NO. 70433-8-I

COURT OF APPEALS  
DIVISION I OF THE STATE OF WASHINGTON

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SEAWAY PROPERTIES, LLC,

Appellant,

v.

CIAO BELLA FOODS, LLC,

Respondent.

FILED  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
2011 MAR 17 PM 3: 14

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**RESPONDENT'S OPENING BRIEF**

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## I. INTRODUCTION

Appellants seek reversal of the trial court's judgment that Ciao Bella Foods LLC ("Ciao Bella") owed Seaway Properties LLC ("Seaway") no duty to pay attorney fees that Seaway incurred in defending against the claims of Helen Heuer, who fell on a common area of the property owned by Seaway and in which by two tenants, Ciao Bella and Ola Salon had equal non-exclusive use rights. Seaway's claim is based on a poorly worded and confusing lease, and on the subjective interpretation of the lease provisions by Seaway's owner, Dahli Strayer. The language of the lease raised interpretation issues for the trial court, and the court interpreted the lease properly.

The trial court determined that the parties at all times acted in good faith, that Ciao Bella provided Seaway with copies of its insurance policy documents, and that Seaway never made any objection to the terms of the policy. In fact, the record reflects that Seaway's agent, Todd Crooks, affirmatively approved the insurance policy provisions. Nevertheless, Seaway wants Ciao Bella to pay to defend Seaway, without showing any fault on the part of Ciao Bella, based on the convoluted and confusing indemnity provision in the lease.

Seaway asks the Court of Appeals to reverse the trial court's assessment of the testimony of the parties and its construction of the Lease

Agreement, and substitute a different interpretation of the Lease in order to require Ciao Bella to indemnify Seaway for a claim arising on the common areas of the property, not on the Premises leased to Ciao Bella. The interpretation urged by appellant is illogical, unreasonable and in conflict with the testimony of Seaway's owner. The trial court's decision was correct under the law and under the contract between the parties, and should be affirmed.

## **II. RESPONDENT'S STATEMENT OF THE CASE**

Helen Heuer had an unfortunate fall on the common area of property owned by Seaway Properties LLC, and leased to Ciao Bella and Ola Salon. The fall did not occur on the Premises leased to Ciao Bella. *CL 12*. The fall did not occur as the result of any negligence by Ciao Bella. *CL 3*. Ms. Heuer sued Seaway and Ciao Bella (which owned and operated an Italian restaurant named Café Revo on the Premises); for reasons unknown she did not name co-tenant Ola Salon in her suit. She presumably targeted Ciao Bella because it was her intended destination. But nowhere in the Complaint did Ms. Heuer allege that she fell on premises leased to Ciao Bella; she alleged only that the area where she fell was "owned by Seaway Properties, LLC. *CP 1-3* (esp. ¶ 5.)

Both defendants denied fault, asserting that Ms. Heuer's fall was her own fault, and eventually the trial court agreed. *CL 3*. Seaway

asserted a cross claim for indemnity and defense costs. *CP 4-15*. Seaway tendered defense and indemnity of the matter to Ciao Bella, *Tr. Ex. 13*, and to Ciao Bella's insurer, Fireman's Fund. *Tr. Ex. 14*. Both were declined. *Tr. Ex. 6, 8, 15*. Fireman's Fund expressly stated that Seaway "is entitled to additional insured coverage only under certain conditions identified in the Policy." It explained that coverage applied only to liability arising out of "the ownership, maintenance or use of that part of the premises, or land owned by, rented to, or leased to you [Ciao Bella]." *Tr. Ex. 15* [emphasis in original]. Thus, Fireman's Fund acknowledged that Seaway was entitled to additional insured coverage, but that coverage was limited; landlord had no right to coverage over areas of the property where Ciao Bella had none. *Id.*

Before trial Ciao Bella settled with Ms. Heuer. *FF 50*. This was, in large part, to "turn off the clock" on Seaway's ever-increasing attorney fee claim.<sup>1</sup> A two-day trial ensued on the issue of defense costs, solely so

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<sup>1</sup> Under Washington law, Seaway has no right to fees incurred in establishing a right to indemnity, even if successful in that effort, absent a specific contractual agreement to that effect. "The general and virtually unanimous rule appears to limit the allowance of such fees to the defense of the claim indemnified against and not to extend such allowance for services rendered in establishing the right to indemnification." *Tri-M Erectors, Inc., v. Drake Co.*, 27 Wn.App. 529, 618 P.2d 1341 (1980), citing 41 *Am. Jur. 2d, Indemnity*, § 36 (Supp. 1974), and 42 C.J.S. *Indemnity* § 13d (1944). Thus, once Ciao Bella settled with plaintiff Heuer, there was no longer a claim to defend against, the amount of Seaway's claim was fixed, and it could not recover further attorney fees (although it continues to try).

that Seaway's insurer could recover its attorney fees incurred in defending its insured, and not for the benefit of Seaway, which had incurred no fees and had no duty to pay counsel retained by its insurer. *RP 44*. (Seaway's insurer was never made a party, and asserted no subrogation claim.) Although the trial court found that Ciao Bella had no duty to pay indemnity, defense costs and attorney fees, it nevertheless made unnecessary (and erroneous, in Ciao Bella's view) findings regarding amounts "incurred" by Seaway but actually paid out by Seaway's insurer. See, *FF 51-53*.<sup>2</sup>

The trial court found the Lease Agreement to be "valid, enforceable and applicable to Ms. Heuer's accident." *CL 2*. However, this does not mean that its provisions are models of clarity and easily applied to the facts of the case. Seaway apparently interprets this to mean that the Lease is applicable according to its own understanding of the meaning of the Lease. Seaway construes the Lease to mean that it is entitled to insurance, indemnity and defense for "anything that happens" on "the property." *RP 17*. Thus, Seaway would have the trial court and the Court of Appeals construe and apply the Lease based on obligations not stated in

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<sup>2</sup> This issue was not fully explored at trial, because the trial court, on its own motion, elected to suspend taking evidence on attorney fees/costs until after it determined the issue of whether Ciao Bella owed any duty to pay them.

the language of the Lease, and based on the strained and illogical understanding of Dahli Strayer as to the meaning of its terms and language.

Seaway drafted an unclear and ambiguous Lease agreement, and sought an unreasonable application of its terms. The trial court ruled against it on its indemnity claim. This appeal followed.<sup>3</sup>

### III. ARGUMENT

1. The trial court correctly found that the Heuer fall did not invoke a duty to indemnify.

*a. Seaway seeks unreasonably broad application of the indemnity provision of the Lease.*

Contractual indemnity clauses "are to be viewed realistically, recognizing the intent of the parties to allocate as between them the cost or expense of the risk of losses or damages arising out of performance of the contract." *Jones v. Strom Const. Co., Inc.*, 84 Wn.2d 518, 521, 527 P.2d 1115 (1974). In *Jones*, the court addressed indemnity obligations in the context of a construction contract, but its principles apply to our case, and support the trial court's decision. There, a subcontractor was asked to indemnify a general contractor for an injury that was caused solely by the

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<sup>3</sup> The Court should be aware that the issue of whether Seaway is an insured under the Ciao Bella policy is being litigated between Seaway and Fireman's Fund in a declaratory judgment action in the US District Court, Western District of Washington, # 2:13-CV-00633-RAJ.

general contractor's negligence. The *Jones* court declined to read the indemnity provision to require the subcontractor to indemnify the general contractor for not only the general's negligence, but potentially the negligence of any other subcontractor on the site as well, merely because of the indemnitor's presence on the premises. The court found that this would not be a logical interpretation of the parties' intent to allocate risk. *Id.*, at 522.

Our case is analogous in that Seaway seeks to have the indemnity clause in the Lease interpreted to require Ciao Bella to indemnify Seaway against its own negligence as well as the negligence of anyone else on the property, including parts of the property not leased to Ciao Bella, merely because of Ciao Bella's existence on the property. Just as in *Jones*, this is not a logical interpretation of the intent of the parties to allocate risk. This interpretation would allow the landlord to fail or refuse to make the premises safe for pedestrians, and yet avoid any tort liability to someone who was injured on the property through no fault of Ciao Bella.

*b. Seaway's attempt to apply subjective interpretation of lease provisions evidences ambiguity, and requires the court to interpret the Lease.*

The trial court was presented with conflicting testimony about the intent of the parties regarding the scope of the tenant's duty to defend, indemnify and hold harmless. On the one hand, the testimony of Dahli

Strayer took an extraordinarily broad approach in her description.

Explaining her interpretation of the meaning of paragraph 23.2, she testified:

Reading through this, it's so – **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 held responsible; that **they'll cover any costs or damages**.

*RP 17:20-25* (emphasis added). But, of course, this was never discussed directly with Ciao Bella's owners, the Goffs. *RP 18:10-12*. And Seaway never told Ciao Bella that **only** Ciao Bella, and not the other tenant, Ola Salon, would be looked to for indemnity and defense. *RP 65:15-20*.

Ms. Strayer goes on to interpret language into sections 10 and 23.2, claiming that the Lease "says they need to have insurance to cover **any accidents** and hold me harmless," to include accidents on the Common Areas. *RP 88:6-14*. But section 10 contains no language whatever requiring the tenant to obtain coverage for incidents on the Common Areas. And section 23.2 is ambiguous at best, and lends itself to the analysis that led to the trial court's conclusions.

Later in her testimony, Ms. Strayer conceded that the language of the Lease could be read to impose duties upon Ciao Bella related to the entire building – not just the portions they leased (the "Premises"). *RP 81*.

Seaway's own citation to testimony of Ms. Strayer demonstrates

exactly why the trial court could conclude that the indemnity provision is not as broad as Seaway argues. See, *Appellant's Brief*, p. 28-29. Ms. Strayer herself uses the terms "property" as if it had the same meaning applied to the term "Premises" in the Lease. Clearly, "Premises" means only the portion of the property leased to Ciao Bella. *Tr. Ex. 5*, ¶ 1.1, 1.2. But Ms. Strayer's testimony shows that she conceptualizes the "property" as the area "they" [Ciao Bella] "are renting ... for their restaurant ... it's theirs while they're renting it, so they are responsible for it." *RP 17*. Yet, she claims that Seaway was entitled to indemnity for anything that happened on the "property" including non-Premises common areas. But Ciao Bella is not responsible for the common areas; those areas are not "theirs" and are not subject to the exclusive use of a single tenant. *Tr. Ex. 5*, ¶ 1.1.

It is this kind of self-contradicting testimony about the meaning of the Lease provisions that raised questions for the trial court about how to construe and apply them. At that point, the trial court had to resort to the language of the Lease and the testimony of the parties to discern the reasonable meaning of the lease, and particularly the indemnity provision of section 23.2. On appeal, the trial court's evaluation of the Lease language and witness testimony is entitled to substantial deference as to its findings of fact, because issues of credibility and weight are involved.

*Niemann v. Vaughn Community Church*, 154 Wn.2d 365, 375, 113 P.3d 463 (2005).

*c. The trial court appropriately assessed the reasonable meaning of the lease provisions.*

The trial court broke down the indemnity language of section 23.2 into two portions, and did so reasonably given the ambiguities in the meaning of the section. First, it addressed the duty to indemnify related to an injury

"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...."

By its plain language, this first clause applies to an injury in the Common Areas, but only if it occurred "by reason of the condition or use of the Premises." As the trial court noted, Ms. Heuer's fall did not occur by reason of the condition of the Premises, since by definition "the Premises" included only the leased restaurant space, and not the Common Areas. The trial court also correctly determined that Ms. Heuer's fall did not occur "by reason of the use of the Premises." The fall had nothing to do with Ms. Heuer's use of the Premises since she had not yet reached the Premises. And it had nothing to do with Ciao Bella's use of the Premises, other than the mere existence of the restaurant. Nothing related to any

restaurant operation contributed to the fall; no debris or oil, or other foreign substance caused Ms. Heuer to fall. No interaction with an employee or customer of Ciao Bella is implicated. In short, the only reason that Ciao Bella is involved at all is that Ms. Heuer's subjective destination was Ciao Bella. If that were enough for liability to attach, neither tenant could protect itself against unlimited risk which would attach merely based upon the subjective intention of a stranger to enter that tenant's Premises, for whatever reason. As the trial court concluded, such a ruling would have unintended and absurd results. *CL 14*.

The second portion of section 23.2 parsed by the trial court could trigger a duty to indemnify for an injury:

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....

These two sections are written in the disjunctive (either a or b), and this section omits any reference to the Common Areas. Thus, under this portion, indemnity for injury to a customer or invitee does not extend to an incident occurring in the Common Area.

The lease could have included the Common Areas in its scope, but it did not. Thus, it is a reasonable and permissible construction for the trial court to find that Ms. Heuer's fall did not arise out of negligence of Ciao Bella, *CL 13*, and that her injury did not invoke a duty to indemnify

because it did not occur on the Premises.

This interpretation would be consistent with the apparent intent of the Lease as a whole, and would avoid the absurd result described in the trial court's *CL 14*. If an invitee on the Common Area intends to patronize one tenant, but falls while walking to the other, but that invitee is serving the business purposes of all three (both tenants and the landlord) there is no sound reason to impose the risk of injury upon only one of the parties benefitted by the invitee's presence on the property, based on the invitee's subjective destination, without specific language to that effect.

The trial court could also have determined that Ms. Heuer was an invitee of landlord and both tenants (as Ciao Bella believes she was), and limited Ciao Bella's potential duty to one-third of any indemnity and defense costs; this would have also been a reasonable and permissible construction of the lease as written. But the trial court rejected the constructions offered by both landlord and tenant, and instead found that some relationship between the cause of the fall and the operation of the café was required (other than its mere existence). It was within its discretion to do so.

Seaway highlights the fact that Helen Heuer subjectively intended to dine at Ciao Bella, as this was her reason for being on the property. This is a red herring. *Anyone* could have been on the property, for any

number of reasons, only two of which would be to patronize one of the two tenants. They could have been cutting across the property to go elsewhere. They could have parked on the property, due to convenience or lack of parking elsewhere, etc., intending to walk to another business entirely. They could have intended to patronize both tenants. In any event, while on the common areas, they were simply members of the public, free to come and go, and enjoying the general status of invitee of Ola Salon, Seaway and Ciao Bella. The question is what the parties to the Lease understood about the meaning of "invitee" or "customer." The evidence shows that this was never discussed. The landlord's subjective, self-serving intention is immaterial, as is the subjective intention of a pedestrian on the Common Area to visit one or the other tenant, or neither.

As written, the Lease could hypothetically allow Seaway to look to Ciao Bella to indemnify landlord against even the negligence of the other tenant, as Ms. Strayer acknowledged in her testimony. *RP 81*. But this or any other interpretation that resulted in an absurd result, was properly rejected by the trial court. It was permitted to apply logical and practical meanings to the disputed provisions of the Lease. It did so, and its judgment should not be disturbed.

*d. Ms. Heuer's fall did not occur "by reason of the condition or use of the premises."*

The trial court broke down the relevant section 23.2 of the lease into two parts. Respondent would break the second part into two sub-parts. In order for the indemnity duty to arise, Helen Heuer's fall must have occurred (1) on the Premises, Building or Common Areas "by reason of the condition or use of the Premises," **or** (2a) on the Premises by reason of the "action, inaction, [or] negligence ... by ... Tenant," or (2b) on the Premises by reason of the "action, inaction, [or] negligence ... by ... customers or invitees of Tenant." The trial court appears to have considered the second and third subparts together, apparently because the first contains language applying it to the Common Areas and Building, and the second and third do not.<sup>4</sup>

The first basis for invoking the indemnity clause does not apply here. While it applies to an incident or injury occurring on the Common Areas, the incident must be "by reason of the condition or use of the Premises." The "Premises" are clearly defined in the lease, and do not include common areas. *CL 4*. Ms. Heuer's fall occurred on the Common Area, not the Premises. *CL 4, 12*. And it certainly did not occur "by reason of" any condition or use of the Premises.

Seaway contended during the underlying litigation that Ms.

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<sup>4</sup> It certainly cannot be said that the court omitted the third alternative entirely, since it recited the language of section 23.2 in its ruling. *FF 34*.

Heuer's fall occurred while she was using the premises leased by Café Revo. *Tr. Ex. 13*. The trial court rejected this contention. Seaway also contends that the fall occurred by reason of the use of "the Premises," because "the Premises" was her destination. The trial court rejected the idea that Ms. Heuer's subjective destination and the mere existence of the Café meant that her fall occurred "by reason of the use of the Premises." Seaway has not pointed to any specific condition or use of the Premises that contributed to Ms. Heuer's fall; it points to Café Revo's mere existence as the reason Ms. Heuer was walking where she was. The trial court correctly concluded that this is insufficient to make her fall "by reason of" the use of the Premises leased by Ciao Bella. *CL 14*.

*e. Ms. Heuer's fall did not occur by reason of action, inaction or negligence by Tenant.*

The second basis for invoking indemnity is also inapplicable. The trial court expressly found that Ms. Heuer's fall occurred in the absence of any negligence on the part of Ciao Bella. *CL 3, 13*. This alone is dispositive of the second possible basis for indemnity.

While Seaway assigns error to Conclusion of Law 13, it appears to challenge only the final sentence of that Conclusion, which states that "the second portion of Section 23.2 is inapplicable." *CL 13*. Seaway devotes no discussion in its brief to the proposition that Ms. Heuer's accident arose

from any action, inaction, negligence or willful misconduct of Ciao Bella; nor does Seaway appear to contend that Ms. Heuer's injury was not caused by her own fault. *Appellant's Brief*, p. 16-17. Assertions of error which are unsupported by argument need not be considered. *Holland v. City of Tacoma*, 90 Wn.App. 533, 538, 954 P.2d 290, *review denied*, 136 Wn.2d 1015 (1998); *see also*, RAP 10.3(a)(6).

*f. Ms. Heuer's fall did not arise by reason of the "action, inaction, [or] negligence ... by ... customers or invitees of Tenant."*

The third basis is more complex than the first two, but the trial court arrived at the correct conclusion – that Ms. Heuer's fall did not give rise to indemnity under section 23.2. This is because it did not occur by reason of the negligence of a "customer" or "invitee" of "Tenant." "Tenant" is Ciao Bella, and only Ciao Bella, under the Lease. This third basis for indemnity requires Seaway to show that Ms. Heuer was an invitee of "Tenant," and "Tenant" is defined as Ciao Bella for the purposes of this lease. Thus, Seaway must show that Ms. Heuer was an invitee of only Ciao Bella. But it did not do so. Although Ms. Heuer intended to become a patron of Ciao Bella, she had not yet become a "customer" of Ciao Bella when she fell in the common area of the property. Despite being bound for Ciao Bella, at the time she fell, she remained an invitee on the property (not the Premises), and Seaway conceded that her presence

benefitted Landlord and Tenants alike. *RP 79-80*. Thus, she was an invitee of all three in general, and of none in particular.

But Seaway's position assumes that Mrs. Heuer was an "invitee" of Ciao Bella, **and only of Ciao Bella**, at the time of her fall. This can only be based on viewing, in hindsight, where Mrs. Heuer intended to go after parking in the Common Area. This is not consistent with the plain language of the Lease. And Ms. Strayer conceded that Ciao Bella's understanding of these terms may not have been the same as hers. *RP 86*.

If the Lease had been intended to make a tenant liable for actions of the public based on their subjective intent it could have said so. Or it could have simply made tenant liable to landlord for any injury occurring on the property, to anyone, for any reason (as Ms. Strayer apparently intended). Instead, the duty was written to apply to an "invitee of Tenant." This could reasonably be understood by a tenant to mean one of that tenant's invitees, determined by the invitee's entry into the Premises. Instead, Seaway's interpretation allocates liability to Ciao Bella for the actions of a stranger, over whom Ciao Bella has no control, and of whose presence Ciao Bella may not even be aware, before there is any opportunity to know whether that stranger is a potential customer, window-shopper, invitee of the other Tenant, or mischief-maker. This would expose Tenant to unreasonably broad risk beyond the common

understanding of a reasonable person.

Seaway would make Ciao Bella liable for the actions of another, without any way to protect itself from that risk. No negligence would be required; under the lease as understood by Seaway, Ciao Bella would be strictly liable for the injuries of others, regardless of fault, based solely on the invisible and subjective intention of that person to enter Ciao Bella's Premises. Liability is assessed in hindsight. This is true even if the cause of the injury is landlord's negligence (so long as it is not gross negligence). Such a strict liability standard is unreasonable, and the absurdity of possible results clearly concerned the trial court, as explained in CL 14.

On the other hand, if the Lease is read to apply to "customers" or "invitees of Tenant" only upon their entry into the Premises, the apparent purpose of the Lease – to make Tenant responsible for the goings-on in the Premises – is satisfied. This does not negate Tenant's responsibility for injuries occurring outside the Premises, provided that they arise "by reason of the condition of the premises."

At the time of her fall, Ms. Heuer was indistinguishable from any other member of the public walking on the Common Areas. In relation to the legal duties of landlord and tenant, it is irrelevant that her subjective intent was to patronize either tenant, both, or neither. This was recognized by the trial court at CL 14, when it declined to impose a duty based on the

subjective intent of the injured party.

g. Seaway's authorities are not apposite to our case.

Appellant cites to allegedly "similar" lease provision in *Northwest Airlines v. Hughes Air Corp.*, 104 Wn.2d 152, 153, 702 P.2d 1192 (1985), but the language in that case is far different from the Lease provision at issue here. See, *Appellant's Brief*, p. 20. Our Lease calls for indemnity for claims arising "by reason of the condition or use of the Premises," not "arising out of or in connection with the use and occupancy of the premises" as the *Hughes* lease provided. "By reason of" is not the same as "arising out of or in connection with;" further, "the condition or use of the Premises" is different than "the use and occupancy of the premises." If our Lease had used the same language as in *Hughes*, it might have reached a different result. But in our Lease the words used are different. *Hughes* is not apposite. It was for the trial court as the finder-of-fact to determine the meaning of the terms used by these parties in this Lease agreement. Appellant's reliance on cases which construe different language is misplaced.

h. The trial court was entitled to construe paragraph 23.2 of the Lease as inapplicable due to the bold-type language therein.

Seaway argues that Conclusion of Law 15 erroneously determined that section 23.2 was not "intended to operate in the manner suggested by

Seaway in this case." As demonstrated above, the Lease is not a model of clear and unambiguous drafting. Seaway's owner, who had the lease prepared, *RP 11:15-17*, conceded in several instances that her understanding of certain obligations was not supported by language in the lease, *RP 58-9*. She had difficulty explaining what portions of it meant, and misused terms that were given specific meaning in the Lease, such as the "property" and the "Premises." She never sat down with the Goffs to discuss the lease. *RP 9:24-25*. She was not involved in negotiating or finalizing the lease with the Goffs. *RP 10*. The result is that the trial court was left to determine the meaning of the lease based on its terms, not based on Seaway's subjective understanding of its terms.

To that end, the trial court carefully considered all of section 23.2, not just the parts that Seaway wanted to enforce according to its subjective intent. And the trial court determined that language set out in bold capitalized type deserved attention. That language specifically referred to "the foregoing indemnity," which is the indemnity under which Seaway makes its claims against Ciao Bella in this action. That indemnity is stated to "specifically and expressly" constitute a waiver of immunity under the Industrial Insurance Act. *Tr. Ex. 5, ¶ 23.2*.

While neither party applied the meaning that the trial court found, the trial court cannot be faulted for departing from the subjective

understandings of either party, given the disputes over a number of the provisions of the Lease. Nor can it be faulted for applying the capitalized portion of section 23.2 as it did, based on the plain meaning of "the foregoing indemnity." Under the circumstances, applying a provision which is set out by capital letters in a provision that is separately initialed by the parties in such a manner as to negate other ambiguities is not unreasonable. The trial court gave meaning to a provision riddled with ambiguity, after two days of testimony and argument, and after obviously giving careful consideration to the evidence. The Court of Appeals should not substitute its judgment for that of the trial court as to how best to construe the Lease in light of the conflicting testimony and evidence.

2. The trial court did not err in finding that Seaway waived enforcement of the "named insured" provision in the Lease.

Section 10 of the Lease required Ciao Bella to have Seaway named on its insurance policy as an insured. Seaway was not a named insured, but was nonetheless an additional insured. *Tr. Ex. 15*. But its right to protection under the policy was not unlimited. *Id.* Even had Seaway been a named insured, it would not have been entitled to coverage that was excluded by the policy language. Under these circumstances, there is no significant difference between a named insured and an additional insured.

If there is any breach of the duty to insure as a result, it is a technical breach only, and resulted in no damages to Seaway.

Ms. Strayer conceded that Ciao Bella did obtain a commercial general liability policy and that her name (Seaway's) was on it. *RP 55:10-13; RP 53:8-10*. She agreed that the Lease did not tell Ciao Bella to provide the landlord with insurance covering incidents that occurred on the common area. *RP 58-59*.

More importantly, Seaway knew of the Lease requirement, and took no action to require Ciao Bella to cure a discrepancy, if there was any. The trial court found that Ciao Bella provided Seaway with policy documents. *FF 31*. This finding is not challenged. It is also supported by testimony. *RP 116-18, 121*. The trial court also found that Seaway reviewed the policy and pointed out at least one discrepancy, which was fixed. *FF 32*. Seaway claims that this finding lacks evidentiary support. *Appellant's Brief*, p. 31. This is incorrect; Ms. Goff's sworn testimony is substantial evidence that supports the finding. *RP 159*. Moreover, her testimony is not refuted. The record reflects that all policy documents were given to Seaway. Seaway does not point to anything in the record that suggests otherwise. And Seaway does not challenge the trial court's finding that Seaway never indicated that Ciao Bella was out of compliance with Section 10 of the Lease. *FF 33*.

Instead, Seaway points to Ms. Strayer's claim that she only looked at the Certificate of Insurance, and to authority that holds that such certificates are not the same as a policy. *Appellant's Brief*, p. 31, 32. This ignores Ms. Goff's uncontested testimony that the policy documents were provided, *RP 117*, and Ms. Strayer's testimony that if Ciao Bella had provided policy documents to her agent, Todd Crooks, he would not have given them to her, he would have put them in a file. *RP 67-68*. This is fatal to Seaway's contention that it was error for the trial court to rule "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." *Appellant's Brief*, p. 33.

The record demonstrates that the parties disregarded the Lease requirement for written consent on certain actions. *RP 97, 99, 114*. Seaway also had unwritten agreements with Ola Spa, regarding the use of the Common Areas. *RP 101*. Thus, record amply supports the parties' practice to waive Lease rights by oral agreement, and the trial court correctly ruled that Seaway waived the requirement by either its affirmative approval of the policy documents or failing after full opportunity to review them to object, just as it waived other rights to require written consent under the Lease.

In any event, the issue is irrelevant because it changes nothing if

the trial court's waiver determination were reversed. Seaway would still not have a right to coverage under the policy for an incident that occurred outside the Premises, and nothing in the Lease specifies any coverage greater than that obtained by Ciao Bella.

3. Ciao Bella is entitled to fees on appeal; Seaway is not.

In section VI.E of Appellant's Brief, Seaway requests fees under paragraph 24 of the Lease. *Tr. Ex. 5*. Seaway is not entitled to reversal of the trial court's judgment. Therefore it is not entitled to contractual attorney fees on appeal as the prevailing party. However, if the trial court's decisions are affirmed, Ciao Bella would be the prevailing party on appeal and would be entitled to fees incurred on the present appeal. RAP 18.1(a). Upon entry of an order affirming the trial court, Ciao Bella will file the necessary affidavit under RAP 18.1(d).

#### **IV. CONCLUSION**

The trial court did not fully adopt either party's proposed construction of the lease provisions. Given the contradictory testimony of Ms. Strayer and Ms. Goff, and the lack of discussion between them as to the meaning of certain terms, it was permitted to reject both of their subjective interpretations and draw its own conclusions from the language

of the Lease and the evidence before it. Its conclusions were within the evidence offered at trial, and interpret the lease in a manner so as to avoid absurd results. This is an appropriate exercise of the trial court's discretion.

The trial court also acted within its discretion and within the evidence in finding that Seaway's actions indicated acceptance of the insurance documents that the record shows it received and approved. The record demonstrates oral agreements to deviate from the strict requirements of the lease in several instances; and the parties did so with respect to the insurance provision here. The trial court properly held that Seaway accepted the insurance provided by Ciao Bella, and waived any additional requirements that may have otherwise been imposed by the Lease.

This court should affirm the decision of the trial court, and grant Ciao Bella its attorney fees on appeal pursuant to the Lease contract.

Respectfully submitted on this 17<sup>th</sup> day of January, 2014.

WOOD SMITH HENNING & BERMAN LLP



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Gordon Hauschild, WSBA #21005  
Attorneys for Ciao Bella Foods LLC

## APPENDIX A

Abridged text of Lease provisions cited by the Respondent  
(with bold and underlining as in original)

1.1 Landlord does hereby lease to Tenant and Tenant does hereby take and lease from Landlord those certain premises referred to as 2940 SW Avalon Way, Seattle, WA 98126, hereinafter called "**Premises**," in that certain building, hereinafter called "**Building**," located at 2940 SW Avalon Way, 2942 SW Avalon Way and 3001 SW Charleston Street, collectively in Seattle, Washington 98126, which is located on the land legally described in Exhibit "A," together with a nonexclusive right to use the common parking areas and other common areas and facilities generally depicted on the site plan attached as Exhibit "B" (the "**Site Plan**"). The above exhibits are attached hereto and incorporated herein by reference.

1.2. For the purposes of this Lease, the Premises are agreed to contain **4,300 rentable square feet.** ...

8. **COMMON AREAS.** Common areas ("**Common Areas**") include, without limitation, parking lots and entrances and exits thereto; driveways ...; sidewalks; landscaped and plaza areas; ... and all other areas, facilities, amenities and improvements provided for the common or joint use and benefit of tenants/occupants of the Building, their employees, agents, customers and invitees. Landlord reserves the right to exercise control and management of the Common Areas ....

10. **INSURANCE.** Tenant ... shall keep in full force and effect; (i) Commercial General Liability insurance.... The Commercial General Liability ... policy limits shall be not less than \$2,000,000 per person and \$5,000,000 per accident .... Tenant may carry a portion of such insurance, to be determined by Tenant, under a "blanket policy". ... Tenant shall name Landlord ... as additional insureds under all of Tenant's insurance policies ....

11.1. Tenant Responsibility. Tenant, at its own expense, shall at all times (i) keep the Premises, any outdoor seating area, and the areas immediately adjacent thereto, neat, clean, and in a safe and sanitary condition; ... (viii) perform all necessary maintenance and custodial services for the Common Areas designated on the Site Plan (the "**Tenant Responsible Common Areas**"), including removal of debris, rubbish, and garbage; ... (xi) keep

the parking lots open and accessible and reasonably free from ice, snow or other hindrances in the Tenant Responsible Common Areas. ...

11.2. Landlord Responsibility. Landlord shall (i) make all structural repairs to the Premises and the Building wherein the Premises are located, whether interior or exterior. ...

14.1. When Alterations Allowed. Tenant, at Tenant's cost and expense, may make the Improvements, as well as any nonstructural changes and alterations to the interior of the Premises from time to time, but ... only after obtaining Landlord's prior written consent before doing so. ...

23.2: Tenant covenants and agrees to indemnify, defend, and hold Landlord, including any director, officer, shareholder, member, partner, trustee, employee, agent or otherwise thereof, however applicable, 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 subtenant, if permitted, 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 Landlord, its agents or employees. Tenant's obligations hereunder shall survive the expiration or termination of the Lease. Tenant shall promptly notify Landlord of casualties or accidents occurring in or about the Premises. THE FOREGOING INDEMNITY IS SPECIFICALLY AND EXPRESSLY INTENDED TO, CONSTITUTE A WAIVER OF TENANT'S IMMUNITY UNDER WASHINGTON'S INDUSTRIAL INSURANCE ACT, RCW TITLE 51, TO THE EXTENT NECESSARY TO PROVIDE LANDLORD WITH A FULL AND COMPLETE INDEMNITY FROM CLAIMS MADE BY TENANT AND ITS EMPLOYEES, TO THE EXTENT PROVIDED HEREIN. LANDLORD AND TENANT ACKNOWLEDGE THAT THE INDEMNIFICATION PROVISIONS OF THIS SECTION WERE SPECIFICALLY NEGOTIATED AND AGREED UPON BY THEM. In addition, in compliance with RCW 4.24.115 as in effect on the date of this Lease, all provisions of this Lease pursuant to which Landlord or Tenant (the "Indemnitor") agrees to indemnify the other (the "Indemnitee") against liability for damages arising out of bodily injury to persons or damage to

property relative to the construction, alteration, repair, addition to, subtraction from, improvement to, or maintenance of, any building, road, or other structure, project, development, or improvement attached to real estate, including the Premises, (i) shall not apply to damages caused by or resulting from the sole negligence of the Indemnitee, its agents or employees, and (ii) to the extent caused by or resulting from the concurrent negligence fo (a) the Indemnitee or the Indemnitee's agents or employees, and (b) the Indemnitor or the Indemnitor's agents or employees, shall apply only to the extent of the Indemnitor's negligence; PROVIDED, HOWEVER, the limitations on indemnity set forth in this Section shall automatically and without further act by either Landlord or Tenant be deemed amended so as to remove any of the restrictions contained in this Section no longer required by then applicable law.

24. **COSTS AND ATTORNEY'S FEES.** If by reason for [sic] any default on the part of either party it becomes necessary for the other party to employ an attorney, or in the case Landlord shall bring suit to recover any sums due hereunder or for breach of any provision of this Lease or to recover possession of the Premises, or if either party shall bring an action for any relief against the other party, declaratory or otherwise, arising out of this Lease, the substantially prevailing party shall be entitled to recover from the other party its reasonable attorneys' fees and all costs and expenses expended or incurred, whether at trial or on appeal, in connection with the default or action. The sum to be received by the substantially prevailing party shall be fixed by the court having jurisdiction in the case. The amount of such reimbursement shall be included in the judgment or decree for the substantially prevailing party. The court shall determine which party is the substantially prevailing party in any such action.

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NO. 70433-8-I

COURT OF APPEALS  
DIVISION I OF THE STATE OF WASHINGTON

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SEAWAY PROPERTIES, LLC,

Appellant,

v.

CIAO BELLA FOODS, LLC,

Respondent.

2014 JAN 17 PM 3:14  
COURT OF APPEALS DIV 1  
STATE OF WASHINGTON

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**CERTIFICATE OF SERVICE  
Of  
RESPONDENT'S OPENING BRIEF**

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ORIGINAL

## CERTIFICATE OF SERVICE

The undersigned declares under penalty or perjury under the laws of the State of Washington, that on the below date, I caused to be served via hand delivery a true and accurate copy of Respondents ' Opening Brief to the following:

Richard L. Martens  
Steven A. Stolle  
Martens + Associates P.S.  
705 Fifth Ave. S., #150  
Seattle, WA 98104-4436

Dated this 17<sup>th</sup> day of January, 2014, at Seattle, Washington.



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