

COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

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No. 40933-0-II

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

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G. ELDON MARSHALL and GERALDINE (GERRY) MARSHALL,

Appellants,

v.

THURSTON COUNTY

Respondent.

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APPELLANTS' REPLY BRIEF

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## I. INTRODUCTION

The Marshalls bought a retirement home on the Scott Lake Golf Course in 1992. The builder of the home told them he had no flooding problems on the property, and the Marshalls relied in part on this assurance when they bought the home. CP 77.

Then in 1996, 1997 and 1999, the Marshall property (the Property) was severely flooded, with all the attendant misery and expense that is commonly the result of such events. At first the Marshalls were not sure exactly where the flood waters had come from. Then they learned that Thurston County in 1994 had installed a drainage diversion improvement uphill from the Marshall home, which diverted stormwater onto the Marshall property during the 1996, 1997 and 1999 events. CP 84.

In response to these floods, on October 2, 2001, the Marshalls filed a claim for damages with Thurston County, asking for out-of-pocket damages of about \$6,300 and for loss in value of their property of \$20,000. CP 84, Exhibit B. After extended negotiations, the County agreed to pay the Marshalls about \$8,800, for out-of-pocket expenses, which was less than one-third of their claim. CP 79. Payment for loss of value of the property was not part of the agreement.

Before the Marshalls could receive the money, the County required that they do two things. First, they had to file a Superior Court action asking for damages due to the flooding. The action was filed in Thurston County Superior Court on January 14, 2003 under Cause No. 03-2-00071-7. Second, the Marshalls were required to sign a "Release of All Claims," (the Release) which had been prepared by the County, and which appeared to be, with minor changes, its stock boilerplate form. CP 78, 86, Exhibit C. The Marshalls had no role in preparing the document. It is this writing that is at issue in this appeal.

Needing the money and trusting that the County would solve the flooding problem, the Marshalls signed the Release on May 13, 2003. The Superior Court action was also dismissed with prejudice on May 13, 2003.

The Marshalls felt that their flooding issues with the County were over and that the problem had been solved by the County. Not so. On January 5, 2009, the Marshalls were again flooded by the County. CP 79. Obviously, the County had not corrected the problem. The Marshalls again filed a claim with the County for damages arising from this flooding event. This time the County would not negotiate for a settlement, denying payment even for out-of-pocket expenses. This position, the County

stated, was based on the Release, which the Marshalls had to sign to get their money in 2003. Thereafter, the Marshalls filed this action, which was dismissed by the trial court on a motion for summary judgment. The dismissal was based on the conclusion that the 2003 Release blocked this action. The court essentially said that by paying the Marshalls the \$8,800 in 2003, the County acquired a perpetual easement to use the Marshall property for stormwater purposes whenever it was needed. It is now on appeal with this court.

## II. ARGUMENT

### A. **To Find That The Release Applies Only To The 1996, 1997 And 1999 Flood Events Does Not Render The Language About Future Damages Meaningless.**

The Marshalls are mindful of the rule that the Release should be interpreted as a whole and that all provisions of the document should be given legal effect, if possible. *Thatcher v. Salvo*, 128 Wn.App. 579, 116 P.3d 1019 (2005). The County argues that to find that the Release bars claims and damages only to those emanating from the 1996, 1997 and 1999 events renders the future damages provisions of the Release meaningless. The Marshalls submit that such an interpretation does no

such thing. They submit instead that their interpretation gives meaning to all provisions of the Release.

Two provisions of the Release make it clear that the “future damages” at issue are those that could arise from the 1996, 1997 and 1999 events but were not yet apparent at the time the Release was signed in 2003. First, the second paragraph reads in part as follows:

... This release is inclusive of damage to property, bodily injury or death growing out of or in any way related to the matter set forth in and described in the Releasor’s claim for damages filed with the Thurston County Risk Management Division on October 24, 2001.

Next, the first sentence of paragraph 5 reads:

The undersigned hereby declares that the terms of this settlement are for the express purpose of precluding forever any further additional claims arising out of or in any way connected with the incident that is the subject of the above referenced cause of action. [Emphasis mine.]

It is clear that the “above referenced cause of action” means the 2001 claim cited in paragraph 2 of the Release. Further, the Marshalls showed in their opening brief that the term “incident” in that claim means the 1996, 1997 and 1999 flood events only. This definition of that term applies to the Release as well. It follows then that the remaining provisions dealing with future damages apply only to those future damages caused by the 1996, 1997 and 1999 floods, which were unknown

or not identified at the signing of the Release. This is a reasonable interpretation and gives meaning to all of the provisions of the Release.

The County suggests in its brief that by 2003 all of the damages from the 1996, 1997 and 1999 floods would have been known. That is speculation. Crawl space dry rot and other problems caused by the 1996, 1997 and 1999 floods may take a long time to be evident. This and other long-term damages were evidently still a concern to the County in 2003. It is this type of delayed damages that the Release was designed to cover by its “all future damages” language. In this way, all provisions of the Release are given reasonable meaning.

**B. If The Court Finds That Both Definitions Of “Incident” Are Reasonable, Ambiguity Is Created And Summary Judgment Is Not Appropriate.**

Under contract law, the granting of summary judgment is inappropriate where, as here, two or more different meanings can be given to a significant term or phrase in the contract. *Wm. Dickson Co. v. Pierce County*, 128 Wn.App. 488, 116 P.3d 409 (2005). The Court must determine whether the key term “incident” in the Release applies to construction of the drain water improvement in 1994, as argued by the County, or whether it refers to the 1996, 1997 and 1999 floods, as

maintained by the Marshalls. Assuming without admitting that the Court could find both interpretations of the term “incident” to be “reasonable,” two competing interpretations would be created, constituting an ambiguity in the Release which can’t be resolved by summary judgment. *Dickson supra*. Also, the Court should construe the ambiguous term against the County because the County was the drafter of the Release. *Pierce Co. v. State of Washington*, 144 Wn.App. 783, 185 P.3d 594 (2008). *King v. Rice*, 146 Wn.App. 662, 191 P.3d 946 (2008). Either way, the trial court erred when it granted the County’s motion for summary judgment. This Court should either adopt the Marshalls’ interpretation of the term “incident” or remand the matter back to the trial court to resolve the ambiguity.

**C. The Terms Of The Release Should Not Be Applied Broadly.**

The County argues that the Washington Supreme Court has accepted and enforced indemnification provisions which protect against “any and all claims and damages” and that such provisions should be enforced broadly. It first cites *Cambridge Townhouses v. Pac. Star*, 166 Wn.2d 475, 209 P.3d 863 (2009) for the proposition that “any and all claims and damages provisions should be applied broadly.” *Cambridge*

*supra* does no such thing. It simply states that such language, like all other contract provisions, should be given its ordinary meaning.

*Cambridge supra* @ 487. There is no indication by the court that “any and all claims and damages” language be given special status in terms of its scope of applicability. Contract provisions generally, including this language, should be given its ordinary meaning.

Even if *Cambridge* did give special status to this type of language, the facts of the case are distinguishable from this case. The indemnity provision in *Cambridge* was unqualified and the court reasoned that to limit that language only to tortious actions violated the clear meaning of the language, which indemnified the contractor for all claims “arising from, resulting from, or connected with services performed or to be performed.” Our case is different. Here the “any and all claims and damages” language is specifically qualified to apply to only claims arising out of the “incident.” As stated in Appellants’ Opening Brief, the definition of “incident” in the Release is derived from that term in the 2001 claim, which limits the Release only to claims and damages arising out of the 1996, 1997 and 1999 floods. The language in this Release is

considerably more qualified than the wording in *Cambridge*, and, as a result, that case should not be used to support the County's Case.

The County also cites *Nationwide Mutual v. Watson*, 120 Wn.2d 178, 840 P.2d 851 (1992) for the same proposition that "any and all claims, damages, etc." language should be interpreted broadly. Again, the court did no such thing. The term "broadly" does not even appear on the page cited by the County. In *Nationwide*, the court was considering a general unqualified release by an injured passenger in an automobile accident. Again, the release was general and unqualified, and the court simply gave the terms their ordinary and usual meanings. This is much different than our case for the same reasons set forth above vis-à-vis the *Cambridge* case. Like *Cambridge*, *Nationwide* cannot be used to support the County's case.

**D. By Its Terms, The "Objective" Or "Purpose" Of The 2003 Release Was To Settle Liability Only For The 1996, 1997 And 1999 Flood Events.**

The County argues that the intent of the parties to the Release was to bar all actions and claims for flood damage occurring after the 1999 event. The Marshalls argue that the Court at times must look beyond the written words to determine the true intent behind a document.

In Washington, the “objective” or “purpose” of a contract is, in addition to the language, important in determining the intent of the parties.

This rule is set out in the case of *Tanner Electric v. Puget Sound*, 128

Wn.2d 656, 911 P.2d 1301 (1996) as follows:

In Washington the intent of the parties to a particular agreement may be discovered not only from the actual language of the agreement, but also from viewing the contract as a whole, the subject matter and objective of the contract. ...” [Emphasis mine.]

*Tanner* at 674.

In *Durand v. HIMC Corp.*, 214 P.3d 189, Division II, 2009, this

Court, citing the *Tanner* case, held that:

We look for the parties’ intent in the contract, language subject and objective, the circumstances surrounding the formation. ...” [Emphasis mine.]

Likewise, the court in *Davis v. Dept. of Transportation*, 138

Wn.App. 811, 159 P.3d 427 (2007) was asked to determine whether

“watch changes times” were included as wages under a union contract.

The court recited that it must look to the parties’ intent, the contract as a whole and the objective of the contract.

The objective or purpose of the Release in this case is enumerated in the language of the Release document itself. Paragraph 5 reads in part as follows:

The undersigned hereby declares that the terms of this settlement are for the express purpose of precluding forever any further additional claims arising out of or are in any way connected with the incident that is the subject of the above referenced cause of action. [Emphasis mine.]

Specifically, the Release is limited in its scope to damages emanating from the “incident.” And, as shown in the Appellants’ Opening Brief, the “incident” is the 1996, 1997 and 1999 flooding events. Thus, the purpose/objective of the Release is to settle the liability issues arising only from those flooding events. It is not the purpose/objective of the Release to preclude claims for all later floods, including the 2009 event as argued by the County.

**E. The County’s Interpretation Of The Release Is Not Reasonable; Violates Public Policy.**

**1. Release Interpretation Not Reasonable.**

As the Marshalls have stated, the effect of the trial court’s decision is to grant to the County, for \$8,800 for out-of-pocket expense, a perpetual easement to use their property for public stormwater purposes. The County argues that this was the intent of the parties. The Marshalls maintain that this is an unreasonable and absurd interpretation. And, the courts of this state have universally refused to enforce contracts with

unreasonable or absurd results. In *Hearst v. Seattle Times*, 154 Wn.2d 493, 115 P.3d 242 (2005), the Supreme Court ruled that courts should strive for reasonable interpretations. In *Hearst*, an interpretation that Hearst incurred liability because of its duty to negotiate a cessation date to a joint operating agreement did not constitute a reasonable reading of the term “liability.”

In *Weyerhaeuser v. Commercial Union Insurance*, 142 Wn.2d 654, 15 P.3d 115 (2000), an insurance case, the court held that:

Our rules require interpreting the whole contract by giving it a fair, reasonable and sensible construction, as would be given to the contract by the average person purchasing insurance.

*Weyerhaeuser* at 669-670.

In *Weyerhaeuser*, the court held that the only reasonable (and enforceable) interpretation is that nearly identical language in an insurance policy has the same meaning.

Likewise, this court in *Forest Marketing Enterprises, Inc. v. State Dept. of Natural Resources*, 125 Wn.App. 126, 104 P.3d 40 (2005) made the following statement:

We avoid interpreting statutes and contracts in a way that leads to absurd results. When a court examines a contract it must read it as the average person would read it; it should be given a practical and

reasonable rather than a literal interpretation and not a strained or forced construction leading to absurd results.

*Forest Marketing @ 132.*

In *Forest Marketing*, this Court was examining whether the initial deposit in a forest harvest contract should be part of the liquidated damages calculation. This Court found that if it was, the formula would lead to the absurd result that the DNR may well be entitled to no damages for rescission at the later part of the contract.

*Also, see Seabury and Smith, Inc. v. Payne Financial Group*, 393 F.Supp. 2d 1057 (2005).

The Marshalls submit that the summary judgment ruling by the trial court leads to an unreasonable and absurd result. To conclude that for payment of \$8,800 for out-of-pocket expenses the County acquired from the Marshalls an easement for stormwater storage on the Property with an indefinite term is not a reasonable outcome. Therefore, the ruling on summary judgment by the trial court should be overturned.

## **2. County's Interpretation Is Against Public Policy.**

The County's interpretation of the Release as effectively precluding and barring claims for damages which may result from flooding events is against public policy, and the Release is void or

voidable upon that basis. This is in reply to the County's argument in its brief that the Release, as interpreted by the County, is a reasonable contract representing the intent of the parties.

Public policy can be a basis upon which a court can take into consideration whether more than one interpretation of a contract is possible. A contract should be constructed and interpreted in favor of the public interest. Restatement (Second) of Contracts § 207 (1981). Therefore, this Court has the inherent power to interpret the Release in a manner that favors public policy.

In *Iris L. Boyce v. James West, et al.*, 71 Wn.App. 657, 862 P.2d 592 (1993), the Court of Appeals laid out the criteria to determine if public policy should void a release. The criteria were stated as follows:

1. Whether the agreement concerns an endeavor of a type generally thought suitable for public regulation;
2. The party seeking release is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public;

3. Such party holds itself out as willing to perform this service for any member of the public who seeks it, or at least any member coming within certain established standards;

4. Because of the transaction, the party invoking release possesses a decisive advantage of bargaining strength against any member of the public who seeks the services;

5. In exercising a superior bargaining power, the party confronts the public with a standardized adhesion contract of exculpation and makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence; and

6. The person or property of members of the public seeking such services must be placed under the control of the furnisher of the services, subject to the risk on the part of the furnisher, its employees or agents.

These criteria apply to the Release as it is interpreted by the trial court and the County. The County holds itself out as a service provider and is engaged publicly in controlling stormwater, which is a great practical and public necessity. The County certainly held an advantage of bargaining strength against the Marshalls in developing the Release, which

was basically a boilerplate document of the County. As interpreted by the County, the Release could be considered a standardized adhesion contract of exculpation for purposes of criteria No. 5. Lastly, the Marshalls and other property owners like them were placed under the control of the County, which is the furnisher of the stormwater control service, and are subject to the risk of carelessness on the part of the contract.

The Marshalls maintain that, as a result, the Release as interpreted and applied in the case by the County is contrary to public policy and should be held by the Court as void.

**F. There Was No “Explicit Recognition” By The Marshalls That Damages Would Occur In Future Storm Events.**

A court of equity must limit a general release to matters contemplated by the parties at the time of its execution. *Spokane Helicopter Service v. Malone*, 28 Wn.App. 377, 623 P.2d 727 (1981). The County tries to show that the parties contemplated later flooding when they signed the Release in 2003. There is no substantial evidence in the record to support this claim.

In its brief, the County alleges that there was “explicit recognition” by the Marshalls in 2003 that flooding would continue into the future.

This is based on speculation and selective words taken out of context from the 2001 claim and the 2003 Superior Court Complaint.

The County picked a phrase out of the 2001 claim to allegedly show this contemplation. It quotes Mr. Marshall as saying, "With any substantial rain I still have water under house." County's brief, pp. 11-12.

This isolated phrase falls far short of showing that the Marshalls anticipated any future flooding, much less the 2009 event. It is an innocuous phrase which merely shows that flooding occurred between 1996 and 1997, since it is positioned in the claim between language describing the 1996 flood and the 1997 flood. Much more is needed to show that the Marshalls contemplated a 2009 flood when they signed the Release two years later.

Nor does the language quoted from the 2003 Complaint (p.12 of County's brief) show that the Marshalls in 2003 contemplated future flooding when it signed the Release that year.<sup>1</sup> Taken as a whole, the language speaks generally to the full extent of damages brought on by the 1996, 1997 and 1999 floods. Further, the language is located in the

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<sup>1</sup> It should be noted that filing of the complaint was required by the County before the Marshalls could get their \$8,800 compensation. The undersigned developed the summons and complaint for that purpose only.

“Background Facts” portion of the Complaint as information only. It is not repeated in the “Causes of Action” portion of the Complaint, so it should be given little weight.<sup>2</sup>

Thus, the County alleges but fails to definitively show that the 2009 flood was somehow anticipated or contemplated in the Release. It is notable that the County can point to no specific language in the Release itself which hints that future flooding events were contemplated and included in that document. The “future claims and damages” language is not specific enough to show the parties’ contemplation. Much clearer is the language in the Release which supports the Marshalls’ position that only damages, present and future, emanating from the 1996, 1997 and 1999 flooding events were contemplated.

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<sup>2</sup> The County required that the Marshalls file the court action before they could get their money in 2003. It is unfair to now use the terms of the Complaint against the Marshalls.

**G. The Present Action Is Not Barred By Res Judicata.**

For its final argument, the County submits that the doctrine of Res Judicata bars this action. The Marshalls maintain that it does not.

Res Judicata is appropriate where the subsequent action is identical with a prior action in four respects: (1) persons and parties; (2) cause of action; (3) subject matter; and (4) the quality of the persons for or against whom the claim is made. *Landry v. Luscher*, 95 Wn.App. 779, 976 P.2d 1274 (1999). The County maintains that the present action is identical to the 2003 lawsuit in all these respects and should therefore be dismissed.

While the two actions are identical in persons and parties, they don't meet the remaining criteria. The 2003 action is different from the present action because it is not the same "cause of action." The 2003 lawsuit covered flooding events in 1996, 1997 and 1999. The present action pertains only to the 2009 flood.

The same distinction can be made for subject matter. The 2003 action was directed only to the flooding events occurring up to that time. The 2009 action pertained only to the flooding event in 2009. While the general nature of the two actions is the same, the "subject matter" is

different because the various flooding events contained different facts and occurred at different times.

If the Court agrees that the two lawsuits cover different causes of action or subject matter, it must also hold that Res Judicata does not bar this action. The Marshalls request that the Court of Appeals issue such a conclusion.

### III. CONCLUSION

The Marshalls request that the Court of Appeals overturn the trial court's determination that the County has gained, for \$8,000 for out-of-pocket expenses, the right to flood the Marshall property forever without facing legal recourse. The trial court's ruling is grossly unfair and is not supported by the law or facts. The Marshalls respectfully request the ruling be overturned.

RESPECTFULLY SUBMITTED this 4<sup>th</sup> day of November 2010.

  
\_\_\_\_\_  
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