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No. 62269-2-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

(Snohomish County Superior Court Cause No. 07-2-02976-0)

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

v.

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

APPELLANT'S BRIEF

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I. INTRODUCTION

Appellant Community Transit seeks reversal of the trial court's summary judgment order. Respondent First Transit contracted with Community Transit to provide commuter bus service within its municipal public transportation system. First Transit operated this service with buses bearing Community Transit's logo and color scheme.

First Transit agreed to indemnify Community Transit from any claims "in connection with" work performed under the contract. The only exception is if Community Transit was solely negligent. On February 24, 2004, a First Transit bus and Community Transit bus were involved in a five-vehicle collision. First Transit agrees that Community Transit was not solely negligent, but still refused to indemnify for injury claims by its own bus driver and passengers on both buses. As a matter of law, First Transit's indemnity obligation was valid and enforceable. The trial court should be reversed.

II. ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court erred in granting First Transit's motion for summary judgment dismissal and denying Community Transit's cross-motion for summary judgment on the issue of indemnity.

Issues Pertaining to Assignment of Error

1. Is a contractor obliged to defend and indemnify a transit agency where the only exception to the contract's broad indemnity provision is the agency's sole negligence and the parties agree that the agency was not solely negligent?

2. Under *Northwest Airlines v. Hughes*, can the contractor avoid its indemnity obligation because it was not negligent?

III. STATEMENT OF THE CASE

This appeal presents a pure issue of law. The facts are not disputed.

On or about April 19, 2002, Community Transit entered into a Service Agreement for Commuter Bus Service with Coach USA Transit ("Service Agreement"). Pursuant to the Service Agreement, Coach USA agreed to provide commuter bus service for Community Transit from Snohomish County to downtown Seattle. (CP 13, 124-26)

The Service Agreement incorporated by reference Community Transit Request for Proposal #19-01 dated September 13, 2001 ("RFP"). In the Service Agreement, Coach USA explicitly agreed to abide by the terms and conditions of the RFP. (CP14)

Section 3.54 of the RFP provides as follows:

> **3.54 HOLD HARMLESS AND INDEMNIFICATION**
>
> **The Contractor shall defend, indemnify and save harmless Community Transit**, its officers, employees and agents **from any and every claim and risk,** including, but not limited to, suits or proceedings for bodily injuries (including death and emotional claims), patent, trademark, copyright or franchise infringement, and all losses, damages, demands, suits, judgments and attorney fees, and other expenses of any kind, **on account of all personal bodily injuries** (including death and emotional claims), property damages of any kind, whether tangible or intangible, including loss of use resulting therefrom, **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, or any other property upon which the Contractor is performing any work** called for or in connection with this contract, **except only for those losses resulting solely from the negligence of Community Transit**, its officers, employees and agents.
>
> Should a court of competent jurisdiction determine that this agreement is subject to RCW 4.24.115, then in the event of liability for damages arising out of bodily injury to persons or damages to property caused by or resulting from the concurrent negligence of the Contractor and Community Transit, its members, officers, employees and agents, the

> Contractor's liability hereunder shall be only to the extent of the Contractor's negligence. It is further specifically and expressly understood that the indemnification provided herein constitutes Contractor's waiver of immunity under industrial insurance, Title 51 RCW, solely for the purpose of the indemnification. This waiver has been mutually negotiated by the parties.
>
> If a lawsuit in respect to this hold harmless provision ensues, the Contractor shall appear and defend that lawsuit at its own cost and expense, and if judgment is rendered or settlement made requiring payment of damages by Community Transit, its officers, agents, employees and volunteers, the Contractor shall pay the same.

(CP 152)(Emphasis supplied).

Effective July 1, 2003, Coach USA Transit assigned its interests, rights, obligations and duties under the Service Agreement to First Transit. Community Transit, Coach USA Transit, and First Transit all executed a First Amendment to Service Agreement to Commuter Bus Service ("First Amendment"). In that First Amendment, the Length of Services provision in paragraph 1 of the Service Agreement was modified. First Transit explicitly agreed that the remainder of the Service Agreement remained unchanged and that all provisions not specifically amended by the First Amendment "shall remain in full force and effect." The First Amendment did not modify or amend the Contractor's duties to Community Transit under Section 3.54 of the RFP. (CP 14-15, 170-71)

Pursuant to Section 2.01 of the RFP, First Transit provides "commuter" bus service between Snohomish County and parts of King County including Seattle and Redmond. This means that First Transit operates buses during rush hour commutes on I-5 and I-405. (CP 15, 200-205)

Pursuant to Section 2.03.17.A(11) of the RFP, First Transit operates buses painted with Community Transit's logo and paint scheme. (CP 15, 214)

On February 24, 2004 at approximately 4:00 p.m., there was a multiple vehicle accident on northbound Interstate 5 in Seattle near the 130th Street overpass, which involved the following five vehicles:

(1) 2000 Honda Accord driven by Cesar Castillo;

(2) Jeep SUV driven by Ronald Smith;

(3) 1985 Toyota Corolla driven by David Russell;

(4) a First Transit bus driven by Frank Whittington; and

(5) a Community Transit bus driven by Allen Bowen.

(CP 15)

Immediately prior to the accident, the bus operated by First Transit with Community Transit markings and colors was traveling northbound on Interstate 5 in the HOV lane in front of the Community Transit bus. At the

same time, the other three vehicles identified above were traveling in the lane immediately to the right of the HOV lane. The Russell vehicle was in front. The Smith vehicle was immediately behind the Russell vehicle. The Castillo vehicle was immediately behind the Smith vehicle. (CP 15)

The accident occurred in the following sequence: Mr. Castillo's vehicle struck the rear of Mr. Smith's vehicle. Mr. Smith's vehicle immediately struck the rear of Mr. Russell's vehicle. The force of that impact pushed the Russell vehicle into the adjacent HOV lane into the path of the First Transit bus. Mr. Whittington applied his brakes quickly but he could not avoid hitting the rear of the Russell vehicle. The Community Transit bus driven by Mr. Bowen immediately struck the rear of the First Transit bus. (CP 16)

Mr. Castillo admitted his responsibility for the accident in his deposition:

> Q. [Y]ou did hit the vehicle in front of you, right?
>
> A. I did.
>
> Q. And would you agree that had you been keeping a longer distance between you and Mr. Smith's vehicle, the Jeep Cherokee, you could have avoided the accident?
>
> A. I probably would have avoided the accident.
>
> . . .

Q. [I]n looking back would you agree that you were driving too fast for the conditions?

A. I probably may have been.

(CP 176, 177)

Mr. Whittington, the First Transit driver, testified there would have been no accident if the white car had not been unexpectedly knocked into the HOV lane in front of his bus.

Q Do you have any reason to believe that the Community Transit bus would have collided with you had it not been for that white car entering your lane?

A If the white car had not entered my lane, there would not have been an incident that day. That's just my opinion. But if that car wouldn't have popped out in front of me, there would have been no incident.

Q There would have been no collision --

A No.

Q -- by the Community Transit bus hitting your bus?

A No.

(CP 196-97)

The accident was caused by the shared negligence of Mr. Castillo and Mr. Bowen, the driver of the Community Transit bus.

Community Transit is responsible for the negligence of Mr. Bowen under respondeat superior. Neither Mr. Whittington nor First Transit was negligent. The parties agree that the accident did not result from the sole negligence of Community Transit. (CP 16)

Community Transit received a total of forty-two (42) claims for damages from passengers of both buses as well as Mr. Whittington, the First Transit driver. (CP 16)

Based on Section 3.54 of the RFP, Community Transit tendered these claims to First Transit. First Transit rejected Community Transit's tender and refused to defend, indemnify or hold Community Transit harmless from these claims. (CP 16)

Community Transit was later sued by Marci Kalif alleging injuries from the February 24, 2007 multiple vehicle accident. The complaint lists several defendants including Community Transit, Cesar Castillo, and the First Transit driver, Frank Whittington. (CP 272, 263-64, 187)

Community Transit tendered the Kalif lawsuit to First Transit for defense and indemnity. First Transit did not accept Community Transit's tender. It instead retained the law firm of

Reed McClure to defend the First Transit driver, Mr. Whittington, in the same lawsuit. (CP 272, 263-64, 173-74, 187-88)

Community Transit paid a total of $1,142,572.07 to settle all forty-two (42) claims. The parties agree that the amount paid was reasonable and necessary to settle the claims. (CP 16) The settlement payments included a payment to the First Transit driver. Mr. Whittington filed a claim for $500,000 against Community Transit. First Transit refused to defend or indemnify and Community Transit paid Mr. Whittington $175,000 in settlement. (CP 238)

Community Transit paid an additional $108,378.12 in expenses related to adjusting, investigating and defending the claims. The parties agree that the expenses incurred were reasonable and necessary to resolve the claims. The parties further agree that Community Transit's total settlement and defense costs of $1,250,950.19 were reasonable and necessary. (CP 16-17)

IV. ARGUMENT

The trial court erroneously ruled that First Transit had no duty to defend and indemnify Community Transit. This contradicts the parties' contract and Washington indemnity law. Section 3.54 of the RFP clearly spells out that First Transit must indemnify for all claims "in connection"

with its work under the contract "except only" for Community Transit's sole negligence. The claims are for injuries suffered while First Transit was providing contracted bus service and occurred to persons on the First Transit bus or on a bus that collided with the First Transit bus. The parties agree that Community Transit was not solely negligent.

Aside from construction contracts, Washington law permits indemnification for an indemnitee's sole negligence. First Transit's lesser indemnity obligation (everything but sole negligence) is likewise enforceable. The trial court should be reversed.

A. Indemnity Contract Applies to These Claims

The plain language of the indemnity contract applies to the driver and passenger claims against Community Transit from the February 24, 2004 multiple vehicle accident. Section 3.54 requires indemnity from claims for: (1) injuries "in connection with" First Transit's work under the contract; and (2) injuries "caused or occasioned in whole or in part" by First Transit's "presence" on or near Community Transit's property or any other property where First Transit is working. The accident claims here satisfy both bases for indemnity. Section 3.54's only exception to indemnity (Community Transit's sole negligence) does not apply.

1. Broad Definition of Claims Includes These Claims

Section 3.54 requires First Transit to defend and indemnify Community Transit from "any and every claim and risk . . . and all losses, damages, demands, suits, judgments and attorney fees, and other expenses of any kind, on account of all personal bodily injuries." This language is comprehensive. It clearly includes Community Transit's costs in defending and settling personal injury claims from the First Transit driver, Frank Whittington, as well as passengers on both buses.

2. Injuries "In Connection With" Work Under Contract

Section 3.54 sets a low threshold for First Transit's indemnity obligation. Claims requiring indemnification need only be based on bodily injuries "in connection with the work performed under" the contract. Section 3.54 does not require First Transit's fault. The contract does not limit indemnity to claims for injuries "caused" by First Transit or "in connection with" First Transit's *negligence*. Rather, the contract requires only that the claims were "in connection with the *work performed under this contract*."

The 42 personal injury claims against Community Transit clearly were "in connection with" work performed under the contract. At the time of the multiple vehicle accident, First Transit was providing contracted commuter service for Community Transit. First Transit was operating a

bus with Community Transit's logo and color scheme. First Transit was not performing its contract work at some distant location. It was literally in the middle of this injury accident.

The First Transit bus was the fourth vehicle and Community Transit's bus was the fifth vehicle in a five-vehicle collision. Cesar Castillo initiated a chain reaction that resulted in the First Transit bus hitting the Russell vehicle and then being hit by the Community Transit bus. The 42 claimants were passengers on the First Transit and Community Transit buses and the First Transit driver. All 42 claimants were injured by one or both of the collisions involving the First Transit bus. Even though First Transit was not at fault, claimants' injuries were inextricably connected with work performed under the at that place and time. The undisputed facts easily satisfy the first basis for indemnity under Section 3.54.

3. Injuries Caused in Part By First Transit's "Presence"

The facts also satisfy the second basis for indemnity under Section 3.54. Claimants' injuries were caused "in part by reason of the presence" of First Transit's property (bus) and employee (Mr. Whittington) "in proximity to the property of Community Transit" (bus). Unlike the first basis for indemnity, there is a causation requirement. Yet the activities that could serve as a basis for the causal connection are very broad and easily met here. The indemnity contract does not require that claimants'

injuries were caused by First Transit's negligence. No fault is required. Community Transit need only show that First Transit's fault-free presence on or near Community Transit's property was a partial cause of the claimed injuries.

The injuries to Mr. Whittington and the passengers on both buses were the result of two collisions. Both collisions involved the First Transit bus. The second collision was between the First Transit bus and the Community Transit bus. The claimed injuries either would not have happened or would have been less severe but for the presence of the First Transit bus immediately in front of the Community Transit bus. Even though Mr. Whittington did nothing wrong, the injuries were caused "in part" by the close proximity of the buses--especially at the time of impact. This satisfies the second basis for indemnity under Section 3.54.

4. Sole Negligence Exception Does Not Apply

If either of the two bases for indemnity is met, then First Transit must indemnify "except only for those losses resulting solely from the negligence of Community Transit." First Transit agrees that the claimed injuries were not the result of Community Transit's sole negligence. The record is clear that Cesar Castillo initiated the five-vehicle chain reaction. Mr. Whittington testified that if the Russell vehicle had not been knocked into the HOV lane, the First Transit bus would not have been involved in

any collision. Therefore, First Transit cannot avoid indemnity because the injuries did not result from the sole negligence of Community Transit.

Indemnity does not require First Transit's negligence. Significantly, the only mention of "negligence" in the first paragraph of Section 3.54 is in relation to Community Transit. The use of the term "negligence" in this exception contrasts with the words used to describe the bases for First Transit's indemnity. The phrase "in connection with the work performed" is not synonymous with "negligence." Similarly, the phrase "caused . . . in part by reason of the presence of [First Transit]" is quite different from "negligence."

B. Indemnity Agreement Does Not Violate Public Policy

Section 3.54 is enforceable under Washington Law. RCW 4.24.115, which governs construction contracts, is the only statutory prohibition against indemnification for an indemnitee's own negligence. The statute does not apply to this commuter transit contract. Outside of construction contracts, Washington courts will enforce indemnification even for an indemnitee's sole negligence. *Northwest Airlines v. Hughes Air Corp.*, 104 Wn.2d, 152, 154, 702 P.2d 1196 (1985). If indemnification for sole negligence does not violate public policy, then neither does Section 3.54 (everything except sole negligence).

1. RCW 4.24.115 Does Not Apply

First Transit is not the first indemnitor to argue that it should not be held responsible for an indemnitee's negligence. The issue arose frequently in construction contracts where subcontractors were required to indemnify the general contractor even where the general was solely negligent. In response, the Legislature declared that such an indemnity provision is "against public policy and is void and unenforceable." RCW 4.24.115(1). In a construction contract, an indemnitor may indemnify only to the extent of its own share of concurrent negligence. RCW 4.24.115(2). The parties agree that this transit service agreement is not a construction agreement.

Nevertheless, the second paragraph of Section 3.54 contains an alternative indemnity provision if a court determines that the agreement is subject to RCW 4.24.115. In that case, First Transit's indemnity obligation tracks RCW 4.24.115(2) and only extends to its own share of concurrent negligence. This is the only place within Section 3.54 that First Transit's indemnity depends upon its own negligence. This shows that the parties were capable of drafting Section 3.54 to require what First Transit now argues: that it has no obligation to indemnify unless it was negligent. Because this is not a construction contract, the alternative indemnity provision does not apply. First Transit is bound by its bargain: to indemnify except only for Community Transit's sole negligence.

2. *Northwest Airlines v. Hughes* Controls

Washington courts generally enforce indemnification agreements according to their terms. A party may contractually indemnify against loss resulting from that party's own negligence, "unless prohibited by statute or public policy." *Northwest Airlines v. Hughes Air Corp.*, 104 Wn.2d, 152, 154, 702 P.2d 1196 (1985).

In *Hughes*, the court construed a commercial lease whereby the lessee (Hughes) agreed to indemnify the lessor (Northwest) for any claims "arising out of or in connection with the use and occupancy of the premises" by Hughes "whether or not caused by [Northwest's] negligence." 104 Wn. 2d at 153. A Hughes employee slipped and fell in a portion of a building owned and occupied by Northwest that was not part of the leased premises. *Id.*

Hughes argued that as a matter of law an indemnity agreement cannot require one party to indemnify for the other party's sole negligence. The court rejected the argument and enforced the agreement. The Court noted that the "general rule in Washington . . . is that a party may contractually indemnify against loss resulting from that party's own negligence, unless prohibited by statute or public policy." *Id.* at 154. Other than RCW 4.24.115, no statute or public policy prohibits indemnification for an indemnitee's <u>sole</u> negligence.

> Clearly, these rules do not say that indemnification clauses are void as against public policy or that as a matter of law, an indemnitor cannot be held responsible for an indemnitee's sole negligence. What these rules require is that, for an indemnitor to be found responsible for the indemnitee's own negligence, the agreement must be clearly spelled out. The Northwest-Hughes lease clearly spells out an agreement for indemnity even when Northwest is negligent.

Id. at 158; Cf *Jones v. Strom Constr. Co.*, 84 Wn.2d 518, 527 P.2d 115 (1974)(holding that an indemnification clause tied only to subcontractor's performance did not apply where contractor was solely negligent).

Similarly, Section 3.54 of the RFP clearly spells out an agreement for indemnity of Community Transit "except only" for losses resulting from Community Transit's sole negligence. This narrow exception makes clear the expansive scope of First Transit's obligation. If the indemnitee in *Hughes* can be indemnified for its sole negligence without violating public policy, then the same is true for First Transit's lesser indemnity obligation (everything but sole negligence). As the Court in *Hughes* noted, only in the construction setting are such sole negligence indemnity clauses void against public policy. *Id.* (citing RCW 4.24.115).

C. First Transit Bound By Its Pre-Loss Allocation of Risk

This case involves a voluntary agreement between two corporations that can freely decide who will pay for a loss. First Transit willingly assumed the duties of Coach USA under the Service Agreement, including indemnification. Section 3.54 represents a pre-loss allocation of risk between the parties and now, post-loss, First Transit seeks to limit indemnification to losses involving its own negligence. First Transit cannot rewrite the terms of its bargain. *Clements v. Olsen*, 46 Wn.2d 445, 449-50, 282 P.2d 266 (1955) ("Respondents may have made a poor bargain, but they cannot look to the courts for relief.")

The parties' allocation of risk is reasonable and realistic.

> [C]ontracts of indemnity must receive a reasonable construction so as to carry out, rather than defeat, the purpose for which they were executed. To this end they should neither be so narrowly or technically interpreted as to frustrate their obvious design, nor, on the other hand, so loosely or inartificially as to relieve the obligor from liability within the scope or spirit of their terms.

Northern Pacific R.R. Co. v. National Cylinder Gas Div., 2 Wn. App. 338, 342, 467 P.2d 884 (1970). In *National Cylinder*, the court concluded that the almost identical indemnity provision "appears to us to be a realistic effort by the parties to allocate as between them the cost and expense of the risk of accidents apt to arise." *Id.* at 345.

Looking at the parties' agreement as a whole, it is clear that Community Transit intended (and First Transit agreed to) as sweeping an indemnity as possible. The only limitation is Community Transit's sole negligence.

The parties drafted a savings provision, so that if RCW 4.24.115 governed, then First Transit would still indemnify Community Transit to the maximum extent allowed by law. Section 3.54 is clear that this is the parties' second choice. If RCW 4.24.115 does not apply, then First Transit agrees to the much broader indemnity provision in the first paragraph of Section 3.54. First Transit agreed that it would indemnify even for Community Transit's negligence "except only" for Community Transit's sole negligence.

The rationale for a broad indemnification is evidenced by other contract provisions. Pursuant to Section 2.01, First Transit transports passengers on moving buses in heavy traffic during rush hour commutes on I-5 and I-405. These buses do not operate in a vacuum. They are surrounded by thousands of other moving vehicles. The potential for collisions involving a First Transit bus is obvious. First Transit and Community Transit could easily foresee the potential of a multiple vehicle accident involving third parties.

The parties could also easily foresee the potential of claims against Community Transit. Under Section 2.03.17.A(11), First Transit operates buses painted with Community Transit's logo and paint scheme. To the outside world, these buses appear to be Community Transit buses. Community Transit has no control over these buses. Simply by performing its contract, First Transit significantly expands Community Transit's exposure to potential accident claims.

Another foreseeable risk is the potential for claims from First Transit employees. In the absence of a contract for commuter bus service, Community Transit's own employees would be driving buses on commuter routes on I-5 and I-405. In the event that a Community Transit employee was injured while driving, RCW 51 would bar the employee from suing Community Transit even if Community Transit was negligent. The same is not true for a claim by a First Transit driver injured on the job due in part to Community Transit's negligence.

This is one of the obvious risks that can be allocated through an indemnity agreement. Absent the indemnification provision, Community Transit would have to defend and settle a claim brought by a First Transit driver. This is precisely what happened here. Mr. Whittington was injured and filed a claim against Community Transit for $500,000.

Community Transit eventually settled with First Transit's driver for $175,000. Community Transit clearly did not receive the benefit of its bargain when First Transit refused to indemnify for the claim of its own driver.

Under these circumstances, § 3.54 reflects the parties' realistic allocation of the "risk of losses or damages arising out of the performance of the contract." *Jones*, 84 Wn.2d at 521. Community Transit was to have no part of any claims or lawsuits in connection with a First Transit bus except only for Community Transit's sole negligence.

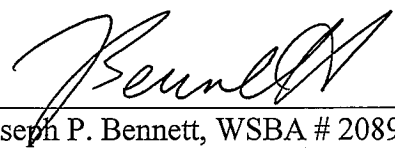
V. CONCLUSION

For all of the foregoing reasons, Community Transit respectfully request that the Court reverse the trial court's summary judgment order dated August 15, 2008, and remand the case for entry of judgment in favor of Community Transit.

DATED THIS 24th day of November, 2008.

Respectfully submitted,

HENDRICKS – BENNETT, PLLC

By: 

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APPENDIX – A-1

RCW 4.24.115 - Validity of agreement to indemnify against liability for negligence relative to construction, alteration, improvement, etc., of structure or improvement attached to real estate

A covenant, promise, agreement or understanding in, or in connection with or collateral to, a contract or agreement relative to the construction, alteration, repair, addition to, subtraction from, improvement to, or maintenance of, any building, highway, road, railroad, excavation, or other structure, project, development, or improvement attached to real estate, including moving and demolition in connection therewith, purporting to indemnify against liability for damages arising out of bodily injury to persons or damage to property:

(1) Caused by or resulting from the sole negligence of the indemnitee, his agents or employees is against public policy and is void and unenforceable;

(2) Caused by or resulting from the concurrent negligence of (a) the indemnitee or the indemnitee's agents or employees, and (b) the indemnitor or the indemnitor's agents or employees, is valid and enforceable only to the extent of the indemnitor's negligence and only if the agreement specifically and expressly provides therefor, and may waive the indemnitor's immunity under industrial insurance, Title 51 RCW, only if the agreement specifically and expressly provides therefor and the waiver was mutually negotiated by the parties. This subsection applies to agreements entered into after June 11, 1986.