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No. _____

**IN THE SUPREME COURT
OF THE STATE OF WASHINGTON
(Court of Appeals Cause No. 62269-2-I)
(Snohomish County Superior Court Cause No. 07-2-02976-0)**

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

v.

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

PETITION FOR REVIEW

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2009 OCT 21 PM 4:04

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I. IDENTITY OF PETITIONER

Petitioner is the Snohomish County Public Transportation Benefit Area Corporation, d/b/a Community Transit (“Community Transit”) and was the Appellant below.

II. CITATION TO COURT OF APPEALS DECISION

Community Transit seeks discretionary review of the decision of the Court of Appeals, Division One, in Case No. 62269-2-I, Snohomish County Public Transportation Benefit Area Corporation, d/b/a Community Transit v. FirstGroup America, Inc. d/b/a First Transit, dated September 21, 2009. (Attached hereto as Appendix A)

III. ISSUES PRESENTED FOR REVIEW

1. Under *Northwest Airlines v. Hughes*, is a contractor obliged to defend and indemnify a transit agency where (a) the parties’ indemnity agreement requires indemnity “except only for those losses resulting solely from the negligence” of the agency; and (b) the contractor admits that the agency was not solely negligent?

2. Under *Hughes*, does an indemnity provision limited only by a transit agency’s sole negligence clearly spell out that the contractor must indemnify if the agency was not solely negligent?

IV. STATEMENT OF THE CASE

The facts are not disputed. Community Transit contracted with Coach USA Transit to provide commuter bus service for Community Transit from Snohomish County to downtown Seattle and Redmond. (CP 13, 124-126)

The contract contained the following indemnity provision:

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.

(CP 152)(Emphasis supplied).

Coach USA Transit later assigned its interests, rights, obligations and duties under the contract to First Transit. First Transit provided "commuter" bus service between Snohomish County and parts of King County including Seattle and Redmond. This means that First Transit operated buses during rush hour commutes on Interstate 5 and Interstate 405. (CP 15, 200-205). The contract also required First Transit buses to bear Community Transit's logo and color scheme. (CP 15, 214)

At the beginning of afternoon rush hour on February 24, 2004, a five-vehicle accident occurred on northbound Interstate 5. When the driver of a Toyota Corolla braked abruptly in response to heavy traffic, the driver of a Jeep, behind the Corolla, braked in response to the Corolla's sudden deceleration. The driver of a Honda Accord, struck the rear end of the Jeep, causing the Jeep to strike the Corolla and push it into the adjacent HOV (high-occupancy vehicle) lane, in front of a First Transit bus driven by Frank Whittington. The First Transit bus driver quickly braked, but

could not avoid hitting the rear of the Corolla. A Community Transit bus, following in the HOV lane, immediately rear-ended the First Transit bus. (CP 15-16)

As a result, Community Transit settled forty-two (42) claims for damages from passengers of both buses as well as Mr. Whittington, the First Transit driver. (CP 16) 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 196)

Community Transit incurred \$1,250,950.19 to investigate, adjust, defend and ultimately settle the claims. (CP 16-17) This amount included \$175,000 to settle the personal injury claim of the First Transit driver, Mr. Whittington.¹ (CP 238)

The parties stipulated as follows with respect to negligence:

1. The accident was caused by the shared negligence of the Honda Accord driver and the Community Transit bus driver (and Community Transit under respondeat superior).
2. Neither Mr. Whittington nor First Transit was negligent.

¹ Absent this contract, Community Transit's own employees would be driving buses on commuter routes. RCW 51 would bar the employee from suing Community Transit for negligence.

3. “The accident did not result from the sole negligence of Community Transit.” (CP 16)

The parties filed cross-motions for summary judgment. The trial court granted summary judgment dismissal to First Transit. Community Transit appealed and the Court of Appeals affirmed.

V. ARGUMENT

Community Transit petitions this Court for discretionary review based on RAP 13.4(b)(1). The decision of the Court of Appeals conflicts with this Court’s decision in *Northwest Airlines v. Hughes Air Corp.*, 104 Wn.2d 152, 702 P.2d 1192 (1985). The Court of Appeals decision frustrates the parties’ clear intention that First Transit would indemnify “except only” for Community Transit’s sole negligence. Further, by reading ambiguity into the unambiguous phrase “solely from the negligence of Community Transit” the Court of Appeals’ decision undermines the parties’ freedom of contract. The decision specifically undermines the freedom of businesses to allocate the risk of loss among themselves without the court rewriting the agreement to save one party from a perceived bad bargain.

A. HUGHES IS THE DEFINITIVE CASE ON WASHINGTON INDEMNITY LAW

In *Hughes*, a unanimous Supreme Court reconciled decades of prior indemnity decisions. 104 Wn.2d at 154-58. “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. Further, “a contract for indemnity will not be construed to indemnify the indemnitee against loss resulting from his own negligence unless this intention is expressed in clear and unequivocal terms.” *Id.* at 154-55.

It was not sufficient for indemnity for an indemnitee's own negligence to be based on the mere breadth of an all-encompassing indemnity clause. “Washington currently requires, as do some other states, that more specific language be used to evidence a clean and unequivocal intention to indemnify the indemnitee's own negligence. (citing, *inter alia*, *Dirk v. Amerco Marketing Co.*, 88 Wn.2d 607, 612-13, 565 P.2d 90 (1977); and *Scruggs v. Jefferson Cy.*, 18 Wn. App. 240, 244, 567 P.2d 257 (1977)).

1. Hughes Enforced Clearly Worded Indemnity

In *Hughes*, a commercial lessee's employee was injured as a result of the lessor's sole negligence. The lessee was not at fault. Further, the

injury occurred not on the leased premises but in an area controlled by the lessor.

The lessee had agreed to the following indemnity clause:

INDEMNITY. Lessee [Hughes] shall indemnify the Lessor [Northwest] from and against any and all claims, demands, causes of action, suits or judgments (including costs and expenses incurred in connection therewith) for deaths or injuries to persons or for loss of or damage to property arising out of or in connection with the use and occupancy of the premises by Lessee, its agents, servants, employees or invitees whether or not caused by Lessor's negligence.

104 Wn.2d at 153 (emphasis in original). The court enforced the indemnification obligation. It made no difference that the lessee was fault free. No statute or case prohibited such indemnity clauses in a commercial lease. *Id.* at 154.

The only question was whether the intention to indemnify for the indemnitee's own negligence was "clear and unequivocal." *Id.* at 155. The court answered "yes." "The clause involved in this case explicitly refers to injuries 'whether or not caused by Lessor's [Northwest's] negligence' . . . Even under the more stringent requirement, the involved indemnification clause clearly includes coverage for the indemnitee's negligence" *Id.* at 156.

2. Hughes Clarified Jones v. Strom Construction Co.

The lessee in *Hughes* relied upon two earlier decisions of this Court. *Brame v. St. Regis Paper Co.*, 97 Wash.2d 748, 649 P.2d 836 (1982); and *Jones v. Strom Constr. Co.*, 84 Wash.2d 518, 527 P.2d 1115 (1974). The lessee asserted that *Brame* and *Jones* “stand for the proposition that, as a matter of law, an indemnity agreement cannot be construed to require an indemnitor to hold harmless the indemnitee for losses resulting solely from the indemnitee's own negligence.” *Hughes*, 104 Wn.2d at 156. This Court disagreed. “Petitioner misreads these cases.” *Id.*

This Court focused on the precise language of the indemnity agreement in *Jones* where a subcontractor agreed to indemnify the contractor from any claims “ ‘arising out of,’ ‘in connection with,’ or ‘incident to’ [*the subcontractor's*] ‘performance’ of the subcontract.”

This Court noted that

The clause referred only to the subcontractor's performance; it made no mention of or reference to the contractor's performance. Construing the language strictly, we held that the involved indemnification clause required an act or omission by the subcontractor in performance of the subcontract for it to be applicable. *Brame* involved the construction of an indemnity provision identical to the one in *Jones*.

Id. at 156-57.

In *Hughes*, this Court rejected the lessee's broad reading of *Jones* and clarified that it only applied to the indemnity language involved in that case.

Petitioner erroneously asserts that this language requires employer negligence before any indemnification clause will be enforced. Reading this language in context, the "such indemnification agreements" referred to in this passage are agreements which require, by their language, the subcontractor's performance be involved before the clause is applicable. *Jones* held only that the language of the indemnity clause involved in that case could not be construed to require indemnification where the acts of the indemnitee were the sole cause of the injury.

Id. at 157 (Emphasis supplied). This court concluded that the true rule of *Jones* is that "for an indemnitor to be found responsible for an 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.

Even though the agreement in *Hughes* contained some similar indemnity language as the agreement in *Jones*, taken as a whole the language of the two agreements was substantively different. Both agreements contained the phrase "arising out of [or] in connection with." *Jones*, 84 Wn.2d at 521; *Hughes*, 104 Wn.2d at 153. Yet, only the indemnity agreement in *Hughes* contained additional language that the

lessee would indemnify “whether or not caused by Lessor’s negligence.”

Id. Thus, the specific language of an indemnity agreement as a whole determines whether or not it applies.

3. Three Principles of Hughes

Hughes provides three principles that should guide Washington indemnity decisions:

(1) An agreement to indemnify for an indemnitee’s sole negligence is valid if the indemnity obligation is clearly spelled out.

(2) If the obligation is clearly spelled out, it applies even if the indemnitor is fault free.

(3) The actual wording of the particular indemnity agreement as a whole determines whether or not indemnity applies. Does the agreement explicitly state that the indemnitor will be liable for the indemnitee’s negligence?

The Court of Appeals misapplied these principles and its decision conflicts with *Hughes*.

B. TEST: DOES INDEMNITY CLAUSE EXPLICITLY REFERENCE THE INDEMNITEE’S NEGLIGENCE?

All of the Washington cases cited by the Court of Appeals can be reconciled by asking the following question: Does the indemnity

agreement at issue explicitly provide that the indemnitor must indemnify for the indemnitee's own negligence?

Where the answer is "yes" the courts hold that the indemnity obligation applies. *Hughes*, 104 Wn.2d at 153 (enforcing agreement where Hughes agreed to indemnify for losses "whether or not caused by [Northwest's] negligence"); *Northern Pac. Ry. Co. v. National Cylinder Gas Div.*, 2 Wn. App. 388, 339-40 n.1, 467 P.2d 884 (Div. I 1970) (enforcing agreement where contract agreed to indemnify a Railroad company for claims "except when such claims . . . arise out of the sole negligence of the RAILROAD"); see also *McDowell v. Austin Co.*, 105 Wn.2d 48, 49-50, 710 P.2d 192 (1985) (enforcing agreement where subcontractor agreed to indemnify "Owner and Austin against *all liability* . . . caused, directly or indirectly, by an act or omission, negligent or otherwise, *by Owner or Austin*") (Emphasis in original).

Where the answer is "no" courts do not require indemnity. In *Jones*, the indemnity agreement made no mention of the indemnitee's negligence or even its performance. *Jones*, 84 Wn.2d at 521. The identical language was considered in *Brame v. St. Regis Paper Company*, 97 Wn.2d 748, 649 P.2d 836 (1982). Both courts determined that the

indemnity contracts did not require indemnification for the indemnitee's own negligence.²

The other cases cited by the Court of Appeals reach the same result. *Northern Pac. Ry. Co. v. Sunnyside Valley Irrigation Dist.*, 85 Wn.2d 920, 540 P.2d 1387(1975); *Dirk v. Amerco Mktg. Co.*, 88 Wn.2d 607, 565 P.2d 90 (1977); and *Scruggs v. Jefferson Cy.*, 18 Wn. App. 240, 567 P.2d 257 (Div. II 1977). All of these cases pre-date *Hughes*. None involves an indemnity clause that states that the indemnitor will indemnify for the indemnitee's negligence.

In *Sunnyside*, an irrigation canal broke, water overflowed a culvert and then washed out a roadway. The indemnity agreement simply provided that the district would indemnify a railroad from all loss "occasioned by the improvements [culvert]." 85 Wn.2d at 921. The court

² The Court of Appeals noted that *Jones* overruled a prior decision of the Court of Appeals. Opinion at 5 (citing *Tucci & Sons, Inc. v. Madsen, Inc.*, 1 Wn. App. 1035, 1036, 467 P.2d 386 (Div. II 1970)).

Significantly, the *Jones* court did not overrule another appellate decision from 1970 that enforced an indemnity provision very similar to § 3.54 of the First Transit - Community Transit contract. *N. Pac.*, 2 Wn. App. 388, 467 P.2d 884 (Div. I 1970). Unlike the indemnity clause in *Jones*, the contract in *National Cylinder* specifically mentioned the negligence of the indemnitee. The indemnitor agreed to indemnify "except when . . . claims arise out of the sole negligence" of the indemnitee. 2 Wn. App. at 339-40 n.1. The substantive differences between the indemnity clauses in *Tucci* and *National Cylinder* explain why the *Jones* court overruled one and not the other.

concluded that the washed out roadway resulted from the broken canal not anything to do with the culvert. “The culvert itself did not fail to operate effectively as a culvert it only failed to transform itself into a tunnel at the crucial moment.” *Id.* at 923. The indemnity agreement did not reference the railroad’s negligence. *Sunnyside* has no bearing on the substantially different indemnity agreement at issue in this case.

Dirk involved an indemnity agreement limited to the **indemnitor’s** negligence. Amerco agreed to indemnify a U-Haul dealer for any liability “arising out of accidents occasioned by the negligence of [Amerco] or by defects in U-Haul equipment.” 88 Wn.2d at 609 (1977). The dealer sought indemnity even though it caused the accident by negligently towing a defective trailer. The court held that there was no indemnity obligation.

The indemnity provision here did not specifically state that [the dealer] would be indemnified for damages caused by his own acts of negligence. . . . [W]e find it difficult to believe that, as a business practice, Amerco intended to indemnify U-Haul dealers for their own acts of negligence without specific wording to that effect . . .

Id. at 613. Unlike the agreement in *Dirk*, § 3.54 includes specific wording that Community Transit would be indemnified for its own negligence “except only” its sole negligence.

Scruggs also involved an indemnity agreement limited to loss caused by an improvement. Puget Power erected a utility pole and agreed

to indemnify the County for any loss “caused by the construction or operation of [the pole].” 18 Wn. App. at 242. A motorist struck the pole and was injured as a result of his own negligence and the County’s negligent road design. The court held that the indemnity agreement did not require Puget Power to indemnify the County. “The clause in question does not explicitly require Puget Power to indemnify the County for losses due to the County’s negligence.” *Id.* at 244.

In contrast to the indemnity clauses at issue in *Jones*, *Brame*, *Sunnyside*, *Dirk* and *Scruggs*, the indemnity agreement here explicitly required First Transit to indemnify Community Transit for losses due to its own negligence. First Transit’s indemnity obligation is not limited to losses arising from a stationary object like a pole or culvert. Unlike *Dirk*, § 3.54 is not limited to the indemnitor’s negligence. It is expansive and includes all losses “except only” for losses resulting solely from Community Transit’s negligence. As in *Hughes*, the duty to indemnify for the indemnitee’s negligence is clearly spelled out. That is all that Washington law requires.

C. COURT OF APPEALS PARSES INDEMNITY PROVISION

In applying the law to this case, the Court of Appeals parses the indemnity provision into three clauses. It separately analyzes (1) the “in

connection with” clause; (2) the “cause or occasioned . . . by First Transit’s presence” clause; and (3) the sole negligence exception. The Court of Appeals concludes that indemnity is not required under any one of these clauses. Opinion at 9-11. This parsing of the language conflicts with *Hughes* and leads to an erroneous result.

If this indemnity agreement contained only the “arising out of clause” and not the others, the Court of Appeals would be correct. *Jones* would apply and require some “overt act or omission” by First Transit to trigger indemnity. The same analysis could be applied to the agreement in *Hughes*. If it only contained the “arising out of or in connection with” clause, then indemnity would require some fault by the lessee. Obviously, the different indemnity language explains the different results in *Jones* and *Hughes*. In *Hughes*, the lessee was on notice that it would indemnify for the indemnitor’s negligence because the agreement explicitly stated that.

Even in isolation, the Court of Appeals cannot persuasively explain away the “caused or occasioned . . . by First Transit’s presence” language. Although *Scruggs* would be somewhat analogous in that situation, *National Cylinder*, 2 Wn. App. 338, is directly on point. *National Cylinder* contained a virtually identical exception for the sole

negligence of the indemnitee. 2 Wn. App. at 339-40 n.1. The Court of Appeals misinterprets *National Cylinder*, by claiming that the triggering language was the “arising out of” language or the “caused or occasioned by” not the sole negligence exception. Opinion at 11 n.2. This misses the point. The indemnitor in that case was fault free. Indemnity still applied. As in this Court’s later decision in *Hughes*, the indemnity obligation was clearly spelled out so that the indemnitor was liable even though it was not negligent.

The Court of Appeals makes the analytical mistake of considering the sole negligence clause in isolation. Opinion at 10-11. It is not a stand-alone clause. As in *Hughes*, this clause is inextricably part of the whole indemnity provision and requires that First Transit indemnify Community Transit for these losses.

D. “EXCEPT ONLY FOR SOLE NEGLIGENCE” CLAUSE IS CLEAR AND UNEQUIVOCAL

The Court of Appeals erroneously determined that the following phrase is somehow unclear or equivocal: “except only for those losses resulting from the solely negligence of Community Transit.” Opinion at 11-12. The argument is that to be clear the indemnity provision had to explicitly state that it applied to losses caused by the combined negligence

of Community Transit and a third party. Opinion at 1, 12. This interpretation is wrong as a matter of fact and law.

The terms “solely” or “sole negligence” are not ambiguous. Words used in a contract should be given their “ordinary, usual, and popular meaning unless the entirety of the agreement clearly demonstrates a contrary intent. *Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 504, 115 P.3d 262 (2005). “Ordinary meaning” is considered to be the dictionary definition of the word. *Nationwide Ins. Co v. Hayles, Inc.*, 136 Wn. App. 531, 537, 150 P.3d 589 (2007). As an adjective (or an adverb), “**sole**” is defined as “1. Being the only one; single; [or] 2. Of or pertaining to one individual or group; exclusive.” *American Heritage Dictionary* at 1163 (2^d College Edition 1985) (Appendix B hereto).

As used in this indemnity agreement, “Sole” or “solely” negligent has only one possible meaning. As a matter of law, only one entity can be “solely” negligent. For this exception to apply, Community Transit must be 100 percent at fault and no one else. There is no other meaning. Was this accident caused by the sole negligence of Community Transit? This is a yes or no question. First Transit stipulated that the answer was “no.” “The accident did not result from the sole negligence of Community Transit.” (CP 16) This ends the inquiry.

Under *Hughes*, the indemnity obligation was clearly spelled out. The phrase “except only for those losses resulting solely from the negligence of Community Transit” is no less clear than the phrase “whether or not caused by Lessor’s negligence.” Both clauses identify the indemnitee by name. Both clauses use the word “negligence” in reference to the indemnitee only. Both clauses notify the indemnitor as to the extent of the indemnitee’s negligence to be indemnified: sole negligence (*Hughes*), everything but sole negligence (Community Transit). Both clauses are clear and unequivocal.

E. COURT OF APPEALS’ DECISION CONTRADICTS HUGHES AND UNDERMINES FREEDOM OF CONTRACT

The Court of Appeals’ decision unduly restricts the ability of businesses to contractually allocate the risk of loss.

[C]ourts do not have the power, under the guise of interpretation, to rewrite contracts the parties have deliberately made for themselves. *Clements v. Olsen*, 46 Wn.2d 445, 448, 282 P.2d 266 (1955). Courts may not interfere with the freedom of contract or substitute their judgment for that of the parties to rewrite the contract . . .

McCormick v. Dunn & Black, P.S., 140 Wn. App. 873, 891-92 ¶37, 167 P.3d 610 (Div. II 2007).

The Court of Appeals decision essentially rewrites the indemnity agreement so that it only applies to accidents caused by the concurrent

negligence of First Transit and Community Transit. There is no textual basis for concurrent negligence in the first paragraph of § 3.54. Moreover, the parties knew how to draft a concurrent negligence indemnity clause. They did so in the second paragraph of § 3.54. In the event that a court finds that RCW 4.24.115 applies, First Transit's duty to indemnify is limited to its own share of concurrent negligence. (CP 83) Since that paragraph clearly does not apply, indemnity cannot be limited to the concurrent negligence of the parties.

The indemnitor in *Hughes* also attempted to rewrite the contract to avoid indemnity. The indemnitor argued without authority that the indemnification clause only applied to injuries that occurred on the leased premises. The court rejected that argument because it would require the court to substitute "on the premises" for the actual language of the agreement. "This we will not do. A reasonable interpretation of this language indicates a clear intention to protect Northwest for all liability arising in connection with the lease." *Hughes*, 104 Wn.2d at 159.

Similarly, a reasonable interpretation of § 3.54 indicates a clear intention to protect Community Transit from all liability in connection with the contract "except only" for losses resulting solely from its own

negligence. Indemnity is not limited to accidents caused by the concurrent negligence of Community Transit and First Transit.

VI. CONCLUSION

The decision of Court of Appeals conflicts with *Northwest Airlines v. Hughes* and undermines the freedom of businesses to contractually allocate risk of loss. This Court should accept review to revisit and reaffirm its holdings in *Hughes* and clarify Washington indemnity law

The Court of Appeals erred by reading ambiguity into clear contract terms that have no alternative meaning. Under *Hughes*, an indemnitor is liable for indemnitee's own negligence if the indemnity obligation is "clearly spelled out." Here, the parties' contract clearly spells out that First Transit will indemnify "except only" for losses "resulting solely from Community Transit's negligence." First Transit agrees that Community Transit was not solely negligent. The indemnity obligation is unequivocal and should be enforced as written.

DATED THIS 21st day of October, 2009.

Respectfully submitted,

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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

SNOHOMISH COUNTY PUBLIC)	NO. 62269-2-I
TRANSPORTATION BENEFIT AREA)	
CORPORATION, d/b/a COMMUNITY)	DIVISION ONE
TRANSIT,)	
)	
Appellant,)	
)	
v.)	
)	
FIRSTGROUP AMERICA, INC.,)	Unpublished Opinion
d/b/a FIRST TRANSIT, a foreign)	
corporation,)	FILED: September 21, 2009
Respondent.)	
)	

Lau, J. — In this appeal, the parties dispute the meaning of an indemnity provision in the Service Agreement for Commuter Bus Service. Community Transit argues that the plain language of the agreement requires First Transit to indemnify it for tort claims caused by the combined negligence of Community Transit and third parties. But because the agreement does not clearly and unequivocally state this intention, we affirm the trial court's summary judgment dismissing Community Transit's indemnify claims against First Transit.

FACTS

The facts are undisputed. Coach USA Transit contracted with Community

Transit to provide commuter transit service between King and Snohomish counties.

The contract contained the following indemnity provision:

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.

Clerk's Papers (CP) at 152 (emphasis added). Later, Coach USA Transit assigned its interests, rights, obligations, and duties under the contract to First Transit. The contract also required First Transit buses to bear Community Transit's color scheme and logo.

At the beginning of the afternoon rush hour on February 24, 2004, a five-vehicle accident occurred on Interstate 5. When the driver of a Toyota Corolla braked abruptly in response to heavy traffic, the driver of a Jeep, behind the Corolla, braked in response to the Corolla's sudden deceleration. The driver of a Honda Accord, struck the rear end of the Jeep, causing the Jeep to strike the Corolla and push it into the adjacent HOV (high-occupancy vehicle) lane, in front of a First Transit bus. The First Transit bus driver quickly braked, but could not avoid hitting the rear of the Corolla. A

Community Transit bus, following in the HOV lane, immediately rear-ended the First Transit bus.

As a result, Community Transit settled 42 claims from passengers on both buses and from the First Transit bus driver. It then tendered the claims to First Transit pursuant to their contract's indemnity provision. But First Transit rejected the tender and refused to defend or indemnify Community Transit from the claims. Community Transit incurred \$1,250,950.19 to investigate, adjust, defend, and ultimately settle the claims. In response, Community Transit filed suit against First Transit for breach of contract and specific performance, seeking to enforce the indemnity provision. The parties filed cross-motions for summary judgment. For purposes of these motions, the parties stipulated that the First Transit driver was not negligent and that the shared negligence of the Honda Accord driver and the Community Transit bus driver (and Community Transit under respondeat superior) caused the accident. The trial court granted summary judgment dismissal to First Transit. This appeal followed.

ANALYSIS

Community Transit contends the trial court erred in granting summary judgment to First Transit because the settled claims fall within the scope of the indemnity provision. The court reviews a summary judgment order de novo. Nunez v. Am. Bldg. Maint. Co. West, 144 Wn. App. 345, 350, 190 P.3d 56 (2008). Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Interpretation of a contractual indemnity clause is a question of law. Nunez, 144 Wn. App. at 350.

"Indemnity agreements are

essentially agreements for contractual contribution, whereby one tortfeasor, against whom damages in favor of an injured party have been assessed, may look to another for reimbursement.” Stocker v. Shell Oil Co., 105 Wn.2d 546, 549, 716 P.2d 306 (1986). Washington courts generally enforce such agreements. Nw. Airlines v. Hughes Air Corp., 104 Wn.2d 152, 154, 702 P.2d 1192 (1985). However, “a contract of indemnity will not be construed to indemnify the indemnitee against losses resulting from his own negligence unless this intention is expressed in clear and unequivocal terms.” Nw. Airlines, 104 Wn.2d at 154–55. Indemnity clauses that purport to exculpate an indemnitee from liability for losses flowing solely from the indemnitee’s own acts or omissions are disfavored and must be clearly drawn and strictly construed, with any doubts resolved in favor of the indemnitor. Scruggs v. Jefferson County, 18 Wn. App. 240, 243, 567 P.2d 257 (1977). The purpose of these rules is to ensure that the indemnitor has fair notice that a large and potentially ruinous award can be assessed against it based solely on negligence attributable to the indemnitee. McDowell v. Austin Co., 105 Wn.2d 48, 53, 710 P.2d 192 (1985).

Historically, Washington courts construed an unequivocal intention to indemnify for an indemnitee’s own negligence from “all-encompassing language,” even if the agreement contained no specific reference to the indemnitee’s negligence. See Nw. Airlines, 104 Wn.2d at 155 (citing Griffiths v. Henry Broderick, Inc., 27 Wn.2d 901, 182 P.2d 18 (1947)). For example, in Tucci & Sons, Inc. v. Carl T. Madsen, Inc., 1 Wn. App. 1035, 1036, 467 P.2d 386 (1970), the court concluded that a construction subcontractor’s promise to indemnify the general contractor from all claims “arising out of, in connection with, or incident to” the

subcontractor's performance included claims that were caused solely by the general contractor's own negligence. The court reasoned that so long as the claim fell within this broad language, no explicit statement of intent to indemnify the general contractor for its own negligence was required. Tucci, 1 Wn. App. at 1038. Therefore, the court concluded that the claim at issue "arose out of, in connection with, or [was] incidental to" the subcontractor's performance because the injured employee who filed the claim would not have been injured but for the fact that he was performing work under the subcontract. Tucci, 1 Wn. App. at 1038.

Since Tucci, however, Washington courts now require more specific language to show a clear and unequivocal intent to indemnify for the indemnitee's own negligence. See Nw. Airlines, 104 Wn.2d at 155 (citing Dirk v. Amerco Mktg. Co., 88 Wn.2d 607, 612-13, 565 P.2d 90 (1977); Scruggs, 18 Wn. App. at 244 (and other cases)). For example, in Jones v. Strom Construction Co., 84 Wn.2d 518, 521, 527 P.2d 1115 (1974), which expressly overruled Tucci, the court held that the construction subcontractor's promise to indemnify Strom for all claims "arising out of, in connection with, or incident to" its performance of the contract was insufficient to trigger indemnification when the claim did not result from an "overt act or omission" by the subcontractor. Thus, an accident that would not have occurred but for the subcontractor's presence at the scene "inculpably performing its specified contractual obligations" did not fall within the scope of the indemnity agreement, despite the agreement's broad and sweeping language. Jones, 84 Wn.2d at 522. Either the subcontractor's overt act or omission must cause or "concur[] in causing" the loss or more specific indemnity language is

required. Jones, 84 Wn.2d at 521.

Subsequent cases reinforced this strict-construction approach to broadly worded indemnity clauses. For instance, in Northern Pacific Railway v. Sunnyside Valley Irrigation District, 85 Wn.2d 920, 540 P.2d 1387 (1975), the court held that the indemnitee railroad company was not entitled to recover for property damage under an indemnification theory. In 1913, the railroad company had agreed to permit Yakima County to construct a culvert under its tracks. The county agreed to indemnify the company from all losses “occasioned by” the culverts. When an irrigation canal broke, water flooded through the culverts, damaging the railroad company’s property. N. Pac., 85 Wn.2d at 921–23. The court held that the loss was not “occasioned by” the culverts because they did not proximately cause the damage.

The washout of plaintiff’s roadbed occurred independent of the culvert. The deluge resulted from a source only indirectly related to the culvert, and the washout of the roadbed was clearly not ‘occasioned’ by the culvert. To extend this hold-harmless provision so far would be unreasonable. The culvert itself did not fail to operate effectively as a culvert; it only failed to transform itself into a tunnel at the crucial moment.

N. Pac., 85 Wn.2d at 923.

And in Dirk, the court narrowly interpreted the scope of an indemnity provision in a U-Haul dealership contract. Amerco agreed to hold Dirk harmless from “any and all liability . . . arising out of accidents occasioned by the negligence of Marketing Co. or by defects in U-Haul equipment” Dirk, 88 Wn.2d at 609. After an equipment defect disabled a U-Haul van, Dirk negligently towed the vehicle to his service station and an accident occurred. Dirk settled the injury claims and then sought

indemnification from Amerco. Dirk, 88 Wn.2d at 609. The court concluded that the indemnity provision was not triggered even though the accident would not have occurred “but for” the defective equipment. And because this was a remote and indirect cause, the accident was not “occasioned by” the defect. Dirk, 88 Wn.2d at 612. The court also reasoned that the indemnity clause lacked specific language indicating Amerco agreed to indemnify Dirk for damage caused by his own negligent acts. Dirk, 88 Wn.2d at 613.

Finally, in Scruggs, the court held that Puget Power was not required to indemnify Jefferson County for settling a personal injury claim involving a Puget Power utility pole. A car passenger was injured when the car went off the county’s road and crashed into the utility pole. Scruggs, 18 Wn. App., at 241. The combined negligence of the car driver and the county caused the accident. Puget Power owned and maintained the utility pole under an agreement with the county, in which it promised to indemnify the county for “all costs and expense or damages of any kind whatsoever, experienced or caused by reason of the exercise by [Puget Power] of any of the rights herein granted [which included construction and maintenance of utility poles].”

Scruggs, 18 Wn. App. at 242. While the passenger’s injury would not have occurred but for the pole (or at least would have been less severe), the court concluded,

[T]he issue is not the direct cause-in-fact of the injuries; rather, it is whether the placement or maintenance of the pole in its location can be said to have been a proximate cause of the accident so that Puget Power must hold Jefferson County harmless for its own negligence.

.... [T]he accident that produced Keith Scruggs' injuries was not caused by the mere presence of the pole in a place specified by the franchise agreement. At most, the pole was merely a passive, nonculpable cause-in-fact

of the injuries. It was a condition and not a cause of the accident. Consequently, the pole was only indirectly related to the County's loss and was not the type of loss the parties intended to cover in the indemnity clause. . . . [A]n indemnity contract will not be construed to indemnify the indemnitee against losses resulting to him through his own negligent acts where such intention is not expressed in unequivocal terms.

Scruggs, 18 Wn. App. at 243–44.

But in Northwest Airlines, the court enforced the indemnity provision between Hughes (the indemnitor) and Northwest (the indemnitee) because the provision expressed a clear and unequivocal intent to indemnify for losses caused by Northwest's own negligence. There, the indemnity clause explicitly stated, "Lessee [Hughes] shall indemnify the Lessor [Northwest] from and against any and all claims . . . arising out of or in connection with the use and occupancy of the premises . . . whether or not caused by Lessor's negligence." Nw. Airlines, 104 Wn.2d 153 (emphasis omitted). The court noted that by expressly covering injuries "whether or not caused by Lessor's negligence," the parties unambiguously intended to protect Northwest from all liability, even from claims resulting solely from its own negligence. Nw. Airlines, 104 Wn.2d at 156–58 (emphasis omitted). Thus, when contracting parties use specific language showing a clear intent to indemnify for losses caused by the indemnitee's sole negligence, no "overt act or omission" by the indemnitor is necessary to trigger indemnification. Compare Jones, 84 Wn.2d at 521–22 (where there was no specific language referencing the general contractor's negligence, a loss did not unequivocally occur "in connection with" the subcontractor's performance because the subcontractor made no overt act or omission that caused or contributed to the loss).

Here, because Community Transit seeks indemnification against losses resulting to it from its own negligent acts, the intent to cover such losses must be expressed unequivocally in the indemnity agreement.¹ Dirk, 88 Wn.2d at 612. Community Transit first argues that the claims it settled were “in connection with” the work performed under its contract with First Transit because First Transit was providing contracted commuter service at the time of the accident. It emphasizes that the claims were “inextricably connected” to First Transit’s performance because First Transit was literally in the middle of a five-vehicle freeway accident. But the essence of this argument is “but for” First Transit’s presence in the HOV lane, inculpably performing its contractual duties, the accident would not have happened. Under Jones and its progeny, this is not sufficient to establish that a loss arose “in connection with” First Transit’s contractual performance. Similarly, the injury in Jones would not have occurred “but for” the subcontractor’s presence on the jobsite. The Jones court nevertheless held the subcontractor’s “mere presence on the jobsite inculpably performing its specified contractual obligations,” without any “overt act or omission” on its part, did not trigger indemnification. Jones, 84 Wn.2d at 522. While the “in connection with” language is broad and sweeping on its face, it is strictly construed against a negligent indemnitee and this language alone is not sufficient to trigger First Transit’s duty to indemnify

¹ While the negligence of the Honda Accord driver also contributed to the losses here, the “clear and unequivocal” rule still applies. Compare Scruggs, 18 Wn. App at 244 (Where accident was caused by the combined negligence of the indemnitee county and the third party driver, the court held there was no indemnity because “[t]he clause in question does not explicitly require Puget Power to indemnify the County for losses due to the County’s negligence.”).

Community Transit.

Community Transit next argues that the claims it settled were “caused or occasioned in whole or in part’ by First Transit’s ‘presence’” on or near Community Transit’s property.” Appellant’s Br. at 10. It points out that “[t]he 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.” Appellant’s Br. at 13. While this may be true, the accident in Scruggs would not have occurred or would have been less severe but for the presence of the utility pole. And the accident in Dirk would not have occurred but for the equipment defect. Yet the accidents in those cases were not “caused” or “occasioned by” the utility pole or the defective equipment because they were not the proximate causes of the accidents. Likewise here, while the presence of the First Transit bus was a cause-in-fact of the accident, the injuries were proximately caused by the Honda Accord driver and the Community Transit bus driver following other vehicles too closely for heavy traffic conditions. The accident claims here were not “caused” or “occasioned by” the presence of First Transit, which was inculpably performing its contractual obligations when the accident happened. Without some culpable act or omission by First Transit that contributed to the accident, indemnity must be based on more specific language than the broadly phrased “in connection with” or “caused or occasioned by” language used here.

Finally, Community Transit argues that addition of the “sole negligence” clause in the indemnity agreement provides the necessary language. Specifically, it notes that First Transit agreed to indemnify it for all claims “in connection with the work” or “caused or occasioned” by the parties’

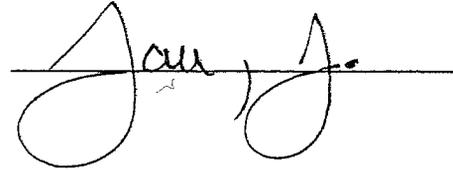
proximity, “except only for those losses resulting solely from the negligence of Community Transit.” Appellant’s Br. at 3, 13. Community Transit infers from this language that First Transit agreed to indemnify it for any claims in which Community Transit was partially but not completely negligent, regardless of any negligence by First Transit.² But nothing in the indemnity provision clearly spells out that First Transit would indemnify Community Transit even when First Transit was fault free. We adhere to the general rule that an indemnification agreement will not be construed to indemnify the indemnitee against losses resulting from its own negligence unless this intent is expressed in clear and unequivocal terms. And because such agreements are not favored, they are strictly construed against the indemnitee. Strictly construing indemnity agreements such as this one ensures that the indemnitor has fair notice that it may be required to indemnify the other contracting party for that party’s own negligence even though the indemnitor may have been fault free.³ See McDowell v.

² Community Transit also relies on Northern Pacific Railway Co. v. National Cylinder Gas, 2 Wn. App. 338, 467 P.2d 884 (1970), which involved an indemnity agreement with similar language to the language present here. But the critical language triggering indemnity in that case was the “arising or growing out of” and “caused or occasioned by” language, not the “sole negligence” language. N. Pac., 2 Wn. App. at 343. Northern Pacific is also distinguishable because in that case, there was no finding that the indemnitee’s own negligence contributed to the accident whereas here, the parties stipulated that Community Transit’s negligence was a partial cause of the accident.

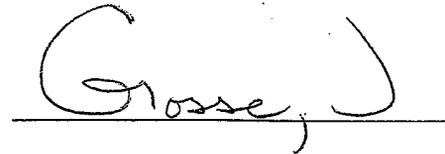
³ In Hughes, the indemnity agreement clearly stated that the tenant would have to indemnify the landlord for claims in connection with the tenant’s use of the premises “whether or not caused by [the landlord’s] negligence.” Hughes, 104 Wn.2d at 153 (emphasis omitted). This language gave fair notice to the tenant that it would be required to indemnify the landlord even if the claim was caused solely by the landlord’s negligence and the tenant was blameless. In contrast, the “sole negligence” clause here expressly rejects indemnification for claims caused solely by the indemnitee’s

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Austin Co., 105 Wn.2d 48, 53, 710 P.2d 192 (1985). If Community Transit intended to allocate the risk of a significant loss to First Transit under the circumstances present here, it must say so in clear and unequivocal terms. Because the indemnity provision lacks such language, we affirm.



WE CONCUR:



negligence. Thus, it does not provide clear notice that First Transit will be required to indemnify even in the absence of fault on its part.

APPENDIX B

Second College Edition

The
**American Heritage
Dictionary**

guished from a commissioned officer. **3.** An active, loyal, and militant follower. **4.** A sexually undeveloped form of certain ants and termites, having the jaws specialized to serve as fighting weapons. —*intr.v.* -diered, -dier-ing, -diers. **1.** To be or serve as a soldier. **2.** To make a show of working in order to escape punishment. [ME *soudeour*, mercenary < OFr. *soudier* < *soude*, pay < Lat. *solidus*, solidus.]

sol-dier-ly (sōl'jər-lē) *adj.* Of, pertaining to, or befitting a soldier.

soldier of fortune *n.* One who will serve in any army for personal gain or love of adventure.

soldiers' home *n.* A government-funded institution for the care of armed forces veterans.

sol-dier-y (sōl'jə-rē) *n., pl. -ies.* **1.** Soldiers collectively. **2.** A body of soldiers. **3.** The military profession.

sold-out (sōld'out') *adj.* Having all tickets or accommodations completely sold, esp. ahead of time.

sole¹ (sōl) *n.* **1.** The undersurface of the foot. **2.** The undersurface of a shoe or boot. **3.** The part on which something rests while standing, esp.: **a.** The bottom surface of a plow. **b.** The bottom surface of the head of a golf club. —*tr.v.* **soled, sol-ing, soles.** **1.** To furnish (a shoe or boot) with a sole. **2.** To put the sole of (a golf club) on the ground, as in preparing to make a stroke. [ME < OFr. *solea*, sandal < *solum*, bottom.]

sole² (sōl) *adj.* **1.** Being the only one; single: *His sole purpose was to succeed.* **2.** Of or pertaining to only one individual or group; exclusive: *The court has the sole right to decide.* **3. Law.** Single or unmarried. [ME, alone < OFr. *sol* < Lat. *solus*.]

sole³ (sōl) *n., pl. sole or soles.* **1.** Any of various chiefly marine flatfishes of the family Soleidae, related to and resembling the flounders, esp. any of several European species, such as *Solea solea*, valued as food fishes. **2.** Any of various flatfishes. [ME < OFr. < Lat. *solea*, sandal, flatfish < *solum*, bottom.]

sole-cism (sōl'i-siz'əm, sō'li-) *n.* **1.** A nonstandard usage or grammatical construction. **2.** A violation of etiquette. **3.** An impropriety, mistake, or incongruity. [Lat. *soloecismus* < Gk. *soloikismos* < *soloikos*, speaking incorrectly, after *Soloi*, an Athenian colony in Cilicia where a substandard dialect was spoken.] —**sol'e-cist** *n.* —**sol'e-cis'tic** *adj.*

sole-ly (sōl'lē, sō'lē) *adv.* **1.** Alone; singly: *solely responsible.* **2.** Entirely; exclusively: *did it solely for love.*

sol-emn (sōl'əm) *adj.* **1.** Marked by deep earnestness; grave: *a solemn voice.* **2.** Of impressive and serious nature: *a solemn occasion.* **3.** Performed with full ceremony: *a solemn High Mass.* **4.** Invoking the force of religion; sacred: *a solemn vow.* **5.** Gloomy; somber. [ME *solempne* < OFr. < Lat. *sollemnis*, established, customary.] —**sol'emn-ly** *adv.* —**sol'emn-ness** *n.*

so-lem-ni-ty (sə-lēm'nī-tē) *n., pl. -ties.* **1.** The condition or quality of being solemn. **2.** A solemn observance or proceeding.