

**FILED: July 24, 2013**

IN THE COURT OF APPEALS OF THE STATE OF OREGON

PACIFICORP,  
an Oregon corporation,  
Plaintiff-Respondent,

v.

SIMPLEXGRINNELL, LP,  
a Delaware limited partnership,  
Defendant-Appellant.

Multnomah County Circuit Court  
090303793

A148167

Leslie M. Roberts, Judge.

Submitted on May 29, 2013.

On appellant's petition for reconsideration filed May 29, 2013, and respondent's response to petition for reconsideration filed June 5, 2013. Opinion filed May 15, 2013. 256 Or App 665, \_\_\_ P3d \_\_\_ (2013).

Anna S. Raman and Preg O'Donnell & Gillette PLLC, and Charles C. Eblen and Shook, Hardy & Bacon LLP, Missouri, for petition.

Bruce L. Campbell and Miller Nash LLP, for response.

Before Schuman, Presiding Judge, and Wollheim, Judge, and Nakamoto, Judge.

NAKAMOTO, J.

Reconsideration allowed; former opinion adhered to as modified.

1                    NAKAMOTO, J.

2                    Defendant petitions for reconsideration of our decision concluding that the  
3 indemnification clause in the parties' contract would not entitle plaintiff to recover  
4 attorney fees in an action between the parties for breach of contract and affirming the trial  
5 court's denial of defendant's request for attorney fees under the reciprocity statute, ORS  
6 20.096. *PacifiCorp v. SimplexGrinnell, LP*, 256 Or App 665, \_\_\_ P3d \_\_\_ (2013).  
7 Defendant contends that we arrived at the wrong conclusion because, in several of our  
8 hypothetical examples, we incorrectly assumed that the indemnification clause applies to  
9 actions for plaintiff's negligent or wrongful acts. In response, plaintiff suggests that our  
10 opinion "appears to have transposed the placement of plaintiff and defendant" in our  
11 hypotheticals, but it contends that we should deny the petition because that error was  
12 immaterial. Although we agree that the error was immaterial to our disposition, we allow  
13 reconsideration and, with the modification set out below, adhere to our original opinion  
14 and disposition.

15                    Defendant notes that our opinion, in two instances, applied defendant's  
16 interpretation of the contract to a hypothetical in which defendant files an action against  
17 plaintiff. Defendant correctly notes that the indemnification clause only applies to  
18 actions by plaintiff for defendant's negligent or wrongful acts. The indemnification  
19 clause allows plaintiff to recover "costs and damages of every kind and description,  
20 including attorneys' fees and/or litigation expenses, brought or made against or incurred  
21 by [plaintiff] \* \* \* resulting from or arising out of *any negligence or wrongful acts of*

1 *[defendant]*[".] (Emphasis added.) Plaintiff acknowledges that the indemnification  
2 clause only applies to actions resulting from or arising out of defendant's negligence or  
3 wrongful acts but observes that our opinion "appears to have transposed the placement of  
4 plaintiff and defendant" in our hypotheticals. Plaintiff argues that, if we transposed the  
5 parties in our hypotheticals, applying defendant's construction of the indemnification  
6 clause would still lead to absurd results; under that construction, regardless of the merits  
7 of an action by plaintiff, defendant would have an obligation to indemnify plaintiff and to  
8 pay its attorney fees.

9           We agree with plaintiff. Our transposition of the parties in the  
10 hypotheticals has no effect on our holding, but to prevent any misunderstanding of our  
11 reasoning, we modify our opinion in two respects. In our previous opinion, we stated:

12           *"If defendant files a breach of contract action against plaintiff, then, under*  
13 *defendant's interpretation of the terms of the indemnification clause,*  
14 *defendant must 'indemnify, defend, and hold harmless' plaintiff. In*  
15 *practical terms, regardless of the merits or outcome of defendant's claims*  
16 *against plaintiff, defendant would be required to indemnify plaintiff.*  
17 *Simply stated, defendant could not obtain relief on a first-party claim*  
18 *against plaintiff. Defendant's interpretation leads to an unreasonable result,*  
19 *which the parties likely did not intend."*

20 256 Or App at 672 (emphasis added). We revise the emphasized portions so that the  
21 passage reads as follows:

22           *"If plaintiff files a breach of contract against defendant, then, under*  
23 *defendant's interpretation of the terms of the indemnification clause,*  
24 *defendant must 'indemnify, defend, and hold harmless' plaintiff. In*  
25 *practical terms, regardless of the merits or outcome of plaintiff's claims*  
26 *against defendant, defendant would be required to indemnify plaintiff.*  
27 *Defendant's interpretation leads to an unreasonable result, which the parties*  
28 *likely did not intend."*

1                   We also stated in a second passage of our original opinion:

2                   "We disagree with defendant that subparagraph (a) renders its  
3 construction of the indemnity clause plausible. As we stated above,  
4 applying defendant's interpretation to a direct action between the parties  
5 would lead to an absurd result. The same holds true under subparagraph  
6 (a). If *defendant* filed a direct action against *plaintiff* for loss of or damage  
7 to *defendant's* property, defendant would be required to 'defend, indemnify,  
8 and hold harmless' plaintiff for such damage, even if plaintiff bore  
9 significant responsibility for causing the damage. Under subparagraph (a),  
10 defendant once again would be on both sides of the legal action in a claim  
11 *against* plaintiff. That interpretation is not sensible."

12 256 Or App at 672-73 (emphasis added). On reconsideration, we similarly transpose the  
13 references to the parties and revise the emphasized portions of the second passage so that  
14 it reads as follows:

15                   "We disagree with defendant that subparagraph (a) renders its  
16 construction of the indemnity clause plausible. As we stated above,  
17 applying defendant's interpretation to a direct action between the parties  
18 would lead to an absurd result. The same holds true under subparagraph  
19 (a). If plaintiff filed a direct action against defendant for loss of or damage  
20 to plaintiff's property, defendant would be required to 'defend, indemnify,  
21 and hold harmless' plaintiff for such damage, even if plaintiff bore  
22 significant responsibility for causing the damage. Under subparagraph (a),  
23 defendant once again would be on both sides of the legal action in a claim  
24 by plaintiff. That interpretation is not sensible."

25 We adhere to our opinion, as modified.

26                   Reconsideration allowed; former opinion adhered to as modified.