IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

BENEVOLENT & PROTECTIVE ORDER OF ELKS OF THE UNITED STATES, INC., a foreign corporation, Appellant, v. LARRY and JANE DOE ZIEGLER, a Marital community, Respondents.	No. 38160-5-II UNPUBLISHED OPINION

Houghton, J. — The Benevolent & Protective Order of Elks of the United States, Inc., filed an indemnity claim against Larry and Jane Doe Ziegler under a commercial lease after a fire that started in the Zieglers' leased space damaged other parts of the Elks-owned building. The Elks appeal a trial court order granting the Zieglers' motion for summary judgment. We affirm.

FACTS

The Zieglers owned and operated the Camera Corner in a ground floor retail space leased from the Elks. On December 9, 2003, a fire started in the Camera Corner and caused extensive damage to other parts of the Elks building. The Elks had full insurance coverage for the loss. The Zieglers had insurance for their leased premises only.

The Port Angeles Fire Department's fire investigation report described the fire's cause as undetermined but noted that the fire most likely resulted from an electrical fault in one of the

electrical components found in the area. The CASE Forensics Corporation took custody of the fire evidence. Douglas Gotschall, CASE's senior electrical engineer, reviewed the evidence and could not determine the fire's ignition source. Kevin Lewis, CASE's principle engineer, also could not identify the fire's probable source.

The Elks retained MDE, Inc., to investigate the fire. Michael Fitz, an MDE engineer, reviewed the fire investigation reports. He eliminated as potential causes all accidental causes except an electrical cord underneath a refrigerator. It appeared to him as though someone had placed the refrigerator directly on the cord. He visited CASE to look for wiring or remnants of the electrical cord but could not find any.

The Elks sued the Zieglers in late 2006. The Elks claimed the Zieglers breached their common law obligation to maintain the Camera Corner space by exercising ordinary care and by taking all reasonable steps to prevent a fire. The Elks also claimed that the Zieglers breached their contractual obligation to indemnify the Elks for all damages "arising out of any occurrence in, upon or at the building occasioned in whole or in part by any act or omission" of the Camera Corner. Clerk's Papers (CP) at 198.

During discovery, Fitz had another opportunity to review the evidence CASE held. During this visit, he identified the conductors that made up the electrical cord from underneath the refrigerator. He found no electrical anomaly involving the cord and could not determine that the cord "most probably" started the fire. CP at 60. His opinion remained unchanged, that is, that the fire started inside the Camera Corner and "most probably" originated in the northwest corner of the space in an office area near the refrigerator.

The Zieglers moved for summary judgment. They raised three arguments, namely that (1) no evidence supported the Elks' negligence and contractual indemnity claims that the Zieglers' acts or omissions caused the fire; (2) the indemnity provision in the lease between the parties applied only to third party claims, not to direct claims by a landlord against its tenant; and (3) the Elks waived any claims against the Zieglers under the lease agreement terms.

Three lease provisions under the heading, "DAMAGES AND INSURANCE," are primarily at issue here:

> A. Tenant will indemnify Landlord and save him harmless from and against any and all claims actions, damages, liability and expense arising from or out of any occurrence, in[,] upon or at the leased premises, or the occupancy or use by Tenant of the leased premises or part thereof, or accasioned wholly or in part by an act if omission of the Tenant, its agents, contractors, employees, servants, Lessees or concessionaires. In case Landlord shall, without fault on his part, be made a party to any litigation commenced by or against Tenant, then Tenant shall proceed and hold Landlord harmless and shall pay all costs, expenses and reasonable attorney's fees that may be incurred or paid by the Landlord in enforcing the covenants and agreements of this lease.
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> B. Tenant agrees to provide, pay for and maintain a policy or policies of public liability insurance with respect to the leased premises in standard form issued by a company or companies acceptable to Landlord insuring Landlord and Tenant with minimum limits of liability of $150,000.00 and $300,000.00 in respect to bodily injury or death, and $50,000.00 in respect to property damage.
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> C. For and in consideration of the execution of this lease by each of the parties hereto, Landlord and Tenant hereby release and relieve the other and waive their entire claim of recovery for loss or damage to the property arising out of the incident to fire, lightning and the perils included in the extended coverage endorsement in, on, or about the demised premises, whether due to the negligence of any of said parties, their agents or employees or otherwise. Any increased premium charge caused by the provision shall be paid by the Tenant.

CP at 139.

After the Elks conceded at argument below that it could not prove a claim based on a tort theory, the trial court granted summary judgment in favor of the Zieglers on that claim. The trial

court also determined that (1) the indemnity clause under 6-A covers third party claims only; (2) the relatively low insurance limits required under Section 6-B suggested the parties did not contemplate that the tenant would be responsible for the damage in this case; and (3) the clearly ambiguous Section 6-C waived any landlord claims against the tenant here. The Elks appeal.

ANALYSIS

The Elks contend that the trial court erred in granting summary judgment in favor of the Zieglers. It raises several arguments based on the lease.

When reviewing a summary judgment order, we engage in the same inquiry as the trial court. *Tyrrell v. Farmers Ins. Co.*, 140 Wn.2d 129, 132-33, 994 P.2d 833 (2000). Summary judgment is appropriate only if the pleadings, affidavits, depositions, and admissions on file demonstrate the absence of any genuine issues of material fact, entitling the moving party to a judgment as a matter of law. CR 56(c). We consider all facts submitted and all reasonable inferences from them in the light most favorable to the nonmoving party. *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 3, 721 P.2d 1 (1986).

When interpreting indemnity provisions, we apply the fundamental rules of contract construction. *MacLean Townhomes, L.L.C. v. America 1st Roofing & Builders, Inc.*, 133 Wn. App. 828, 831, 138 P.3d 155 (2006). We start with the parties' intent when interpreting indemnity provisions. *Scott Galvanizing, Inc. v. Nw. EnviroServices, Inc.*, 120 Wn.2d 573, 580, 844 P.2d 428 (1993). We derive the parties' intent from the actual language of the agreement. We view the contract as a whole, along with the subject matter and objective of the contract, the circumstances surrounding its making, the subsequent acts and conduct of the parties, and the

reasonableness of the interpretations the parties advocated. *Scott*, 120 Wn.2d at 580. We may not adopt contract interpretations that render terms meaningless or ineffective. *Seattle-First Nat'l Bank v. Westlake Park Assocs.*, 42 Wn. App. 269, 274, 711 P.2d 361 (1985).

Causation

The parties dispute whether the Elks must show causation to implicate the indemnity provision. The Elks contend that the provision establishes a duty to indemnify in any situation "[a]rising out of any occurrence in, upon or at the leased premises," even absent proof of causation. Appellant's Br. a 13. But as the Zieglers assert, and the trial court determined, absent an express contractual provision to the contrary, courts will not find indemnification without proof of causation. *See Brame v. St. Regis Paper Co.*, 97 Wn.2d 748, 649 P.2d 836 (1982); *Jones v. Strom Constr. Co.*, 84 Wn.2d 518, 527 Wn.2d 1115 (1974). Here, the Elks conceded that it cannot show proof of causation and its argument fails.[1]

Waiver of Subrogation

The Elks further contend that the trial court erred in holding that the Elks' lease waived its right to recover from the Zieglers. The trial court found the waiver provision to be ambiguous and construed it against the Elks. Faced with an ambiguous lease provision, we construe it against the drafter. *Berg v. Hudesman*, 115 Wn.2d 657, 677, 801 P.2d 222 (1990).

The Elks argue that this provision is not ambiguous and is limited to damage the fire caused to the ground floor space the Camera Corner occupied, not to the damage to the rest of the building. The Elks further argue that the term "property" is defined by the lease as " 'the

[1] Because we hold that the indemnity provision does not apply where the Elks cannot show causation, we do not address the Elks' other indemnification arguments.

following described property: 135 E. First Street, Port Angeles, Washington being a portion of the street floor of [the] building situate on the south 90 feet of lots 18 and 18, Block 16, Norman R. Smith's Subdivision of the Townsite of Port Angeles.' " Appellant's Br. at 24 (alternation in original).

The Zieglers counter that the provision is ambiguous because the lease does not define "property," which is used only as a general term from which the specific premises of the lease is defined. The Zieglers assert that the waiver applies to any property " 'about the demised premises,' " which includes the rest of the building. Resp't's Br. at 22. To support this assertion, the Zieglers reference paragraph 7 of the lease, which states in part:

> Tenant will make all other necessary and proper repairs to the leased premises; and will at the expiration of the term, or sooner termination of this lease quit and surrender the leased premises without notice and in good order, condition and repair; normal wear and tear, *damage by fire, the elements, or other catastrophe excepted.*

CP at 139 (emphasis added).

Contrary to the Elks' argument, the lease does not clearly define the term "property." Thus, the waiver provision is ambiguous, and we construe it against the Elks.[2]

COSTS

The Zieglers request costs under RAP 14.2. Because they prevail, we award costs upon their compliance with RAP 18.1.

[2] Further, the lease provision that exempts the tenant from returning the premises in good condition in the case of fire damage and the fact that the Elks carried an insurance policy for the damage further suggests that the Elks intended to waive its right to recover from the Zieglers.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

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Houghton, J.

We concur:

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Quinn-Brintnall, J.

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Van Deren, C.J.