No. 83795-3

STEPHENS, J. (dissenting)—This case turns on whether the parties' indemnity provision clearly and unequivocally required First Transit to indemnify against losses caused by Community Transit's negligence. The majority holds it does, relying on decisions from other jurisdictions. Whatever the rule may be in other jurisdictions, *this* court has held that indemnity provisions covering losses that result from the indemnitee's own negligence "are not favored and are to be clearly drawn and strictly construed, with any doubts therein to be settled in favor of the indemnitor." *Jones v. Strom Constr. Co.*, 84 Wn.2d 518, 520, 527 P.2d 1115 (1974). Our reluctance to find that parties intend to indemnify against losses caused by the indemnitee's negligence stems from our desire to "prevent injustice, and to insure that a contracting party has fair notice that a large and ruinous award can be assessed against it solely by reason of negligence attributable to the other contracting party." *McDowell v. Austin*, 105 Wn.2d 48, 53, 710 P.2d 192 (1985)

(citing *Joe Adams & Son v. McCann Constr. Co.*, 475 S.W.2d 721, 722 (Tex. 1971)).

Under Washington law, only "'clear and unequivocal'" language showing the parties' intent to cover losses resulting from the indemnitee's concurrent negligence will overcome this reluctance. *See McDowell*, 105 Wn.2d at 52-53 (quoting Maurice T. Brunner, Annotation, *Liability of Subcontractor Upon Bond or Other Agreement Indemnifying General Contractor Against Liability for Damage to Person or Property*, 68 A.L.R.3d 7, 69 (1976)). "[F]or an indemnitor to be found responsible for the indemnitee's own negligence,"—sole or concurrent—"the agreement must be clearly spelled out." *Nw. Airlines v. Hughes Air Corp.*, 104 Wn.2d 152, 158, 702 P.2d 1192 (1985).

Applying this standard, it is clear the indemnity provision at issue falls short of the unequivocal language Washington law requires. Therefore, I respectfully dissent.

ANALYSIS

The majority disregards this court's move toward a narrow interpretation of indemnity provisions based on the concerns articulated in *McDowell*. This disregard is evidenced by the majority's citation to *Cope v. J.K. Campbell & Associates*, 71 Wn.2d 453, 429 P.2d 124 (1967), as supporting its conclusion that the parties here clearly and unequivocally intended to indemnify against losses caused by Community Transit's negligence. Majority at 12 (citing *Cope*, 71 Wn.2d

at 454). Importantly, in cases after *Cope* we have moved away from our previous willingness to generously read indemnity provisions. A brief sketch of this history illustrates why the majority's citation undercuts its view.

Historically, courts identified "a clear and unequivocal intention to indemnify for indemnitee's own negligence by looking at the entire contract or at the all-encompassing language of the indemnification clause." *Nw. Airlines*, 104 Wn.2d at 155. For example, in *Tucci & Sons, Inc. v. Madsen, Inc.*, 1 Wn. App. 1035, 467 P.2d 386 (1970), *overruled by Jones*, 84 Wn.2d at 523), a subcontractor entered into an agreement to perform electrical services for the general contractor. The agreement contained an indemnity provision that required the subcontractor (indemnitor) to reimburse the general contractor (indemnitee) for all losses "'arising out of, in connection with, or incident to'" the subcontractor's performance of the contract. *Tucci*, 1 Wn. App. at 1036. One of the subcontractor's workers was injured on the job as a result of the general contractor's negligence, and the worker sued the general contractor. The general contractor tendered the defense of the action to the subcontractor under the indemnity provision. The court concluded that based on the "'sweeping and all-embracing'" language of the indemnity provision, the losses resulting from the general contractor's own negligence were covered, even though they were not expressly mentioned in the indemnity provision. *Id.* at 1038. The subcontractor was thus obligated to indemnify the general contractor for losses resulting from the general contractor's own negligence.

We later moved away from such an expansive reading of the broad terms of an indemnity clause. In *Jones*, we interpreted an indemnity clause identical to the one analyzed in *Tucci*, which required the indemnitor to reimburse the indemnitee for all losses "'arising out of, in connection with, or incident to'" the indemnitor's performance of the contract. *Jones*, 84 Wn.2d at 521. Overruling *Tucci*, we concluded that the parties' intent to indemnify for the indemnitee's own negligence was not clear and unequivocal, despite the clause's broad and seemingly all-inclusive language. *Id.* at 521-23. We did not purport to specify the language that would be necessary to demonstrate the parties' clear and unequivocal intent but merely noted that failing to mention the indemnitee's conduct at all in the indemnity clause fell short of providing the requisite clarity. *See id* at 521-22.

Following *Jones*, we have consistently required the parties' intent to cover losses caused by the indemnitee's own negligence to be manifest in the contractual language. We have endorsed a stringent analysis that requires specific language showing an intent to indemnify for the indemnitee's own negligence. *Nw. Airlines*, 104 Wn.2d at 156. This intention must be "clearly spelled out." *McDowell*, 105 Wn.2d at 54. Our precedent demonstrates that "clear and unequivocal" means just what it says: the intent to indemnify for losses caused by the indemnitee's own negligence must be *expressly* and *specifically* stated in the indemnity provision.

Notwithstanding our stringent test, the majority finds this intent by insinuation. Because the indemnity provision specifically excluded coverage for

situations in which Community Transit's sole negligence caused the loss, the majority reasons it must have included circumstances in which the loss was caused by Community Transit's concurrent negligence. Majority at 11.

This holding is contrary to our requirement that indemnification provisions be express and specific before we will find coverage for losses stemming from the indemnitee's negligence. *See McDowell*, 105 Wn.2d at 54; *Nw. Airlines*, 104 Wn.2d at 155-56, 158; *Jones*, 84 Wn.2d at 521-23. Washington adheres to the view that a contract "cannot define what is included in an indemnity provision by stating what obligations are outside that indemnity agreement." *Quorum Health Res., LLC v. Maverick County Hosp. Dist.*, 308 F.3d 451, 462 (5th Cir. 2002); *see also Atl. Richfield Co. v. Petroleum Pers., Inc.*, 768 S.W.2d 724, 725 (Tex. 1989) (contract indemnifying against all claims except those resulting from "the sole negligence of [the indemnitee]" did not cover indemnitee's concurrent negligence because "it specifically stated what was not to be indemnified" and it required the indemnitor "to deduce his full obligation from the sole negligence exception" (citing *Singleton v. Crown Cent. Petroleum Corp.*, 729 S.W.2d 690 (Tex. 1987)). The agreement between Community Transit and First Transit lacked the requisite clarity and specificity, and it therefore should not be construed to cover losses resulting from Community Transit's own negligence.

In short, the majority would have us return to the old approach and apply the "clear and unequivocal" rule broadly. Contrary to the majority's view, *McDowell*'s

isolated citation to *Cope* did not thrust us back to the pre-*Jones* era of construing indemnity provisions based on their broad and all-encompassing language. Nor does "overwhelming authority" from other jurisdictions compel us to reverse the trend of our own precedent, especially because at least two of the jurisdictions the majority relies on have taken the same narrow approach that we have used. *See Leadership Hous. Sys. of Fla., Inc. v. T&S Elec., Inc.*, 384 So. 2d 733, 734 (Fla. Dist. Ct. App. 1980) (contract did not clearly cover indemnitee's concurrent negligence where it indemnified for all losses "'[e]xcept due to [indemnitee's] sole negligence'" (emphasis omitted)); *Guy F. Atkinson Co. v. Schatz*, 102 Cal. App. 3d 351, 354, 358-59, 161 Cal. Rptr. 436 (1980) (contract did not clearly and explicitly cover indemnitee's concurrent negligence where it indemnified all losses "unless due solely to [indemnitee's] negligence").

Indeed, this trend toward a narrower application of the "clear and unequivocal" rule highlights a common division in approaches among courts of various jurisdictions. The rationale for adopting a narrow approach was articulated by the Texas Supreme Court when it shifted to a stricter version of the "clear and unequivocal" rule that it calls the "express negligence doctrine":

> As we have moved closer to the express negligence doctrine, the scriveners of indemnity agreements have devised novel ways of writing provisions which fail to expressly state the true intent of those provisions. The intent of the scriveners is to indemnify the indemnitee for its negligence, yet be just ambiguous enough to conceal that intent from the indemnitor. The result has been a plethora of law suits to construe those ambiguous contracts. We hold the better policy is to cut through the ambiguity of those provisions and adopt the express negligence doctrine.

Ethyl Corp. v. Daniel Constr. Co., 725 S.W.2d 705, 707-08 (Tex. 1987). Although we have not adopted a different name for the "clear and unequivocal" rule, the definite trend of our precedent has been to narrowly apply the rule. The fact that a contrary approach has been taken in other jurisdictions should not compel us to reverse this trend. Instead, absent "'a clear showing that [our] established rule is incorrect and harmful,'" *State v. Barber*, 170 Wn.2d 854, 863, 248 P.3d 494 (2011) (quoting *In re Rights to Waters of Stranger Creek*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970)), we should remain true to our precedent.

As discussed above, this precedent requires a clear, specific, and explicit statement showing intent to cover an indemnitee's negligence. Because the provision here did not explicitly require indemnification in the event of Community Transit's concurrent negligence, it fell short of our requirements.

In the absence of clear and unequivocal language providing coverage for Community Transit's own negligence, the sole triggering condition under the parties' indemnity provision is First Transit's conduct. Thus, for the indemnity provision to apply, the losses must have been either "'in connection with'" First Transit's work under the contract or "'caused or occasioned . . . by'" First Transit's presence in proximity to Community Transit's property. *Snohomish County Pub. Transp. Benefit Area Corp. v. Firstgroup Am., Inc.*, noted at 152 Wn. App. 1021, 2009 WL 3018749, at *5.

Here, the "in connection with" clause and the "caused or occasioned by"

clause of the indemnity provision suggests that First Transit's conduct in proximately causing the accident can trigger the duty to indemnify. In *Jones*, the indemnity provision granted coverage for losses "'arising out of,' '*in connection with*,' 'or incident to' the [indemnitor's] 'performance' of [the contract]." 84 Wn.2d at 521 (emphasis added). We explained that under the plain language of the provision in that case, indemnity was not triggered unless there was an "act or omission" on the part of the indemnitor that contributed to the losses. *Id.* at 521-22. And such an "act or omission," we noted, required more than the indemnitor's but-for causal connection to the losses; the indemnitor's mere presence at the scene of the accident was not enough to trigger indemnity. *See id.* Likewise, our cases interpreting the phrases "caused by" and "occasioned by" indicate that losses are not caused or occasioned by a condition unless that condition is more than an indirect cause-in-fact of the losses. *See N. Pac. Ry. Co. v. Sunnyside Valley Irrig. Dist.*, 85 Wn.2d 920, 922-23, 540 P.2d 1387 (1975) (interpreting "occasioned by"); *Dirk v. Amerco Mktg. Co. of Spokane*, 88 Wn.2d 607, 610-11, 565 P.2d 90 (1977) (interpreting "occasioned by"); *Scruggs v. Jefferson County*, 18 Wn. App. 240, 244, 567 P.2d 257 (1977) (interpreting "caused by"). Accordingly, if the First Transit bus was not a proximate cause of the accident, the indemnity provision is not triggered.

Here, First Transit's presence at the scene was nothing more than a cause-in-fact of the resulting losses. Indeed, First Transit's contribution to the accident was a

complete fortuity. The proximate causes of the accident were the Honda vehicle and the Community Transit bus, both of which rear-ended the vehicles in front of them. It may be the case that but for the First Transit bus's location in front of the Community Transit bus, the passengers' injuries would not have occurred. However, the First Transit bus's fortuitous presence was not a proximate cause of the accident.[1] It was at most an indirect cause-in-fact of any losses to Community Transit. In short, the First Transit bus simply had the misfortune of being in the wrong place at the wrong time. This chance involvement in the accident did not trigger First Transit's duty to indemnify Community Transit.

CONCLUSION

The concern we expressed in *McDowell* remains: we should read indemnity provisions with the goal of "prevent[ing]" the "injustice" resulting from a broad application of the "clear and unequivocal" rule. *McDowell*, 105 Wn.2d at 53. I believe the majority errs in veering off the course we have charted since *Jones* and in following the contrary approach of other jurisdictions. We should hew closely to our precedent and refuse to find intent to indemnify against losses resulting from an

[1] At the Court of Appeals, First Transit suggested that "in connection with" required not only proximate cause but also negligence on the part of the indemnitor. Br. of Resp't at 13 n.3. In other words, First Transit argued that *Jones*'s "act or omission" requirement is synonymous with negligence. It is true that *Jones*'s use of the phrase "act or omission" suggests some relationship to negligence. *See Jones*, 84 Wn.2d at 520-22. But the touchstone of indemnity is causation, not negligence. *See, e.g., Cont'l Cas. Ins. Co. v. Mun. of Seattle*, 66 Wn.2d 831, 835-36, 405 P.2d 581 (1965). Parties can agree to pin indemnity to the indemnitor's nonnegligent actions that result in claims against the indemnitee. *Id.* Here, it does not matter whether "act or omission" requires negligence, however, because First Transit's conduct was merely a cause-in-fact of the losses, which itself falls short of an "act or omission" under *Jones*. *See Jones*, 84 Wn.2d at 521-22.

indemnitee's negligence unless such intent is specifically and explicitly stated in the parties' contract. Here, it was not. Thus, the indemnification provision does not encompass losses covered by Community Transit's concurrent negligence. Finally, because First Transit was not a proximate cause of Community Transit's losses, the duty to indemnify was not otherwise triggered. The trial court had it right when it granted summary judgment in First Transit's favor. The Court of Appeals had it right when it affirmed. I would affirm the Court of Appeals.

AUTHOR:
Justice Debra L. Stephens

WE CONCUR:

Justice Tom Chambers

Justice Mary E. Fairhurst

Richard B. Sanders, Justice Pro Tem.