

## CLARK COUNTY STAFF REPORT

**DEPARTMENT:** General Services, Risk Management Division

**DATE:** September 3, 2013

**REQUEST:** To approve settlement and payment of the court ordered judgment in the amount of \$300,000.

**CHECK ONE:**                      X   Consent                           CAO

---

### BACKGROUND

In September of 2008, the Estate of Irwin P. Jessen made two deposits totaling \$976,775.55 with Clark County Clerk Parker in connection with Battle Ground Plaza LLC v. Douglas Ray, et al., Clark County Superior Court No. 02-2-00973-9. The two "Notice(s) of cash deposits as Supersedeas Bond" filed in connection with the deposits provided that Clerk Parker was to "place these funds in an interest-bearing trust account to be held as bond to supersede the Supplement Judgment entered in this case during the pendency of the appeal". The funds were to be held "pending return of the mandate in Court of Appeals Cause No. 37791-8-II and thereafter until disbursed pursuant to further order of court or by agreement of the parties."

In accord with these notices, the funds were deposited into an interest bearing account in the Bank of Clark County. The Bank of Clark County subsequently failed and the Federal Deposit Insurance Corporation (FDIC), as Receiver, took over. Clerk Parker was able to recover \$500,000 of the deposited funds with some additional amounts from asset sales.

On January 10<sup>th</sup>, 2012, the Estate filed a case in Clark County Superior Court to recover the remaining \$365,000 in lost funds. (Anderson v. Sherry Parker et al.,) Superior Court 12-2-00049-6. The Estate named Clerk Parker and Hartford (the Bonding Company) as Defendants. On July 27<sup>th</sup>, 2012 The Superior Court held that Clerk Parker was strictly liable for the funds. Hartford was ordered to pay the full sum of the bond, \$250,000, to the Estate. Hartford paid an additional \$50,000 to the Estate to settle any and all remaining claims against Hartford.

Attached is the Order Granting a Judgment against our former elected officer, Sherry Parker, her husband, and under Clark County Code 2.95 and 2.97, County Clerk Sherry W. Parker was within her course and scope, therefore we indemnify her for \$300,000.

### COMMUNITY OUTREACH

Not Applicable.



**BUDGET AND POLICY IMPLICATIONS**

Fund 5040 currently has sufficient fund balance to pay this loss.

**FISCAL IMPACTS**

Yes (see attached form)       No

See attached form.

**ACTION REQUESTED:**

To approve settlement and payment of the court ordered judgment in the amount of \$300,000.

**DISTRIBUTION**

Bob Stevens, Budget Manager  
Mark Gassaway, Deputy Auditor  
Mark McCauley, General Services Director



*Mark R. Wilsdon*

Mark R. Wilsdon  
Risk Manager

Approved: *Tom Mielke*  
CLARK COUNTY  
BOARD OF COMMISSIONERS

*September 3, 2013*  
*SR 179-13*

**FISCAL IMPACT ATTACHMENT**

**Part I: Narrative Explanation**

I. A - This is being paid from the claims fund.

**Part II: Estimated Revenues**

Fund #/Title	Current Biennium		Next Biennium		Second Biennium	
	GF	Total	GF	Total	GF	Total
5040, Liability		300,000				
<b>Total</b>		300,000				

II. Received at the beginning of the Biennium.

### Part III: Estimated Expenditures

#### III. A – Expenditures summed up

Fund #/Title	FTE's	Current Biennium		Next Biennium		Second Biennium	
		GF	Total	GF	Total	GF	Total
5040.000.309.514700.498			300,000				
<b>Total</b>			300,000				

#### III. B – Expenditure by object category

Fund #/Title	Current Biennium		Next Biennium		Second Biennium	
	GF	Total	GF	Total	GF	Total
Salary/Benefits						
Contractual						
Supplies						
Travel						
Other controllables.....498		300,000				
Capital Outlays						
Inter-fund Transfers						
Debt Service						
<b>Total</b>		300,000				

revision date: 10/26/2010

July 23, 2013

**VIA E-MAIL: [chris.horne@clark.wa.gov](mailto:chris.horne@clark.wa.gov)  
AND VIA U.S. MAIL**

Christopher Horne  
Sr. Deputy Prosecuting Attorney  
Clark County Office of the Prosecuting Attorney  
Civil Division  
604 W. Evergreen Blvd.  
P. O. Box 5000  
Vancouver, Washington 98666-5000

Re: *Hartford Fire Insurance Company v. Parker*  
U.S. District Court Case No. C13-5013 RJB

Dear Mr. Horne:

As you are likely aware, the U.S. District Court issued its ruling on Hartford's Motion for Summary Judgment on July 18, 2013. The Court's Order on Plaintiff Hartford Fire Insurance Company's Motion for Summary Judgment Against Defendant Sherry W. Parker ("Order") requires Mrs. Parker to indemnify and pay Hartford \$300,000 for the amounts paid by Hartford to the Estate as a result of the underlying lawsuit. A copy of the Order is attached for your reference.

Hartford would prefer not to have to enforce the judgment against Mrs. Parker directly. Such action should not be necessary since, as expressly acknowledged in the Opposition your office submitted in response to Hartford's Motion for Summary Judgment, Clark County Code 2.97.025 requires the County to indemnify Mrs. Parker.

The purpose of this letter is to ask you to confirm the following: (1) that Clark County intends to honor its obligation to indemnify Mrs. Parker for the judgment; and (2) that the payment will be made without delay. Please communicate the confirmation to me by no later than the close of business on August 9, 2013. If Clark County fails to comply with this deadline, Hartford will be forced to proceed with enforcement of the judgment against Mrs. Parker.

Christopher Horne

July 23, 2013

Page 2

Thank you for your prompt attention to this matter. Please be advised that this correspondence is sent with a full reservation of all of Hartford's rights, whether under the law, in equity, or otherwise, and nothing herein shall be construed as a waiver of any such rights.

Regards,



Todd W. Blischke

TWB:lr

Enclosure

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

HARTFORD FIRE INSURANCE  
COMPANY, a Connecticut corporation,

Plaintiff,

v.

SHERRY W. PARKER, in her official  
capacity as Clark County Clerk; and  
SHERRY W. PARKER and PHILIP A.  
PARKER, individually and as a marital  
community,

Defendants/Third

Party Plaintiffs,

v.

FARMERS INSURANCE EXCHANGE,  
INC., a California corporation,

Third Party Defendant.

CASE NO. 13-5013 RJB

ORDER ON PLAINTIFF

HARTFORD FIRE INSURANCE

COMPANYS MOTION FOR

SUMMARY JUDGMENT AGAINST

DEFENDANT SHERRY W. PARKER

1 This matter comes before the Court on Plaintiff Hartford Fire Insurance Company's  
2 ('Hartford') Motion for Summary Judgment against Defendants Sherry W. Parker, in her official  
3 capacity as Clark County Clerk, and Sherry W. Parker and Philip A. Parker, individually. Dkt.  
4 22. The Court has considered the pleadings filed in support of and in opposition to the motion  
5 and the file herein.

6 On January 7, 2013, Hartford filed this diversity case against Sherry W. Parker, the  
7 publically elected Clark County Clerk from 2007-2011, for indemnification for payment on a  
8 bond, for unjust enrichment, and for negligence. Dkt. 1. Clerk Parker filed an answer and  
9 asserts claims against her insurance company, Farmers Insurance Exchange, Inc., for breach of  
10 contract. Dkt. 12. In the pending motion, Plaintiff Hartford seeks a summary judgment that it is  
11 entitled to indemnity from Clerk Parker. Dkt. 22. For the reasons set forth below, the motion  
12 should be granted.

13 **I. FACTS AND PENDING MOTION**

14 **A. RELEVANT FACTS**

15 On or about April 17, 2001, Hartford issued a Faithful Performance Position Schedule with  
16 Automatic Coverage Bond no. 52BSBT6744, (Bond'), naming Clark County, Washington, as  
17 employer. Dkt. 22-2, at 6-9. The Bond provides:

18 KNOW ALL MEN BY THESE PRESENTS that Hartford Fire Insurance  
19 Company, a corporation duly authorized by law to become surety on bonds in the  
20 State of Connecticut (hereinafter called the Surety), in consideration of an agreed  
21 premium binds itself to pay to Clark County, Washington (hereinafter called  
22 Employer) within sixty (60) days after satisfactory proof thereof, such pecuniary  
23 loss as the Employer shall have sustained by reason or in consequence of the  
24 failure of any Official or Employee (hereinafter called Employees) who may now  
or hereafter occupy and perform the duties of any position named upon the  
schedule of positions attached hereto as a part hereof, during the period  
commencing with the respective date set opposite such positions in said schedule  
and ending with (a) the termination of the suretyship for any employee by his  
dismissal or retirement from the service of the Employer, or (b) by the discovery

1 of default hereunder, or (c) by cancellation by the Employer or the Surety, as  
2 hereinafter provided, faithfully to discharge the duties of his office.

3 *Id.*, at 6. The "County Clerk" appears on the schedule of positions and the amount of the bond for  
4 that position is listed as \$250,000. *Id.*, at 9. Ms. Parker held the elected office of Clark County  
5 Superior Court Clerk from 2007 to 2011. Dkt. 27, at 44.

6 In September of 2008, the Estate of Irwin P. Jessen ("Estate") made two deposits totaling  
7 \$976,775.55 with Clark County Clerk Parker in connection with *Battle Ground Plaza LLC v.*  
8 *Douglas Ray, et al.*, Clark County Washington Superior Court No. 02-2-00973-9. Dkt. 27, at 45.

9 The two "Notice[s] of Cash Deposit as Supersedeas Bond" filed in connection with the deposits  
10 provided that Clerk Parker was to "place these funds in an interest-bearing trust account to be held  
11 as bond to supersede the Supplement Judgment entered in this case during the pendency of the  
12 appeal." Dkt. 27, at 18. The funds were to be held "pending return of the mandate in Court of  
13 Appeals Cause No. 37791-8-II and thereafter until disbursed pursuant to further order of court or  
14 by agreement of the parties." *Id.*

15 In accord with these notices, the funds were deposited into an interest bearing account in  
16 the Bank of Clark County. Dkt. 27, at 45. The Bank of Clark County then failed and the Federal  
17 Deposit Insurance Corporation, as Receiver ("FDIC"), took over. Dkt. 27, at 45. Clerk Parker was  
18 able to recover \$500,000 of the funds the Estate deposited (and some other unspecified portion),  
19 but some of the remaining funds deposited in connection with this case were lost ("lost funds").  
20 Dkt. 27, at 45, 48-49.

21 According to Clerk Parker, the Clark County policies regarding depositing funds of this  
22 nature were followed. Dkt. 27, at 45. Clerk Parker testified that there were no policies in place  
23 to deal with the FDIC's insurance caps on accounts. Dkt. 27, at 45.



1 On January 10, 2012, the Estate filed a case in Clark County Superior Court to recover  
2 around \$365,000 of lost funds. *Anderson v. Sherry Parker, et al.*, Clark County Washington  
3 Superior Court No. 12-2-00049-6. The Estate named Clerk Parker and Hartford (among others)  
4 as Defendants. *Id.* On July 27, 2012, the Superior Court granted the Estate's motion for partial  
5 summary judgment. Dkt. 1, at 14-15. The Superior Court held that Clerk Parker was strictly  
6 liable for the funds. Dkt. 27, at 9-10. Hartford was ordered to pay the full sum of the bond,  
7 \$250,000, to the Estate. Dkt. 1, at 15. Hartford paid an additional \$50,000 to the Estate to settle  
8 any and all remaining claims against Hartford. *Id.*, at 17-22. Hartford has made repeated  
9 requests to Clerk Parker for indemnification for losses under the bond and associated costs. Dkt.  
10 22-1 and 22-2.

11 **B. PENDING MOTION**

12 In the pending motion, Hartford asserts that it is entitled to indemnity from Clerk Parker  
13 because where a surety, here Hartford, is compelled to pay an obligation of the principal, the law  
14 implies a promise on the part of the principal to reimburse the surety. Dkt. 22. Hartford argues  
15 that Clerk Parker is the primary obligor for the lost funds because under Article 11, Section 5 of  
16 the Washington State Constitution, public officials are strictly accountable for all public monies.  
17 *Id.* Accordingly, it seeks summary judgment against Clerk Parker for the \$300,000 it paid in  
18 partial satisfaction of a debt for which she is the primary responsible party. *Id.*

19 Clerk Parker responds and argues that Hartford's right of subrogation is limited by equitable  
20 principles. Dkt. 26. Clerk Parker further asserts that there is no right of subrogation against  
21 Clerk Parker as an insured. *Id.* She further argues that Clark County waived its right of  
22 subrogation against Clerk Parker for actions taken in good faith and in the course and scope of  
23 her duties. *Id.*

1 Hartford replies and argues that Clerk Parker's positions are meritless due to her confusion of  
2 suretyship and insurance. Dkt. 29. It points out that she offers no opposition to Hartford's right  
3 to indemnity, but raises arguments about subrogation rights, a different form of relief. *Id.*  
4 Hartford asserts that Clerk Parker's discussion of equities and 'unclean hands' has no basis in law  
5 or fact and do not bar summary judgment. *Id.* Hartford argues that Clerk Parker's discussion of  
6 the County's subrogation rights against her is not relevant to this motion. *Id.*

7 **II. DISCUSSION**

8 **A. SUMMARY JUDGMENT STANDARD**

9 Summary judgment is proper only if the pleadings, the discovery and disclosure materials  
10 on file, and any affidavits show that there is no genuine issue as to any material fact and that the  
11 movant is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). The moving party is  
12 entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient  
13 showing on an essential element of a claim in the case on which the nonmoving party has the  
14 burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1985). There is no genuine issue  
15 of fact for trial where the record, taken as a whole, could not lead a rational trier of fact to find  
16 for the non moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586  
17 (1986)(nonmoving party must present specific, significant probative evidence, not simply "some  
18 metaphysical doubt?"). *See also* Fed.R.Civ.P. 56(e). Conversely, a genuine dispute over a  
19 material fact exists if there is sufficient evidence supporting the claimed factual dispute,  
20 requiring a judge or jury to resolve the differing versions of the truth. *Anderson v. Liberty*  
21 *Lobby, Inc.*, 477 .S. 242, 253 (1986); *T.W. Elec. Service Inc. v. Pacific Electrical Contractors*  
22 *Association*, 809 F.2d 626, 630 (9<sup>th</sup> Cir. 1987).

1 The determination of the existence of a material fact is often a close question. The court  
2 must consider the substantive evidentiary burden that the nonmoving party must meet at trial—  
3 e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477 U.S. at 254, *T.W. Elect.*  
4 *Service Inc.*, 809 F.2d at 630. The court must resolve any factual issues of controversy in favor  
5 of the nonmoving party only when the facts specifically attested by that party contradict facts  
6 specifically attested by the moving party. The nonmoving party may not merely state that it will  
7 discredit the moving party's evidence at trial, in the hope that evidence can be developed at trial  
8 to support the claim. *T.W. Elect. Service Inc.*, 809 F.2d at 630 (relying on *Anderson, supra*).  
9 Conclusory, non specific statements in affidavits are not sufficient, and "missing facts" will not be  
10 "presumed." *Lujan v. National Wildlife Federation*, 497 U.S. 871, 888-89 (1990).

#### 11 B. SURETYSHIP AND INDEMNIFICATION IN WASHINGTON

12 As a federal court sitting in diversity, this court is bound to apply state law. *State Farm Fire*  
13 *and Casualty Co. v. Smith*, 907 F.2d 900, 901 (9th Cir. 1990). In applying Washington law, the  
14 Court must apply the law as it believes the Washington Supreme Court would apply it.  
15 *Gravquick A/S v. Trimble Navigation Intern. Ltd.*, 323 F.3d 1219, 1222 (9th Cir. 2003). "[W]here  
16 there is no convincing evidence that the state supreme court would decide differently, a federal  
17 court is obligated to follow the decisions of the state's intermediate appellate courts." *Vestar*  
18 *Dev. II, LLC v. Gen. Dynamics Corp.*, 249 F.3d 958, 960 (9th Cir.2001) (quoting *Lewis v. Tel.*  
19 *Employees Credit Union*, 87 F.3d 1537, 1545 (9th Cir.1996) (internal quotation marks omitted)).

20 Under Washington law, where a "surety performs the obligation of the principal, or where the  
21 surety's property is used to satisfy the principal's duty, the principal is required to reimburse the  
22 surety." *Honey v. Davis*, 131 Wash.2d 212, 218 (1997). A "written contract is not necessary to  
23 create a principal-surety relationship." *Id.* "In such cases, there is an implied promise by the

1 principal to indemnify the surety notwithstanding the absence of an express written agreement.”

2 *Id.*

3 It is undisputed that Hartford is the surety here. Further, Clerk Parker, the principal, does not  
4 dispute that she is under Washington law strictly liable for the lost funds. Article 11 Section 5 of  
5 the Washington State Constitution provides that:“The legislature, by general and uniform laws,  
6 shall provide for the election of . . . county clerks . . . and . . . shall provide for the strict  
7 accountability of such officers for all fees which may be collected by them and for all public  
8 moneys which may be paid to them, or officially come into their possession.” Further, RCW  
9 36.16.050 requires that all county officials“shall furnish a bond conditioned that he or she will  
10 faithfully perform the duties of his or her office and account for and pay over all money which  
11 may come into his or her hands by virtue of his or her office.” It is undisputed that Hartford paid  
12 \$300,000 on the bond for the principal, Clerk Parker, to satisfy her duty regarding the money  
13 which came‘into . . . her hands by virtue of . . . her office’ as a result of the *Battle Ground Plaza*  
14 *LLC v. Douglas Ray, et al.*, Clark County Washington Superior Court No. 02-2-00973-9  
15 litigation. RCW 36.16.050. Accordingly, Hartford argues it is entitled to reimbursement from  
16 Clerk Parker for the \$300,000.

17 In her Response, Clerk Parker argues that Hartford’s right of subrogation is limited by  
18 equitable principles, and equitable principles do not support Hartford’s claim of subrogation  
19 because it failed to take action to protect Clark County or Clerk Parker from the Estate’s claims.  
20 Dkt. 26. She also argues that the balance of equities weigh in favor of Clerk Parker because she  
21 took all reasonable actions to recover the full amounts placed on deposit with the court. *Id.*

22 Hartford properly points out that Clerk Parker offers no opposition to Hartford’s right to  
23 indemnity, but raises arguments about subrogation rights, which are similar but not the same

1 | rights. Dkt. 29. Hartford notes that indemnity applies “where one party, without fault, is  
2 | compelled to pay damages cause by the fault of another.” Dkt. 29 (citing *Newcomer v. Masini*, 45  
3 | Wn.App.284, 286-287 (1986). Subrogation, in contrast, is the substitution of another “in place of  
4 | the creditor as a matter of course, without any express agreement to that effect.” *Id.* (quoting  
5 | *Newcomer* at 286). Hartford argues that it is not seeking subrogation as a remedy in this  
6 | motion, but seeks to be indemnified in accord with Washington law, and that in any event, Clerk  
7 | Parker’s discussion of equities and “unclean hands” does not bar summary judgment. *Id.* Clerk  
8 | Parker argues that Hartford’s failure to meaningfully defend her against the Estate’s claims should  
9 | weigh against granting summary judgment. First, Clerk Parker fails to point to provision in the  
10 | bond that requires Hartford to defend either her or the County. “[A] surety’s liability on its bond  
11 | is determined by the terms of the bond.” *Joint Administrative Board of Plumbing and Pipefitting*  
12 | *Industry v. Fallon*, 89 Wn.2d 90, 94 (1977). She points to no case law that a surety, as opposed  
13 | to an insurer in a liability insurance contract, has a duty to defend her. Moreover, the record  
14 | indicates that Hartford did participate in her defense, even though they did not prevail in  
15 | opposing the summary judgment motion. Clerk Parker’s argument that her attempts at recovering  
16 | the funds entrusted to her should weigh against Hartford’s claims for indemnification are likewise  
17 | unavailing. There is no evidence that Hartford participated in any wrong doing as is implied by  
18 | Clerk Parker’s general “unclean hands” assertion. These arguments fail to raise issues of material  
19 | fact or show that Hartford is not entitled to a judgment as a matter of law.

20 | Clerk Parker argues that as an insured, Hartford has no right of subrogation against her. Dkt.  
21 | 26. She conflates suretyship and insurance contract law. She fails to cite any authority that  
22 | supports her position that as a surety, Hartford has no right of indemnity against her as the  
23 | principal.

1 Clerk Parker further asserts that Clark County waived its right of subrogation against her for  
2 actions taken in good faith and in the course and scope of her duties. Dkt. 26. She does not  
3 explain how this argument is relevant to Hartford's right of indemnity against her. *Id.* She has  
4 not shown that this, in some manner, creates material issues of fact or bars a judgment in favor of  
5 Hartford as a matter of law. Hartford's Motion for Summary Judgment (Dkt. 22) should be  
6 granted.

7 The Court is mindful of the harsh result of this Order. This Order is limited to the motion  
8 before the Court. It is not intended, in any manner, to affect any claims the Parkers may have  
9 against Clark County or Farmers Insurance Exchange, Inc..

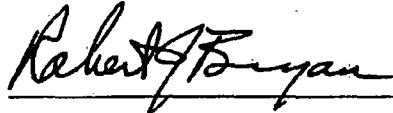
10 **III. ORDER**

11 Therefore, it is hereby **ORDERED** that:

- 12 • Plaintiff Hartford Fire Insurance Company's Motion for Summary Judgment  
13 against Defendant Sherry W. Parker (Dkt. 22) **IS GRANTED**;
- 14 • Defendant Sherry W. Parker, in her official capacity as Clark County Clerk, and  
15 Sherry W. Parker and Philip A. Parker, individually, **SHALL** indemnify Plaintiff  
16 Hartford Fire Insurance Company for the \$300,000 it paid on the bond; and
- 17 • The Clerk is directed to enter judgment against Sherry W. Parker, in her official  
18 capacity as Clark County Clerk, and Sherry W. Parker and Philip A. Parker,  
19 individually in favor of Hartford Fire Insurance Company for \$300,000.

1 The Clerk is directed to send uncertified copies of this Order to all counsel of record and  
2 to any party appearing pro se at said party's last known address.

3 Dated this 18<sup>th</sup> day of July, 2013.

4 

5  
6 ROBERT J. BRYAN  
United States District Judge

7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24