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SUPREME COURT
STATE OF WASHINGTON
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No. 102246-8

Court of Appeals No. 83787-7-I

SUPREME COURT
OF THE STATE OF WASHINGTON

KING COUNTY,

Petitioner,

v.

WALSH CONSTRUCTION COMPANY II, LLC, an Illinois limited liability company,

Respondent,

and

TETRA TECH, INC, a Delaware corporation; and TRAVELERS CASUALTY AND SURETY COMPANY OF AMERICA, a foreign insurance corporation,

Defendants.

WALSH CONSTRUCTION COMPANY II, LLC, an Illinois limited liability company,

Respondent,

MEARS GROUP, INC., a Delaware Corporation; FEDERAL INSURANCE COMPANY; and LIBERTY MUTUAL INSURANCE COMPANY, Bond No. 82381732-906003393,

Third Party Defendants,

and

UNDERGROUND SOLUTIONS, INC., a Delaware corporation,

Dismissed Third Party Defendant.

ANSWER TO PETITION FOR REVIEW

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ANSWERING PARTY, DECISION BELOW & INTRODUCTION

Respondent Walsh Construction Company II, LLC ("Walsh") asks this Court to deny review of ***King Cnty. v. Walsh Const. Co. II, LLC***, __ Wn. App. 2d __, 532 P.3d 182 (2023) ("***Walsh***") (copy attached). After accepting discretionary review, the appellate court reversed a partial summary judgment and remanded for trial because "the trial court misinterpreted the pertinent provisions of the parties' agreement and misapplied controlling precedent." 532 P.3d at 183. Specifically, the "question presented here is whether the Correction of Work . . . provision in the Contract . . . displaces any defense based on alleged defective design, including Walsh's ***Spearin*** defense, as the trial court ruled." *Id*. at 185 (cleaned up).

Under the plain language of the Contract and this Court's controlling precedents, the appellate court correctly reversed and remanded. This Court should deny review.

RESTATEMENT OF ISSUE PRESENTED FOR REVIEW

The County's pipeline-construction Contract stated that contractor Walsh would not provide services that the County had contracted to its architects and engineers, such as making or approving designs, plans, or specifications. Its Correction of Work provision required the County to give Walsh written notice if its Work was either defective or nonconforming. And like all Washington construction contracts, the County's Contract also contained an implied ***Spearin*** warranty for the County's own design, plans, and specifications.

After nine months of satisfactory performance, the pipe collapsed due to the County's faulty design, plans, and specifications. The County has never explained how Walsh's Work was defective or failed to conform to its design, plans, or specifications. Under the Contract and this Court's controlling precedents, did the trial court err as a matter of law in dismissing Walsh's ***Spearin*** defense?

FACTS RELEVANT TO ANSWER

The underlying facts and procedure are correctly stated in ***Walsh***. *See* Appendix. They are also correctly stated – with citations to the record – in Walsh's Brief of Appellant at 5-12. Walsh relies on these statements.

The Court of Appeals quoted the relevant Contract provisions, which (1) required Walsh to correct any defective or nonconforming ***Work*** (contractually defined as labor, materials, equipment, supplies, services, other items, and requirements of the Contract necessary for the execution, completion and performance of all work within the Contract); but (2) did not require Walsh to provide professional services constituting architecture or engineering (***Walsh***, 538 P.3d at 183-84):

> [The Correction of Work clause] states as follows:
>
> > If material, equipment, workmanship, or Work proposed for, or incorporated into the Work, does not meet the Contract requirements or fails to perform satisfactorily, the County shall have the right to reject such Work by giving the

> Contractor written Notice that such Work is either defective or non-conforming.
>
> > 1. The County, at its option, shall require the Contractor . . . to either
> >
> > > a. Promptly repair, replace or correct all Work not performed in accordance with the Contract at no cost to the County; or
> > >
> > > b. Provide a suitable corrective action plan at no cost to the County.
>
> The Contract defines the term "Work," listed above, to include "the labor, materials, equipment, supplies, services, other items, and requirements of the Contract necessary for the execution, completion and performance of all work within the Contract by the Contractor to the satisfaction of King County."
>
> . . .
>
> Walsh . . . was not responsible for the design of the pipeline. Addressing that issue, section 3.2 of the "General Terms and Conditions" states that the "Contractor will not be required to provide professional services which constitute the practice of architecture and engineering except to the extent provided for in the technical specifications and drawings."

The appellate court also noted that this Court has already "squarely addressed" whether a Correction of Work provision like that in the County's Contract could displace defenses based on its own defective design, including the County's implied design warranty under ***United States v. Spearin***, 248 U.S. 132, 39 S. Ct. 59, 63 L. Ed. 166 (1918) and its progeny. ***Walsh***, 532 P.3d at 185 (citing ***Shopping Ctr. Mgmt. Co. v. Rupp***, 54 Wn.2d 624, 343 P.2d 877 (1959) ("***Rupp***")). This Court held in ***Rupp*** that absent an express warranty, "a contractor is not liable for the loss or damage resulting from the defective plans and specifications prepared by the other party to the contract." 54 Wn.2d at 631.

Rupp involved a negotiated private contract to install a septic system. *Id.* at 625. The one-year *guaranty* clause in that contract expressly applied to the *operation* of all installed materials, including two submersible sewage pumps that the contractor installed (*id.* at 628):

> **The contractor *shall guarantee the satisfactory operation of all materials and equipment installed under this contract***, and shall repair or replace, to the satisfaction of the owner or architect, any defective material, equipment or workmanship which may show itself within one year after the date of final acceptance. [Emphases added.]

Unremarkably, this Court held that this clear contract language expressly guaranteed satisfactory *operations* for one year. *Id*. at 632-33. Where (as there) "the language of an express warranty goes beyond warranting the work and also warrants that the materials and equipment installed by the contractor will 'operate satisfactorily under the plans and specifications of the owner,' the contractor's express warranty of satisfactory operation displaces the owner's implied warranty of design adequacy." ***Walsh***, 532 P.3d at 185 (quoting ***Rupp*** at 632-33).

Walsh also notes that ***Rupp*** relies on this Court's decision in ***Port of Seattle v. Puget Sound Sheet Metal Works***, 124 Wash. 10, 213 P. 467 (1923). *Id*. There, the contractor guaranteed "to keep the roof . . . in perfect

condition for a term of ten years." ***Port of Seattle***, 124 Wash. at 11. "Given this broad language . . . *Port of Seattle* held that the contractor was 'bound by the . . . guaranty.'" ***Walsh***, 532 P.3d at 185 (quoting ***Port of Seattle*** at 13). Applying its own precedent, this Court "held that Rupp's express warranty was 'as broad as that in the [*Port of Seattle*] case' because Rupp had agreed 'to do more than merely repair or replace any defective material, equipment, or workmanship'; it had also agreed to 'guarantee the *satisfactory operation*' of all materials and equipment installed *under this contract*, which the court in *Rupp* expressly held 'includes the plans and specifications.'" *Id*. (quoting ***Rupp***, 54 Wn.2d at 632).

But here, "in contrast to *Rupp*, Walsh did not agree that the materials and equipment 'would operate satisfactorily under the plans and specifications of the owner.'" ***Walsh***, 532 P.3d at 185 (quoting ***Rupp*** at 632-33). "To the contrary, section 3.2 of the General Terms and

Conditions states that the ‘Contractor will not be required to provide professional services which constitute the practice of architecture and engineering.’” *Id*. “Nor did Walsh agree to maintain the pipeline in perfect condition for a specified period of time (as the contractor did in *Port of Seattle*).” *Id*. “As a result, this case does not involve the sort of ‘wider guaranty’ that would necessarily displace the implied warranty of design adequacy under *Rupp*.” *Id.* (cleaned up) (citing ***Rupp***, 54 Wn.2d at 632 (quoting ***Port of Seattle***, 124 Wash. at 13)).

Walsh also explains how several well-known principles of contract construction support its reasoning. *Id*. at 186. For instance, because the Correction of Work provision requires the County to give Walsh notice that *the Work is either defective or nonconforming* and because it requires repairs only to *Work not performed in accordance with the Contract*, it is not a broad ***Rupp*** *operations guarantee*. *Id*. The trial court thus legally erred. *Id*. at 187.

REASONS THIS COURT SHOULD DENY REVIEW

A. The County has not cited or discussed the relevant criteria for review under RAP 13.4(b), so its MDR can and should be denied.

The County solely relies on RAP 13.5(b)(1). MDR 13. This Court has already noted that this reliance is misplaced. *See* Court's 8/7/2023 Scheduling Letter & n.1. Since the County has failed to raise any relevant or proper ground for review under RAP 13.4, Walsh has nothing *relevant* to respond to. This Court should simply deny the County's "Motion for Discretionary Review" (MDR) – notwithstanding its "treatment" as a Petition for Review. *Id*.

B. The appellate court *followed Rupp* and *Lake Hills*.

The County argues that ***Walsh*** "deviated from" ***Rupp*** and from this Court's most recent decision involving the ***Spearin*** doctrine, ***Lake Hills Invs., LLC v. Rushforth Constr. Co., Inc.***, 198 Wn.2d 209, 494 P.3d 410 (2021). MDR 14. On the contrary, ***Walsh*** quotes and follows both

cases. 532 P.3d at 184-87. ***Walsh***'s careful and accurate allegiance to ***Rupp*** is fully discussed *supra*, in the facts.

As for ***Lake Hills***, ***Walsh*** first quotes its restatement of the ***Spearin*** doctrine:

> where "[a] contractor is required to build in accordance with plans and specifications furnished by the owner[,] the [owner] impliedly guarantees that the plans are workable and sufficient."

Id. at 184[1] (cleaned up) (quoting ***Lake Hills***, 198 Wn.2d at 218 (citation omitted)). ***Walsh*** then rejects the County's misplaced reliance on ***Lake Hills*** (532 P.3d at 186-87):

> Contrary to the County's argument, *Lake Hills* does not require a different result. In *Lake Hills*, the Supreme Court stated that to successfully assert a *Spearin* defense "'the contractor must establish that … its obligations went no further than to conform with the plans and specifications prescribed by the owner as part of the contract. …'" 198 Wn.2d at 218. [Citation omitted.] Here, with regard to the performance of the conveyance pipeline—as opposed to the distinct items incorporated into the Work—Walsh's obligations went no further than to

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[1] Walsh was required to warrant "that all Work conforms to the requirements of the Contract." CP 304 (Art. 7.9A). It was also forbidden to alter those requirements without the County's written consent. CP 273 (Art. 3.17A).

> conform with the plans and specifications prescribed by the County as part of the Contract. The County's reliance on the foregoing portion of *Lake Hills* is therefore misplaced.

Indeed, ***Walsh*** notes ***Lake Hills***' restatement of the core ***Spearin*** holding that when, as here, "'the owner provides a defective design, . . . the contractor should not be responsible for the damage caused by following the design because [it was] not the source of the defects.'" *Id*. at 187. *Applying* this wisdom, ***Walsh*** notes the lone expert's opinion that the County's design was defective. *Id*. Indeed, that opinion is clear and *unrebutted* (CP 574):

> **The design provided by King County was defective**. The King County design did not account for local geologic conditions which, when combined with the construction of a typical borehole larger than the conveyance pipe, provided a path for water to flow and over time **erode the ground under the pipe**. The release of confinement by the borehole resulted in instability of overlying water and soil that flowed into the borehole eventually resulting in **the collapse of the borehole and breaking of the conveyance pipe**. Additionally, **the pipe *by design* could not withstand prism load** from overlying soil and loads from debris in the pipe. ***The design was a cause of the pipe failure***. [Emphases added.]

Thus, "[c]onsistent with *Lake Hills*, Walsh should not be responsible for damage caused by following the design because [Walsh] was not the source of any alleged defect." ***Walsh***, 532 P.3d at 187.

Despite ***Walsh***'s clear fidelity to this Court's precedents – which *contradict* the County's arguments – the County maintains that ***Rupp*** "is substantively the same" as this matter. MDR 18. Yet it goes on to cite many provisions of its Contract that are substantively different from the simple and direct *guaranty* in the ***Rupp*** contract. *Compare id*. at 18-19 *with, e.g.*, BA 16-20 (distinguishing the County's complex Contract provisions from the simple ***Rupp*** guarantee). This Contract is nothing like ***Rupp***.

And while the Correction of Work clause does say that if "material, equipment, workmanship, or Work proposed for, or incorporated into the Work, does not meet the Contract requirements or fails to perform satisfactorily, the County shall have the right to reject such Work," it must

do so "by giving the Contractor written Notice that *such Work is either defective or non-conforming*." CP 283 (§ 4.7 (emphasis added)). Thus, as ***Walsh*** duly notes, "Walsh is liable [only] if its Work does not meet the Contract requirements or if the distinct items incorporated into the Work fail to perform satisfactorily." 532 P.3d at 187. Again, Walsh did not guarantee *the County's* faulty design.

And this distinction lies at the heart of the County's mistaken analysis. Over and over it says that Walsh "agreed to correct Work that failed to perform satisfactorily." MDR 3, 20, 28. But that is *not* what its Contract says. Rather, Walsh agreed to correct *defective* or *nonconforming* ***Work*** that fails to perform satisfactorily or does not conform to the Contract. The County simply has *no evidence* that Walsh's Work was defective or nonconforming. ***Walsh*** is correct, and correctly follows this Court's precedents regarding the ***Spearin*** doctrine.

C. Fundamental principles of contract construction – and fairness – confirm ***Walsh***'s reasoning.

The County claims that the appellate court "committed obvious error when it failed to grapple with the language of the contract and give effect to all the contract's provisions." MDR 22. Not only is this insulting assertion irrelevant in a Petition for Review, but it borders on absurdity. The appellate court quite obviously "grapples with" all of the Contract language, and it equally obviously rejects the County's arguments because *they* would render both the Contract absurd and some of its language meaningless or senseless. ***Walsh***, 532 P.3d. at 186-87.

Indeed, ***Walsh*** expressly notes that courts must interpret the Contract to give effect to *all* its provisions and to harmonize clauses that seem to conflict.[2] *Id*. at 186 (quoting ***Nishikawa v. U.S. Eagle High, LLC***, 138 Wn.

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[2] The County's insulting mantra that the Court of Appeals "ignored" the "performs satisfactorily" language is blatantly false: its entire analysis *interprets* that very language.

App. 841, 849, 158 P.3d 1265 (2007)). The Contract's requirements that the County must show the Work to be *defective or nonconforming* in order to demand that Walsh repair or replace Work *not performed in accordance with the Contract*, plainly support the appellate court's correct interpretation that the Correction of Work clause *does not guarantee* that the pipeline will *operate* flawlessly forever. *Id*. This is particularly true in light of § 3.2A, relieving Walsh of any responsibility to perform architectural or engineering services like designing, planning, and rendering specifications for the pipeline. *Id*.; CP 263.

Walsh further recognizes that "'courts must avoid construing contracts in a way that leads to absurd results.'" *Id*. (quoting ***Grant Cnty. Port Dist. No. 9 v. Wash. Tire Corp.***, 187 Wn. App. 222, 236, 349 P.3d 889 (2015)). Noting that the Contract contains a one-year "Warranty and Guaranty" provision (which the County initially gave notice under, but then eschewed) ***Walsh*** also recognizes that if

the County were right, both the express warranty and its one-year limitation period would be rendered meaningless. *Id*. Worse, this would mean that Walsh would be required to repair or replace the pipeline *no matter what caused it to fail* and *whenever it happened to fail – forever*. *Id.* No reasonable contractor would willingly enter such an absurdly onerous contract.[3]

Thus, it is the County's interpretation that is absurd. As just one example of the potentially ludicrous consequences of its tortured reading of the Correction of Work clause, 20 years from now a 9.0 earthquake could liquify most of Seattle, incidentally breaking the pipe. According to the County's interpretation, Walsh would have to replace the pipeline at no cost to the County. While no doubt the County might say, "maybe there's an Act of God

[3] The County seemingly attempts to modify the Correction of Work clause to incorporate the one-year limitation period from the Art. 7.9 Warranty & Guaranty. MDR 27-29. As discussed *infra*, courts do not rewrite contracts.

clause," what about the examples ***Walsh*** gave?: if the County's own construction activities above the pipeline negligently caused it to fail, or if the County negligently failed to properly maintain its pipeline, or (as here) "if the County's design was inadequate or defective," Walsh still would be on the hook for $20 million in free repairs, even though its perfect Work wholly conformed to the County's design, plans, and specifications. 532 P.3d. at 186-87.

The County strains credulity beyond its breaking point in arguing that ***Walsh***'s concern regarding requiring free repairs no matter why or when the pipe broke, "writes the entirety of [the Correction of Work clause] out of the" Contract. MDR 28-29. But under ***Walsh***'s reading, if Walsh's Work had been defective or failed to conform to the Contract, the County could *reject the Work* by giving Walsh notice of the defect or nonconformity and requiring either a corrective action plan, correction of the Work, or (as here) both. CP 283 (§ 4.7). Holding that the plain terms

of this Correction of Work clause do not state an *infinite operational guarantee* does not "write it out" of the Contract: ***Walsh*** reads it as written.

The County's reading, however, is directly contrary to the language in the Correction of Work clause. Courts do not rewrite contracts in the guise of "interpreting" them. *See, e.g.*, ***Little Mtn. Estates Tenants Ass'n v. Little Mtn. Estates MHC, LLC***, 169 Wn.2d 265, 269 n.3, 236 P.3d 193 (2010) (citing cases). Rather – as the County contends – courts hold the parties to the actual language of their contracts, particularly in the construction context. *See* MDR 22-23 (citing ***Berschauer/Phillips Constr. Co. v Seattle Sch. Dist. No. 1***, 124 Wn.2d 816, 826-27, 881 P.2d 986 (1994); ***Gilbert H. Moen Co. v. Island Steel Erectors, Inc.***, 128 Wn.2d 745, 764-65, 912 P.2d 472 (1996)). The County's attempt to read a "gotcha" into its Correction of Work clause is contrary both to the letter of the Contract and to the spirit of good faith and fair dealing.

Citing nothing, the County also argues that the Correction of Work clause applies in "two separate scenarios" – essentially claiming that there are two separate *warranties* – one if the Work does not meet the Contract requirements, and a second if fails to perform satisfactorily. MDR 25. But under the distributive-phrasing cannon (*reddendo singular singulis*) the County's reading would mean that Work not meeting the Contract requirements would be defined as "defective," while Work failing to perform satisfactorily would be defined as "non-conforming." *See generally, e.g.*, Antonin Scalia & Bryan A. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 214-16 (2012) ("SCALIA & GARNER"). This is contrary to both common usage and common sense.

Rather, reading the *entire* Correction of Work clause together – which the County *never* does – there is only *one* warranty for *the Work*: if *the Work* does not meet the Contract requirements or fails to perform satisfactorily,

then the County may *reject such Work* by giving Walsh notice that *such Work is either defective or nonconforming*. CP 283 (§ 4.7). Here, the County has never provided a scintilla of evidence that Walsh's Work was defective or nonconforming, so § 4.7 does not apply, as ***Walsh*** held.[4]

Ultimately, the County's attempt to misinterpret its own Contract must fail under what surely is among the most ancient cannons of construction: *verba chartarum fortius accipiuntur contra proferentem*: "the words of a writing are taken more strongly against the person offering them." *See* SCALIA & GARNER 427; *see also id.* at 31 ("It might be said that rules like [*contra proferentem*,] so deeply ingrained, must be known to both drafter and reader alike so that they can be considered inseparable from the

[4] The County mentions § 4.7's choice between demanding correction of defective or nonconforming Work, or a corrective action plan, but it does not explain why that choice supports its reading. MDR 25. In the event, the County demanded *both* things. This claim is a red herring.

meaning of the text") (emphasis added)); *accord* ***Foss v. Golden Rule Bakery***, 184 Wash. 265, 268, 51 P.2d 405 (1935) ("the language used in a contract should be construed more strictly against the party using it") (citing ***Mikusch v. Beeman***, 110 Wash. 658, 661, 188 Pac. 780 (1920) (citing 2 Page, CONTRACTS (1905) § 1123); ***Clise Inv. Co. v. Stone***, 168 Wash. 617, 620-21, 13 P.2d 9 (1932) ("the court will not ordinarily construe [a contract] in such a way as to place one of the parties at the mercy of the other, but will adopt that interpretation which is unfavorable to the one who so drafts or supplies it")).

Walsh so holds: "Lastly, 'where a contract is susceptible of more than one construction, this court should construe it against the drafter.'" ***Walsh***, 532 P.3d. at 186 (citing ***Joinette v. Local 20, Hotel & Motel Rest. Emp. & Bartenders Union***, 106 Wn.2d 355, 364, 722 P.3d 83 (1986)). While the County now claims that the Contract is not even "susceptible" to ***Walsh***'s (and Walsh's) reading,

that simply begs the question. MDR 26-27. Walsh agrees with ***Walsh*** that the County's reading leads to absurd results, meaningless provisions, and nonsensical interpretations, but even if the County's reading were reasonable, the Contract would then be read *contra proferentem* – against the County. The County does not even argue that this is not the law. *Id*.

Rather, it claims that the Correction of Work clause can *only* be read to warrant "that the materials, equipment, supplies, services, other items, and requirements of the Contract [*i.e.*, the Work (CP 255)] would perform satisfactorily under the plans and specifications of the County." MDR 26-27. Yet that clause literally says *nothing* about plans or specifications (CP 283); Walsh was *required* to comply with the County's faulty plan (CP 304); and § 3.2A says that Walsh was *not* responsible for the County's defective 3.2A design, plans, or specifications (CP 263) – as does the ***Spearin*** doctrine itself.

And that last point is key: the County's entire argument simply assumes that the Correction of Work clause somehow can tacitly waive or supersede the implied ***Spearin*** warranty covering its design, plans, and specifications. But as noted in Walsh's Reply Brief, only an express disclaimer or waiver is sufficient to negative the County's legally implied ***Spearin*** warranty. Reply 10. Nothing in the Correction of Work clause – or anywhere else in the Contract – even remotely suggests that the Contractor knowingly waived this near-universal defense.

This Court should deny review.

CONCLUSION

The ***Walsh*** decision is both correct and consistent with all existing Washington precedent – necessary review criteria that the County fails to even address. Review is thus unwarranted.

The County's misreading of its Correction of Work clause is contrary to its plain language, leading to absurd results, meaningless provisions, and senseless distortions. Its deliberate attempt to avoid the terms of its own Contract's actual Warranty & Guaranty clause fall far short of its duties of good faith and fair dealing.

And even if its misinterpretations were plausible, no court should bend over backwards to read a Correction of Work clause in the drafter's favor, imposing a $20 million liability on the Contractor for repairing a $10 million pipeline that it had installed in strict accordance with the County's faulty design, plans and specifications. Seeking injustice is not a good reason to grant review.

The undersigned hereby certifies under RAP 18.17(2)(b) that this document contains **3,865** words.

RESPECTFULLY SUBMITTED this 2nd day of October 2023.

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King County v. Walsh Constr. Co. II, LLC

Court of Appeals of Washington, Division One

June 8, 2023, Oral Argument; July 3, 2023, Filed

No. 83787-7-I

Reporter
532 P.3d 182 *; 2023 Wash. App. LEXIS 1239 **

KING COUNTY, *Respondent*, v. WALSH CONSTRUCTION COMPANY II, LLC, ET AL., *Appellants*.

Prior History: [1]** Judgment or order under review. Date filed: 01/28/2022. Judge signing: Honorable Michael Scott.

Travelers Prop. Cas. Co. of Am. v. Walsh Constr. Co. II LLC, 2023 U.S. Dist. LEXIS 15614, 2023 WL 401928 (W.D. Wash., Jan. 25, 2023)

Core Terms

pipeline, Contractor, plans and specifications, satisfactorily, repair, Correction, installed, replace, express warranty, trial court, no cost, adequacy, displace, conform, corrective action, implied warranty, fail to perform, alleged defect, warranty

Case Summary

Overview
HOLDINGS: [1]-The trial court erred by granting the county summary judgment and dismissing the contractor's Spearin defense to the county's breach of contract and warranty claims because the correction of work or damaged property provision in the parties' contract to construct and install a conveyance pipeline did not displace any defense based on alleged defective design, as the contractor did not agree that the materials and equipment would operate satisfactorily under the plans and specifications of the county, nor did the contractor agree to maintain the pipeline in perfect condition for a specified period of time.

Outcome
Judgment reversed and case remanded.

LexisNexis® Headnotes

Public Contracts Law > Contract Interpretation > Specifications

HN1[] **Contract Interpretation, Specifications**

Succinctly stated, the Spearin doctrine holds that where a contractor is required to build in accordance with plans and specifications furnished by the owner, the owner impliedly guarantees that the plans are workable and sufficient. The Spearin doctrine has since been adopted in nearly all jurisdictions, including Washington.

Business & Corporate Compliance > ... > Contracts Law > Breach > Breach of Warranty

Public Contracts Law > Contract Interpretation > Specifications

Torts > Products Liability > Theories of Liability > Breach of Warranty

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Express Warranties

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Construction Contracts

HN2[] **Breach, Breach of Warranty**

In the absence of an express warranty, a contractor is not liable for the loss or damage resulting from the defective plans and specifications prepared by the other party to the contract. The court explained that where the language of an express warranty goes beyond warranting the work and also warrants that the materials and equipment installed by the contractor will operate satisfactorily under the plans and specifications of the owner, the contractor's express warranty of satisfactory operation displaces the owner's implied warranty of design adequacy.

Governments > Legislation > Interpretation

HN3[] **Legislation, Interpretation**

A court's goal is to interpret the agreement in a manner that gives effect to all the contract's provisions and harmonize clauses that seem to conflict.

Governments > Legislation > Interpretation

HN4[] **Legislation, Interpretation**

Courts must avoid construing contracts in a way that leads to absurd results.

Contracts Law > Contract Interpretation

HN5[] **Contracts Law, Contract Interpretation**

Where a contract is susceptible of more than one construction, a court should construe it against the drafter.

Public Contracts Law > Contract Interpretation > Specifications

HN6[] **Contract Interpretation, Specifications**

To successfully assert a Spearin defense the contractor must establish that its obligations went no further than to conform with the plans and specifications prescribed by the owner as part of the contract.

Torts > Products Liability > Types of Defects > Design Defects

HN7[] **Types of Defects, Design Defects**

If the owner provides a defective design, then the contractor should not be responsible for the damage caused by following the design because they were not the source of the defects.

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Judges: Authored by Leonard Feldman. Concurring: Ian Birk, David Mann.

Opinion by: Leonard Feldman

Opinion

[*183]

¶1 FELDMAN, J. — This appeal arises out of a public works contract that required Walsh Construction Company II to construct and install a conveyance pipeline for King County. After the pipeline broke, the County paid Walsh to repair it and then sued Walsh for those costs. Relevant here, the trial court dismissed with prejudice “[a]ny defense based on alleged defective

design." Because the trial court misinterpreted the pertinent provisions of the parties' agreement and misapplied controlling precedent, we reverse and remand.

I

¶2 In November 2013, the County solicited bids to construct the South Magnolia Combined Sewer Overflow Control Project. The purpose of the project was to diverge and limit the discharge of overflow wastewater into Elliott Bay during significant storm events. After Walsh submitted the lowest bid, the County awarded Walsh a contract (hereinafter "the Contract") for the construction of an underground pipeline to convey overflow wastewater toward a diversion structure and storage tank. Walsh signed the Contract on April 7, 2014. **[**3]**

¶3 The Contract includes a provision entitled "Correction of Work or Damaged Property," which states as follows:

> **[*184]** If material, equipment, workmanship, or Work proposed for, or incorporated into the Work, does not meet the Contract requirements or fails to perform satisfactorily, the County shall have the right to reject such Work by giving the Contractor written Notice that such Work is either defective or non-conforming.
>
> 1. The County, at its option, shall require the Contractor, within a designated time period as set forth by the County, to either
>   a. Promptly repair, replace or correct all Work not performed in accordance with the Contract at no cost to the County; or
>   b. Provide a suitable corrective action plan at no cost to the County.

The Contract defines the term "Work," listed above, to include "the labor, materials, equipment, supplies, services, other items, and requirements of the Contract necessary for the execution, completion and performance of all work within the Contract by the Contractor to the satisfaction of King County."

¶4 Although Walsh agreed that it would repair, replace, or correct all Work not performed in accordance with the Contract at no cost to the County if the material, **[**4]** equipment, workmanship, or Work failed to perform satisfactorily, it was not responsible for the design of the pipeline. Addressing that issue, section 3.2 of the "General Terms and Conditions" states that the "Contractor will not be required to provide professional services which constitute the practice of architecture and engineering except to the extent provided for in the technical specifications and drawings."

¶5 Walsh began installing the pipeline in September 2014. On January 5, 2016, the County issued a "Certificate of Substantial Completion." In September 2016, the County discovered that the pipeline was malfunctioning. Following investigation, the County determined the pipeline had fractured, allowing soil and other debris into the pipe. On February 8, 2017, the County notified Walsh that the break in the pipeline was preventing overflows from flowing through the pipeline to the new storage facility and that the "Work has been found not to conform to Contract [sic]."

¶6 Having found that the Work did not conform to the Contract, the County directed Walsh to develop a corrective action plan and submit the plan to the County as soon as possible. Walsh responded, contrary to the County's **[**5]** assertion, that "the root cause of the break is due to a design issue" and refused to repair the nonfunctioning pipeline unless the County paid it to do so. To expedite the repairs, the County agreed to advance funds to Walsh subject to mutual reservations of rights under which the County could seek reimbursement from Walsh. Walsh ultimately provided a corrective action plan and performed the work to replace the broken pipeline with a new pipeline. The County incurred costs in excess of $20 million to repair and replace the damaged pipeline.

¶7 In September 2020, the County sued Walsh, alleging breach of contract and breach of warranty. The County alleged that the "Work failed to perform satisfactorily due to the physical and other damage to the Project and to the Conveyance Pipe" and "Walsh breached the Construction Contract by not repairing, replacing or correcting the physically damaged Work that failed to perform satisfactorily at no cost to King County." Walsh, in turn, denied liability and asserted as an affirmative defense (among other defenses) that the County's "claims are limited or barred by the application of the *Spearin* doctrine."

¶8 The U.S. Supreme Court recognized the *Spearin* doctrine **[**6]** in *United States v. Spearin, 248 U.S. 132, 39 S. Ct. 59, 63 L. Ed. 166 (1918)*. ***HN1***[] Succinctly stated, the doctrine holds that where "'[a] contractor is required to build in accordance with plans and specifications furnished by the owner[,] the [owner] impliedly guarantees that the plans are workable and sufficient.'" *Lake Hills Invs., LLC v. Rushforth Constr. Co., 198 Wn.2d 209, 218, 494 P.3d 410 (2021)* (quoting *Ericksen v. Edmonds Sch. Dist. No. 15, 13 Wn.2d 398, 408, 125 P.2d 275 (1942)*). The *Spearin* doctrine "'has

[since] been adopted in nearly all jurisdictions,'" including Washington. *Id.* (quoting 3 PHILIP L. BRUNER & PATRICK J. O'CONNOR, JR., BRUNER AND O'CONNOR ON CONSTRUCTION LAW § 9:81, at 666 (2002)).
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¶9 The County filed a motion for summary judgment, seeking (among other relief) dismissal of Walsh's *Spearin* defense. The County asserted that any implied warranty of design adequacy was displaced by the Correction of Work or Damaged Property provision in the Contract. The trial court granted the County's motion and dismissed with prejudice "[a]ny defense based on alleged defective design." Walsh moved for reconsideration, which the trial court denied. The court subsequently granted Walsh's motion to certify the summary judgment ruling for discretionary review under *RAP 2.3(b)*. This court granted Walsh's motion for discretionary review.

II

¶10 The question presented here is whether the Correction of Work or Damaged Property provision in the Contract (quoted above) displaces "[a]ny defense based on alleged defective design," including **[**7]** Walsh's *Spearin* defense, as the trial court ruled. Our Supreme Court squarely addressed a similar issue in *Shopping Center Management Co. v. Rupp, 54 Wn.2d 624, 343 P.2d 877 (1959)*, which the County cites in support of its argument. ***HN2***[] The court there held that "in the absence of an express warranty, a contractor is not liable for the loss or damage resulting from the defective plans and specifications prepared by the other party to the contract." *Id. at 631*. The court explained that where the language of an express warranty goes beyond warranting the work and also warrants that the materials and equipment installed by the contractor will "operate satisfactorily under the plans and specifications of the owner," the contractor's express warranty of satisfactory operation displaces the owner's implied warranty of design adequacy. *Id. at 632-33*.

¶11 In so holding, the court in *Rupp* compared the express warranty at issue there to the contractual guarantee in *Port of Seattle v. Puget Sound Sheet Metal Works, 124 Wash. 10, 213 P. 467 (1923)*. In *Port of Seattle*, the contractor's guarantee stated, "We hereby guarantee to keep the roof installed by us … in perfect condition for a term of ten years from this date." *Id. at 11*. Given this broad language, the court in *Port of Seattle* held that the contractor was "bound by the … guaranty, and must maintain and keep in repair the work, no matter whether **[**8]** the imperfect condition arose from his failure to comply with the plans and specifications or may have arisen by reason of a defect in the very plan of construction itself, independent of any other cause." *Id. at 13*.

¶12 Applying this central holding of *Port of Seattle* to the facts at issue in *Rupp*, the court in *Rupp* held that Rupp's express warranty was "as broad as that in the [*Port of Seattle*] case" because Rupp had agreed "to do more than merely repair or replace any defective material, equipment, or workmanship"; it had also agreed to "guarantee the *satisfactory operation* of all materials and equipment installed *under this contract*," which the court in *Rupp* expressly held "includes the plans and specifications." *54 Wn.2d at 632*. Emphasizing this point, the court held, "Therefore, [Rupp] must be deemed to have guaranteed that the materials and equipment installed by him would operate satisfactorily *under the plans and specifications of the owner*." *Id. at 632-33* (emphasis added).

¶13 Here, in contrast to *Rupp*, Walsh did not agree that the materials and equipment "would operate satisfactorily under the plans and specifications of the owner." *Id.* To the contrary, section 3.2 of the General Terms and Conditions states that the "Contractor will not be required to provide **[**9]** professional services which constitute the practice of architecture and engineering except to the extent provided for in the technical specifications and drawings." Nor did Walsh agree to maintain the pipeline in perfect condition for a specified period of time (as the contractor did in *Port of Seattle*). As a result, this case does not involve the sort of "'wider guaranty'" that would necessarily displace the implied warranty of design adequacy under *Rupp. Id. at 632* (quoting *Port of Seattle, 124 Wash. at 13*).
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¶14 Several principles of contract construction support our conclusion. ***HN3***[] First, "[o]ur goal is to interpret the agreement in a manner that gives effect to all the contract's provisions" and "harmonize clauses that seem to conflict." *Nishikawa v. U.S. Eagle High, LLC, 138 Wn. App. 841, 849, 158 P.3d 1265 (2007)*. The Correction of Work or Damaged Property provision allows the County to reject the Work by giving Walsh notice that the Work "is either *defective* or *nonconforming*" and require Walsh to "[p]romptly repair, replace or correct all Work *not performed in accordance with the Contract*." (Emphasis added.) And section 3.2 of the General Terms and Conditions, as noted previously, relieves Walsh of the requirement to verify the adequacy of the plans and

specifications as an architect or engineer presumably would. These provisions **[**10]** reinforce our conclusion that the Correction of Work or Damaged Property provision does not guarantee that the pipeline will operate satisfactorily under the County's plans and specifications as required to displace the implied warranty of design adequacy under *Rupp*.

¶15 ***HN4***[] Second, “courts must avoid construing contracts in a way that leads to absurd results.” *Grant County Port Dist. No. 9 v. Wash. Tire Corp., 187 Wn. App. 222, 236, 349 P.3d 889 (2015)*. The Contract includes a “Warranty and Guaranty” provision, which warrants that “all Work conforms to the requirements of the Contract and is free from any defect in equipment, material, design, or workmanship performed by Contractor” and limits the warranty period to “the longer period of … one year from the date of Substantial Completion of the entire Project or the duration of any special extended warranty offered by a supplier or common to the trade.” The County initially gave notice under this provision. But if the County's interpretation of the Correction of Work or Damaged Property provision were accepted, this express warranty and its oneyear limitation period would be meaningless because Walsh would be deemed to have guaranteed that the pipeline will operate satisfactorily and that it will provide any repairs or corrective **[**11]** action plan at no cost to the County regardless of what or who caused the pipeline to fail and regardless of when that occurs. For example, if the County's construction activities above the pipeline caused the pipeline to fail, if the equipment was improperly maintained by the County, or if the County's design was inadequate or defective, the County's interpretation would allow it to demand repairs or a corrective action at no cost to the County without regard to the one-year limitation period in the “Warranty and Guaranty” provision, in the absence of any nonconforming work, and despite its agreement that Walsh was not required to provide architectural or engineering services on the project. Such an absurd interpretation should be avoided.

¶16 ***HN5***[] Lastly, “where a contract is susceptible of more than one construction, this court should construe it against the drafter.” *Joinette v. Loc. 20, Hotel & Motel Rest. Emps. & Bartenders Union, 106 Wn.2d 355, 364, 722 P.2d 83 (1986)*. If and to the extent the Correction of Work or Damaged Property provision is susceptible of more than one construction, it should properly be interpreted to mean that the Work will conform to the Contract and that the distinct items incorporated into the Work will perform satisfactorily (in other words, that a fusible polyvinyl **[**12]** chloride pipe installed under the Contract will perform as a fusible polyvinyl chloride pipe reasonably should) and not that the pipeline will operate satisfactorily under the plans and specifications as required to displace the implied warranty of design adequacy under *Rupp*.

¶17 Contrary to the County's argument, *Lake Hills* does not require a different result. ***HN6***[] In *Lake Hills*, the Supreme Court stated that to successfully assert a *Spearin* defense “‘the contractor must establish that … its obligations went no further than to conform with the plans and specifications prescribed by the owner as part of the contract . . . .’” *198 Wn.2d at 218* (quoting MICHAEL T. CALLAHAN ET AL., CONSTRUCTION DISPUTES: REPRESENTING THE CONTRACTOR § 20.02, at 857 (4th ed. 2020). Here, with regard to the performance of the conveyance pipeline—as opposed to the distinct items incorporated into the Work—Walsh's obligations went no further than to conform with the plans and specifications prescribed by the County as part of the Contract. The **[*187]** County's reliance on the foregoing portion of *Lake Hills* is therefore misplaced.

¶18 ***HN7***[] Indeed, elsewhere in its opinion, the Supreme Court expressly reiterated in *Lake Hills* that “[i]f the owner provides a defective design, then the contractor should not be responsible for the damage caused by following the design because [they were] not the source of the defects.” **[**13]** *Id. at 224*. Here, for example, Walsh's expert opined that the design provided by King County was defective. Consistent with *Lake Hills*, Walsh should not be responsible for damage caused by following the design because it was not the source of any alleged defect. Instead, Walsh is liable if its Work does not meet the Contract requirements or if the distinct items incorporated into the Work fail to perform satisfactorily.

III

¶19 The trial court erred in dismissing with prejudice “[a]ny defense based on alleged defective design.” We reverse and remand for further proceedings consistent with this opinion.

MANN and BIRK, JJ., concur.

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CERTIFICATE OF SERVICE

I certify that I caused to be filed and served a copy of the foregoing **ANSWER TO PETITION FOR REVIEW** on the 2nd day of October 2023 as follows:

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