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SUPREME COURT
STATE OF WASHINGTON
8/3/2023
BY ERIN L. LENNON
CLERK

No. 102246-8
(Washington State Court of Appeals, Div. I No. 83787-7)

IN THE SUPREME COURT FOR THE
STATE OF WASHINGTON

KING COUNTY,

Petitioner/Respondent,

v.

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

Respondent/Appellant,

and

TRAVELERS CASUALTY AND SURETY COMPANY OF AMERICA, a foreign insurance corporation,

Respondent/Appellant.

PETITIONER/RESPONDENT KING COUNTY'S MOTION FOR DISCRETIONARY REVIEW

(Treated as an Amended Petition for Review)

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I. INTRODUCTION AND IDENTITY OF PETITIONER

The Court of Appeals committed obvious error in rendering an opinion contrary to binding precedent from this Court and basic principles of contract law. The Court of Appeals rejected the longstanding rule that contractors who warrant more than just the quality of their work and conformance to plans in a construction contract are responsible for design defects in the construction project. Here, Walsh Construction Company II, LLC ("Walsh") warranted the satisfactory performance of the conveyance pipeline being constructed for Petitioner King County (the "County"). That warrant was in addition to guarantees that Walsh's work and the work of their subcontractors would conform to the contract plans and specifications and would be free from defect. Under this Court's decision in *Shopping Ctr. Mgmt. Co. v. Rupp*, 54 Wn.2d 624, 343 P.2d 877 (1959), Walsh is precluded from asserting a design defect affirmative

defense. Parties must be held to the contracts they have made. The County was deprived of the risk allocation structure it agreed to in executing the contract ("Contract") at issue.

The Court of Appeals first erred by attempting to distinguish *Rupp* from this case. The contract and facts in *Rupp* are substantively similar to this case, and thus require the same result: Walsh cannot assert a design defect defense to the County's claim based on the failure of the pipeline to perform satisfactorily.

Second, the Court of Appeals erred by failing to acknowledge and apply basic principles of contract law. The Court of Appeals completely ignored the determinative language "or fails to perform satisfactorily" equating it with Walsh's separate guarantee that its work will conform to the requirements of the Contract and be free from any defect in equipment, material, design, or workmanship performed by Contractor or its Subcontractors and Suppliers. Thus, the

Court of Appeals' opinion renders a distinct warranty of performance meaningless and superfluous.

These obvious errors render further proceedings useless under RAP 13.5(b)(1) because the disposition of the case depends on the resolution of this issue. As such, the County requests that this Court grant its motion for discretionary review.

II. DECISION BELOW

The County seeks discretionary review of the Court of Appeals' published interlocutory decision. *King County v. Walsh Construction Co. II, LLC*, No. 83787-I (Div. I, July 3, 2023).

III. ISSUES PRESENTED FOR REVIEW

In addition to warranting that its work would be free from defects and conform to plan specifications, Walsh agreed that if its work "fails to perform satisfactorily," Walsh, not the County, would bear the costs of corrective action. The work failed to perform satisfactorily. Under this Court's precedent,

if, as here, a contractor agrees to warrant the performance or operation of a project, then as a matter of law, the contractor cannot assert a defense of the owner's design defect. Did the Court of Appeals commit obvious error rendering further proceedings useless under RAP 13.5(b)(1) when it held that Walsh's "perform satisfactorily" obligation did not bar a defense that the County was responsible for an alleged project design defect, Walsh's only viable defense?

IV. STATEMENT OF THE CASE

A. The County and Walsh Execute a Contract for Construction of a Public Works Project.

In November 2013, the County called for bids for construction of the South Magnolia Combined Sewer Overflow Control Project (the "Project"), a public works facility intended to divert and limit the discharge of overflow wastewater into Elliott Bay. CP 21, 140-41. The County awarded Walsh a construction contract for one of the Project's diversion structures and an underground pipeline ("Conveyance Pipeline" or

"Pipeline") to convey overflow wastewater toward a second diversion structure and a storage tank. CP 21, 141.

Prior to bid submission, Walsh's counsel reviewed the bid documents, which included the General Terms and Conditions as well as the plans and specifications setting forth the Pipeline design. CP 242-45, 253-313. Indeed, Walsh was required to "[c]arefully reviewe[] the Contract Documents, and visit[] and examine[] the Site." CP 262. More specifically, Walsh was to "[b]ecome familiar with the general and local conditions in which the Work is to be performed, and satisf[y] itself as to the nature, location, character, quality and quantity of Contract Work." *Id*. And Walsh agreed to understand "the surface and reasonably ascertainable subsurface conditions and other matters that may be encountered at the Site or affect performance of the Contract Work or the cost or difficulty thereof." *Id*.

General Condition ("GC") 4.7(A) sets forth a "Correction of Work" requirement:

> **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.

CP 283 (emphasis added) [1]. If Walsh's Work fails to perform satisfactorily, then:

> 1. The County, at its option, shall require the Contractor, within a designated time period as set forth by the County, to
> . . .
> b. Provide a suitable corrective action plan at no cost to the County.

Id. If the County opts to require submittal of a corrective action plan ("CAP"), the contractor must implement the CAP following review and approval by the County. CP 283 (GC 4.7(A)(2)).

Walsh made two additional warrants in the contract. First, under GC 4.7(D), Walsh agreed to be "liable for all damages and

[1] The General Terms and Conditions define "Contract Work" or "Work" as "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." CP 255.

costs incurred by the County caused by the Contractor's or its Subcontractors' and Suppliers' defective or non-conforming work or workmanship, including but not limited to all special, incidental, or consequential damages incurred by the County." CP 284.

Second, separately, under General Terms and Conditions, GC 7.9, "Warranty and Guaranty," Walsh agreed:

> **In addition** to any special warranties provided elsewhere in the Contract, Contractor 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 or its Subcontractors and Suppliers.

CP 304 (GC 7.9(A)) (emphasis added). Moreover, GC 7.9(E) provides that "[t]he warranty provided in this provision **shall be in addition** to any other rights or remedies provided elsewhere in the Contract or by applicable law." *Id*. (emphasis added). Walsh had the right to submit questions about these terms prior to submitting a bid but did not do so. CP 243.

After having reviewed the General Terms and Conditions and the Pipeline design and being selected, Walsh signed its Contract with the County on April 7, 2014. CP 383-84.

On or about September 24, 2014, Walsh (through its subcontractor) began installing the Pipeline. CP 23, 141.

On January 5, 2016, the County issued a Certificate of Substantial Completion, effective December 22, 2015. CP 141, 224.

B. The Conveyance Pipeline Fails, Requiring $20 Million in Repairs.

In September 2016, the County discovered the Project was malfunctioning. CP 141. Further inspection revealed the Pipeline was blocked. CP 141, 421, 430. The County determined the Pipeline had fractured, allowing debris into the pipe and causing the blockage. CP 141, 424, 469.

On December 21, 2016, the County notified Walsh of the potential for a warranty claim under GC 7.9 regarding the Pipeline. CP 472. The County described "damage to the pipeline that resulted in a blockage which rendered the South Magnolia

CSO Control system inoperable" and stated it would notify Walsh as to "the necessary corrective action to be taken." *Id*.

On February 8, 2017, the County notified Walsh that the break in the Pipeline was preventing overflows from flowing to the new storage facility. CP 476. The County instructed Walsh to "develop and submit a [CAP] to the County[.]" CP 477. As noted above, CAPs are governed by GC 4.7. *See* CP 283.

Walsh refused to repair the non-functioning Pipeline unless the County paid it to do so. CP 142, 604-06. To expedite the repairs, the County agreed to provisionally advance funds to Walsh under Change Orders subject to mutual reservations of rights under which the County could seek reimbursement from Walsh. CP 142, 484, 486, 488. Walsh consulted with legal counsel before signing these Change Orders. *See* CP 248-49.

In a September 2017 letter to Walsh, the County again noted GC 4.7's CAP requirement. CP 618. Walsh ultimately provided a CAP and performed the work to replace the broken Conveyance Pipeline with a new pipeline. CP 230, 507. Walsh

executed the October 2017 CAP Change Order and agreed that the repair work was pursuant to GC 4.7: "This Change Order authorizing the Contractor to proceed with work related to a Corrective Action Plan **under Spec. Section 00700-4.7** of the Contract does not relieve Contractor from strict compliance with guarantee, warranty, and all other provisions of the original Contract." CP 484 (emphasis added). The County incurred costs in excess of $20 million to repair and replace the Pipeline. CP 25.

C. The Trial Court Dismisses Walsh's Affirmative Defenses Grounded in Defective Project Design.

In September 2020, the County sued Walsh alleging breach of contract under GC 4.7 and breach of warranty under GC 7.9. CP 20-28. Specific to its breach of contract claim, the County alleged in relevant part 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." CP 25-26.

In its answer to the County's First Amended Complaint, Walsh denied liability and asserted several affirmative defenses. CP 30-37. Relevant here, Walsh's affirmative defenses 10-13 are grounded in alleged flaws in the Project design:

> 10. Damages allegedly sustained as a result of Walsh's work, if any, were caused in whole or in part by other parties to this lawsuit or non-parties over which Walsh had no control, including but not limited to [the County's] design and engineering professions;
> 11. [The County's] claims against Defendant Walsh may be barred by [the County's] assumption of risk on choosing design and materials used;
> 12. Defendant Walsh performed as directed;
> 13. [The County's] claims are limited or barred by the application of the *Spearin* doctrine.

CP 37. The *Spearin* doctrine is in part an affirmative defense based on an alleged defect in a design provided by the owner of a project. *United States v. Spearin*, 248 U.S. 132, 136, 39 S. Ct. 59, 63 L. Ed. 166 (1918). Washington has its own case law as to when the *Spearin* doctrine applies including *Rupp*.

In December 2021, on the basis of *Rupp* and GC 4.7, the County filed a motion for partial summary judgment requesting that the trial court dismiss affirmative defenses 10-13. CP 114-33. On January 28, 2022, the trial court granted partial summary judgment and dismissed with prejudice "[a]ny defense based on alleged defective design," including "any such defense asserted in Affirmative Defense # 10, 11, 12, or 13." CP 626. Walsh moved for reconsideration, which the trial court denied. CP 633-46, 673-77.

D. The Court of Appeals Reversed the Trial Court's Decision.

Walsh sought and the Court of Appeals granted discretionary review of the trial court's summary judgment in favor of the County. CP 692-94; Ruling Grating Discretionary Review, No. 83787-7 (Jun. 30, 2022).

On July 3, 2023, the Court of Appeals, Division I reversed and remanded for further proceedings. The Court of Appeals held that the trial court erred in dismissing any defense based on alleged defective design because "Walsh's obligations went no

further than to conform with the plans and specifications prescribed by the County as part of the Contract" and therefore "Walsh should not be responsible for damage caused by following the design because it was not the source of any alleged defect." *Walsh*, No. 83787-I, at 9.

The County here moves for discretionary review of the Court of Appeals' decision.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

This Court should grant discretionary review pursuant to RAP 13.5(b)(1) because the Court of Appeals committed obvious error rendering further proceedings useless. The Court of Appeals committed obvious errors by deviating from binding authority and failing to recognize and apply the plain language of the Contract. These were errors of law that would eliminate an expensive battle of the experts at trial about whether the project failed as a result of a design defect and at

best might eliminate the need for a trial at all. These errors thus render further proceedings useless.

A. The Court of Appeals' Opinion is Contrary to Binding Precedent from this Court.

The Court of Appeals committed obvious error when it deviated from *Rupp* and *Lake Hills Invs., LLC*, binding authority from this Court.

As background, construction contracts typically contain provisions "under which a contractor expressly warrants the quality of its workmanship and materials." *Lake Hills Invs., LLC v. Rushforth Constr. Co., Inc.*, 198 Wn.2d 209, 217-18, 494 P.3d 410 (2021) (cleaned up). Years ago, the question arose whether a contractor warranting the quality of its work and conformance to plans and specifications also is impliedly warranting the quality of design plans and specifications supplied by an owner. As described in *Lake Hills*: "Washington State first recognized the implied warranty of design accuracy in construction contracts in *Ward v. Pantages*, 73 Wash. 208, 211, 131 P. 642 (1913). Five

years later the United States Supreme Court, in *Spearin*, established the standard for the implied warranty of design accuracy across the United States." 198 Wn2d. at 219. Under these cases, the contractor with these limited warrants may under the *Spearin* doctrine raise an affirmative defense of design defect based on the theory that the project owner impliedly warrants to the contractor the sufficiency of the plans and specifications. *Id*. at 219-21.

To successfully assert a *Spearin* defense, however, "at a minimum 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. . . ." *Lake Hills*, 198 Wn.2d at 218-19 (cleaned up). Fundamentally, the availability of the *Spearin* defense depends on "the facts and circumstances of the particular case, and more particularly on the language of the construction contract…." *Id*. at 219. Thus, an owner's furnishing of plans and specifications does not constitute an implied warranty that overrides the parties' ability

to allocate risk in the construction contract under general contract law principles.

Here, the question is whether Walsh's warrant that its Work will "perform satisfactorily" went further than the typical warrant to conform to the contract plans and to perform work free from defects. *Rupp* makes clear that the answer is yes.

In *Rupp*, the parties disputed liability for the failure of the project's sewage pumps to function properly after installation. 54 Wn.2d at 628-29. As in this case, the owner's engineer had produced the design, and the equipment was installed according to the plans. *Id*. Before installation, the contractor suggested a change to the project design based on the pump manufacturer's recommendation, but the proposed design change was rejected and the equipment was installed according to the plans. *Id*. at 625, 628-29.

At trial, the contractor argued it was not liable because it had installed the pumps in accordance with the plans. *Id*. The owner claimed the contractor was liable under specific contract

language in which the contractor had promised the satisfactory operation of the installed work:

> 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 date of final acceptance.

Id. at 630 (emphasis added). The trial court ruled in favor of the owner. *Id*.

The Supreme Court affirmed because the contractor in *Rupp* "undertook to do more than merely repair or replace any defective material, equipment, or workmanship which might appear within one year after the date of final acceptance," and rather guaranteed the "satisfactory operation" of all materials and equipment installed under the contract – which included the plans and specifications. *Rupp*, 54 Wn.2d at 632. "Therefore, [the contractor] 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.

In light of the contractor's performance guarantee the Supreme Court held the cause of the pump failure was simply "immaterial" to the liability determination:

> Thus, it is **immaterial** in this case whether the pumps failed to operate satisfactorily because of the plans and specifications **or because** of defective materials, equipment, or workmanship. **In either event**, appellant must be held, under the language of his guaranty, to have **assumed the risk** of the events which subsequently transpired, as described in the trial court's oral decision and its findings of fact.

Id. at 633 (emphasis added).

The case here is substantively the same as *Rupp*. Under GC 4.7(A), Walsh explicitly agreed that "[i]f 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 would have the right to reject "such Work" by giving Walsh notice that "such Work" is either "defective or non-conforming." CP 283 (emphasis added). Under the express terms of the Contract, Walsh makes three distinct warrants. GC 4.7(A) sets forth two: conformance to plan

specifications and satisfactory performance of the work. And GC 7.9 warrants that Walsh's work would be free from defects. *See* CP; 304 (GC 7.9's warranty is "[i]n addition to" any special warranties or other rights or remedies provided elsewhere in the Contract). If Walsh had merely warranted its work would conform to plan specifications and would be free from defects, it likely would be entitled to assert a *Spearin* affirmative defense. But by additionally warranting its work would "perform satisfactorily" the contractual risk allocation changed. Like *Rupp*'s "satisfactory operation" obligation, Walsh took on additional risk that made the issue of design defect "immaterial."

The Court of Appeals was flatly wrong in stating that "Walsh's obligations went no further than to conform with the plans and specifications prescribed by the County as part of the Contract," as required to assert a *Spearin* defense. *Walsh*, No. 83787-7-I at 9 (relying on *Lake Hills*, 198 Wn.2d at 218). The Court ignored without explanation the **additional** warrant in GC

4.7(A) that the Work "perform satisfactorily," a warrant functionally identical to the contract in *Rupp*.

The Court of Appeals further failed to recognize the broad contractual definition of "Work" that is subject to the "fails to perform satisfactorily" warrant. CP 283. "Work" is defined 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 . . ." CP 255. And the Contract includes the plans and specifications. CP 383. Thus, Walsh agreed to correct Work that failed to perform satisfactorily under the plans and specifications of the County. The Court of Appeals obviously erred in ruling that "this case does not involve the sort of 'wider guaranty' that would necessarily displace the implied warranty of design adequacy under *Rupp*." *Walsh*, No. 83787-7-I at 6-7 (quoting *Rupp*, 54 Wn.2d at 632).

Further, in trying to distinguish *Rupp* from this case, the Court of Appeals erroneously excused Walsh from the plain

language of the Contract on the basis that GC 3.2(A) states 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." *Walsh*, No. 83787-7-I at 6. The Court of Appeals reasoned that because Walsh did not render the design it could not be liable for any alleged design defect. But this reasoning is categorically foreclosed by the holding in *Rupp*, where the contractor also did not render the design (and in fact pointed out, before construction, that the design seemed flawed). GC 3.2(A) does not relieve Walsh of responsibility with respect to the design services or any defect therein. It merely confirms that Walsh is not the party performing such services (just as the contractor in *Rupp* was also not the party performing such services sixty years ago). Walsh explicitly promised to correct Work that "fails to perform satisfactorily." CP 283. Like in *Rupp*, this provision goes beyond a mere workmanship warranty. And that Walsh did not render the design is immaterial to the core

issue of the contract's allocation of responsibility. The language in GC 3.2(A) is not in conflict with the specific risk allocation of GC 4.7(A). The Court of Appeals erred in distinguishing *Rupp* where no distinction exists.

B. The Court of Appeals' Opinion is Contrary to Basic Principles of Contract Law.

The Court of Appeals committed obvious error when it failed to grapple with the language of the contract and give effect to all the contract's provisions.

Washington courts "hold parties to their contracts." *Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1*, 124 Wn.2d 816, 826, 881 P.2d 986 (1994). This principle is particularly important in the construction context, "for it is in this industry that we see most clearly the importance of the precise allocation of risk as secured by contract." *Id*. at 826-27. Consistent with *Berschauer/Phillips*, Washington courts have acknowledged the importance of enforcing express construction contract language as written. *See Gilbert H. Moen Co. v. Island Steel Erectors, Inc.*, 128 Wn.2d 745, 764-65, 912 P.2d 472

(1996) (noting "[t]he construction industry is highly structured by contractual relationships" and the Court has historically deferred to such contractual relationships in lieu of adopting new tort principles in this field"; Court upheld contractual allocation of responsibility for workplace injuries as "consistent with this historical policy").

This same principle applies when determining whether or not the *Spearin* defense can be made. As this Court recently explained, the availability of the *Spearin* defense "will depend . . . **on the language of the construction contract and the documents incorporated by reference**, such as plans and specifications." *Lake Hills*, 198 Wn.2d at 219 (cleaned up) (emphasis added). The Court of Appeals quotes extensively from *Lake Hills*, but omits the Supreme Court's critical observation quoted above.

Washington follows the objective manifestation theory of contracts. *Hearst Communications, Inc. v. Seattle Times Co.*, 115 Wn.2d 493, 503, 115 P.3d 262 (2005). Under this approach,

courts attempt to determine the parties' intent by focusing on the objective manifestation of the agreement, rather than on the unexpressed subjective intent of the parties. *Max L. Wells Trust v. Grand Cent. Sauna & Hot Tub Co. of Seattle*, 62 Wn. App. 593, 602, 815 P.2d 284 (1991). Courts impute an intention corresponding to the reasonable meaning of the words used. *Lynott v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 123 Wn.2d 678, 684, 871 P.2d 146 (1994). Further, an interpretation of a contract which gives effect to all of its provisions is favored over one which renders some of the language meaningless. *Wagner v. Wagner*, 95 Wn.2d 94, 101, 621 P.2d 1279 (1980).

1. The Court of Appeals ignored the words used in the contract.

The Court of Appeals reasoned that GC 4.7A "does not guarantee that the pipeline will operate satisfactorily under the County's plans and specifications" because the provision allows the County to reject the Work by giving Walsh notice that the Work is "either *defective or nonconforming*" and requires Walsh

to "[p]romptly repair, replace or correct all Work *not performed in accordance with the Contract*." *Walsh*, No. 83787-7, at 7.

But the Court of Appeals ignored the plain language of GC 4.7(A). As shown above, that provision identifies two separate scenarios under which Walsh is liable: where its Work "does not meet the Contract requirement" and separately if its Work "fails to perform satisfactorily." CP 283. GC 4.7(A) then provides that the County "shall have the right to reject such Work" – meaning Work that fits either of the above scenarios – as "either defective or non-conforming." *Id*. The Contract then gives the County the choice to either correct work not in accord with the contract plan, language cited by the Court of Appeals, **or** to require a corrective action plan be developed and implemented, language ignored by the Court of Appeals. The Court of Appeals is wrong that GC 4.7(A) 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.

Further, the Court of Appeals reasoned that if GC 4.7A is susceptible to more than one construction, it should be construed against the County and "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 . . . 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*." *Walsh*, No. 83787-7-I, at 8-9.

But GC 4.7(A) is not susceptible to multiple interpretations. Reading *all* the relevant contractual provisions together, including the phrase, "or fails to perform satisfactorily," GC 4.7(A) can be interpreted only one way: Walsh warranted that the materials, equipment, supplies, services, other items, and requirements of the Contract would

perform satisfactorily under the plans and specifications of the County.[2]

2. The Court of Appeals' reading of the contract renders GC 4.7(A) meaningless and superfluous.

The Court of Appeals also reasoned that "if the County's interpretation of the Correction of Work of Damaged Property provision were accepted, th[e] express warranty and its one-year 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 action at no cost to the County regardless of what or who caused the pipeline to fail and regardless of when that occurs." *Walsh*, 83787-7-I at 8. The Court of Appeals' reasoning is wrong on multiple grounds.

First, the County made the claim at issue here within one year of completion of the project. The one-year limitation is the

[2] "[A] contract provision is not ambiguous merely because the parties suggest opposite meanings." *Martinez v. Miller Indus.*, Inc., 94 Wn. App. 935, 944, 974 P.2d 1261 (1999).

shortest period that could apply to a claim by the County. So regardless whether some other period would be imputed by industry practice or law, Walsh did not and could not claim the County's claim was late.

Second, GC 4.7 is a distinct contractual obligation of the contractor from that of GC 7.9. Walsh agreed in GC 4.7 to correct Work that fails to "perform satisfactorily," which constitutes either a special warranty or another right or remedy preserved and "in addition" to the warranty in GC 7.9. *See* CP 304. Because GC 7.9 and GC 4.7 are distinct obligations, the one-year timeframe in GC 7.9 does not necessarily apply to GC 4.7. For example, if the Pipeline had malfunctioned from a defect, design or otherwise, two years after the County had issued a Certificate of Substantial Completion, the warranty period under GC 7.9 would be over, but the County could have still asked Walsh to submit a CAP under GC 4.7 and implement the CAP following review and approval by the County. *See* CP 283 (GC 4.7(A)(2)). Under the Court of Appeals' reading of the Contract, the County

would have no remedy for Walsh's failure under 4.7(A) to meet contract requirements **or** to complete Work that fails to "perform satisfactorily." Similarly, the County would have no remedy to seek indemnification of damages under 4.7(D). In sum, the Court of Appeals' reasoning writes the entirety of 4.7 out of the contract.

The Court of Appeals' reasoning is obvious error. It cannot write multiple obligations out of a contract because a limitation period is not specified. If the gist of the issue is that the short one-year period should apply (a period short of what would be implied by law), then the Court of Appeals committed obvious error because the County made its claim within that period.

C. The Court of Appeals' Obvious Errors Render Further Proceedings Useless.

Whether or not Walsh can assert a *Spearin* defense ultimately resolves the liability phase of this case. The parties do not dispute the amount of damages in controversy. Thus, the resolution of this issue governs the disposition of this case, and

proceeding with the case at this point will be unnecessary and will need to be revisited upon this Court's determination that the Court of Appeals obviously erred.

If Walsh argues some other defense, which they have not to date, resolution of this issue now would avoid a substantial trial based on conflicting expert opinions about the allegation that a design defect caused the defective performance at issue. Resolution of this issue of law now would save substantial time and taxpayer money and avoid a subsequent decision of this court that would render such a trial useless.

VI. CONCLUSION

Walsh, an experienced public contractor, bid on the Contract at issue after fully reviewing the proposed contract terms and specifications, and inspecting the job site. Walsh accepted the allocations of risk within that contract including the risk that the project would not "perform satisfactorily." The Court of Appeals obviously erred in ignoring clear precedent from this Court and re-writing the risk allocation. The County

respectfully requests that the Court grant its motion for discretionary review.

This document contains 4,950 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 2nd day of August, 2023.

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DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that on this day I caused a copy of the foregoing document to be served upon the following counsel of record via electronic mail:

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DATED this 2nd day of August, 2023, at Seattle, Washington.

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No. _____
(Washington State Court of Appeals, Div. I No. 83787-7)

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Defendant.

APPENDIX IN SUPPORT OF KING COUNTY'S MOTION FOR DISCRETIONARY REVIEW

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Respondent,

v.

WALSH CONSTRUCTION COMPANY II, LLC, an Illinois limited liability company; and TRAVELERS CASUALTY AND SURETY COMPANY OF AMERICA, a foreign insurance corporation,

Appellants.

No. 83787-7-I

DIVISION ONE

PUBLISHED OPINION

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.

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.

The Contract includes a provision entitled "Correction of Work or Damaged Property," which 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, 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."

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, 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."

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 [sic] Contract."

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 assertion, that "the root cause of the break is due to a design issue" and refused to repair the non-functioning 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.

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."

The U.S. Supreme Court recognized the *Spearin* doctrine in *United States v. Spearin*, 248 U.S. 132, 54 Ct.Cl. 187, 39 S. Ct. 59 (1918). 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 Investments, LLC v. Rushforth Construction Co., Inc*. 198 Wn.2d 209, 218, 494 P.3d 410 (2021) (quoting *Ericksen v. Edmonds School 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.* (internal quotation marks omitted).

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.

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 Walsh's *Spearin* defense, as the trial court ruled. Our Supreme Court squarely addressed a similar issue in *Shopping Center Management Company v. Rupp*, 54 Wn.2d 624, 343 P.2d 877 (1959) (hereinafter *Rupp*), which the County cites in support of its argument. 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.

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 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.

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).

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 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*. 54 Wn.2d 632 (quoting *Port of Seattle*, 124 Wash. at 13).

Several principles of contract construction support our conclusion. 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 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.*

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 one-year 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 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 non-conforming 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.

Lastly, "where a contract is susceptible of more than one construction, this court should construe it against the drafter." *Joinette v. Local 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 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.*

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. 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 County's reliance on the foregoing portion of *Lake Hills* is therefore misplaced.

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." 198 Wn.2d 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.

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.

Feldman, J.

WE CONCUR:

Bird, J.

Mann, J.

PACIFICA LAW GROUP

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Filing Petition for Review

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