

75331-2

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NO. 75331-2-I

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

620, LLC,

Appellant,

v.

MERIDIAN, INC. dba MERIDIAN CONSTRUCTION,

Respondent.

ON APPEAL FROM KING COUNTY SUPERIOR COURT
(Hon. Monica Benton – Cause No. 15-2-14567-3 SEA)

BRIEF OF APPELLANT

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I. INTRODUCTION

This case arises out of a dispute regarding the effect of a settlement agreement between appellant 620, LLC, the owner of commercial real property located in Kirkland, Washington, and respondent Meridian, Inc. dba Meridian Construction (“Meridian”), a company that constructed a building on that property. At the end of Meridian’s work on the building, a disagreement arose between Meridian and 620, LLC. Meridian claimed that it was owed an additional \$180,000 for change order work, which 620, LLC denied.

Soon thereafter, 620, LLC and Meridian entered into negotiations to resolve this dispute. Meridian prepared the first draft of a proposed settlement agreement and sent it to 620, LLC. This draft contained language calling for the parties to “hold each other harmless for any future claims on [the] project” and it included language that would have released Meridian “of any liability in [the] building.” 620, LLC revised the draft so that the release was limited to “any warranty work in [the] building,” instead of “any liability.”

The parties ultimately executed the version modified by 620, LLC to limit the scope of the release. The final agreement resolved the parties’ lien dispute and absolved Meridian of any obligations to return to the building to perform warranty work. However, the parties did not intend

the agreement to release Meridian from all of 620, LLC's potential claims, especially breach of contract claims arising from construction defects.

Despite the limited scope of the release in the final version of the agreement, the differences between "warranty work" and breach of contract claims arising from construction defects, and the communications that 620, LLC sent to Meridian before and after the parties executed the settlement agreement alerting Meridian to the presence of construction defects, the trial court granted Meridian's motion for summary judgment dismissing 620, LLC's breach of contract and bond claims. Further, the trial court refused to grant 620, LLC's motion for reconsideration.

In rendering these decisions, the trial court ruled that the only reasonable interpretation of the settlement agreement precluded 620, LLC from asserting breach of contract claims against Meridian, Inc. arising from construction defects. Because the settlement agreement can reasonably be interpreted to retain 620, LLC's breach of contract claims against Meridian, the trial court's rulings were clearly in error, and the trial court's grant of Meridian's motion for summary judgment dismissing 620, LLC's claims must be overturned.

II. ASSIGNMENTS OF ERROR

Assignment of Error No. 1

The trial court erred in entering the order of April 22, 2016, granting the defendants' motion for summary judgment.

Issue Pertaining to Assignment of Error No. 1

Whether the settlement agreement between 620, LLC and Meridian precluded 620, LLC from asserting breach of contract claims against Meridian arising from construction defects.

Assignment of Error No. 2

The trial court erred in entering the order of May 26, 2016, denying the plaintiff's motion for reconsideration.

Issue Pertaining to Assignment of Error No. 2

Whether the trial court abused its discretion by concluding that the settlement agreement between 620, LLC and Meridian precluded 620, LLC from asserting breach of contract claims against Meridian, Inc. arising from construction defects.

III. STATEMENT OF THE CASE

Background Facts

In 2012, 620, LLC entered into an agreement (the "Agreement") with Meridian for Meridian to construct a commercial building (the "Project") located at 620 7th Ave. in Kirkland, Washington (the "Property").¹ Under

¹ CP 43, Declaration of Luay Joudeh, ¶2.

the Agreement, Meridian promised that its construction would “comply with all applicable national, state and local building codes” and would “see that work is completed in a timely and workmanlike manner.”²

Meridian began its work on the Project in 2012.³ Over the course of the Project, Meridian made a number of unapproved changes to its work.⁴ Meridian ultimately asserted that 620, LLC owed it an additional \$180,000 for these unapproved change orders.⁵ 620, LLC contested this claim and took the position was that no money was owed to Meridian.⁶ Meridian then filed a lien against the Property for this amount.⁷

To resolve this dispute with Meridian, 620, LLC’s managing member, Luay Joudeh, agreed to have Meridian design and build his personal residence.⁸ 620, LLC also agreed to pay \$30,000 to Meridian and agreed that Meridian did not have to provide a repair warranty on the Project.⁹ In exchange, Meridian agreed to settle its claim of \$180,000 against 620, LLC and remove its lien from the Property.¹⁰

² CP 50, 51, Ex. 1 to Declaration of Luay Joudeh, Construction Agreement, “Codes” (CP 50) and “Supervision” (CP 51).

³ CP 44, Declaration of Luay Joudeh, ¶3.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*, ¶4.

⁹ *Id.*

¹⁰ *Id.*

The parties then went about reducing this agreement to writing. Meridian wrote up the initial draft of the proposed settlement agreement (“Meridian’s Draft”).¹¹ However, Meridian’s Draft did not properly reflect the terms that the parties discussed.¹² Meridian’s Draft incorrectly added “Charles” as a party to the agreement, and it contained terms that could have been interpreted to release Meridian from all liability stemming from its work on the building.¹³

620, LLC made handwritten changes to Meridian’s Draft to remove these incorrect terms.¹⁴ 620, LLC then sent that revised draft (the “Revised Draft Agreement”) to Ali Amin, Meridian’s manager on the Project.¹⁵

The Revised Draft Agreement’s terms eventually became the terms of the final draft that the parties executed (the “Final Agreement”).¹⁶ The parties executed the Final Agreement on or about June 9, 2014.¹⁷

Before and after 620, LLC executed the Final Agreement, the building had been experiencing various problems that arose from Meridian’s

¹¹ CP 44, Declaration of Luay Joudeh, ¶5. *See also* CP 53, Ex. 2 to the Declaration of Luay Joudeh, Meridian’s Draft Agreement.

¹² CP 44-45, Declaration of Luay Joudeh, ¶6.

¹³ *Id.*

¹⁴ CP 45, Declaration of Luay Joudeh, ¶7. *See also* CP 55, Ex. 3 to the Declaration of Luay Joudeh, 620, LLC’s Revised Draft Agreement.

¹⁵ CP 45, Declaration of Luay Joudeh, ¶7.

¹⁶ *Id.*, ¶8. *See also* Ex. 4 to the Declaration of Luay Joudeh, the Final Agreement.

¹⁷ *Id.*

deficient work.¹⁸ For example, in late 2013, the building experienced serious problems with door malfunctions and heating imbalances.¹⁹ 620, LLC demanded that Meridian correct these problems and expected that they would in order to avoid a lawsuit.²⁰

In early July 2014, 620, LLC again asked Meridian to correct other problems that the building was experiencing, including separating floors, paint issues, and other door issues.²¹ In October 2014, the building began experiencing even more problems with the floors, and leaks developed in a number of windows as a result of Meridian's defective work on the Project.²² Further, in December 2014, 620, LLC advised Meridian of issues with insulation, a window sill, and additional window leaks, and Meridian told 620, LLC that it would resolve these problems.²³ Until this point, Meridian never told 620, LLC that it would not be correcting or paying for the defective work it had performed.²⁴

¹⁸ CP 45, Declaration of Luay Joudeh, ¶9.

¹⁹ *Id.*

²⁰ *Id.* See also CP 59-60, Ex. 5 to the Declaration of Luay Joudeh, 620, LLC's December 2013 emails to Meridian about construction defects.

²¹ CP 45-46, Declaration of Luay Joudeh, ¶10. See also CP 62-63, Ex. 6 to the Declaration of Luay Joudeh, 620, LLC's July 2014 emails to Meridian about construction defects.

²² CP 46, Declaration of Luay Joudeh, ¶11. See also CP 65, Ex. 7 to the Declaration of Luay Joudeh, 620, LLC's October 2014 email to Meridian about construction defects.

²³ CP 46, Declaration of Luay Joudeh, ¶11. See also CP 67, Ex. 8 to the Declaration of Luay Joudeh, 620, LLC's December 2014 email exchange with Meridian about construction defects.

²⁴ CP 46, Declaration of Luay Joudeh, ¶12.

By early 2015, the building was suffering from numerous defects that arose from Meridian's poor work.²⁵ These defects included water intrusion into the elevator shaft, various window leaks, cracks in the concrete, door fit issues, persistent flooring issues, and other problems.²⁶ Despite demands, Meridian has refused to correct these defects, and 620, LLC initiated the underlying action against Meridian.²⁷

Procedural History

On June 18, 2015, 620, LLC filed the underlying action against Meridian and its contractor's bond.²⁸ On March 22, 2016, Meridian filed its motion for summary judgment seeking to dismiss all of 620, LLC's claims.²⁹ Meridian's motion relied solely on the "mutual hold harmless" provision in Meridian's Draft.³⁰ Meridian did not introduce any other material facts into the record, did not disclose to the trial court the existence of the Revised Draft Agreement or the Final Agreement, and did not disclose that the parties amended material terms in Meridian's Draft before they executed the Final Agreement.³¹ 620, LLC submitted its

²⁵ CP 46, Declaration of Luay Joudeh, ¶12.

²⁶ *Id.*

²⁷ *Id.*

²⁸ CP 39, Ex. 1 to the Declaration of Seth Chastain, Complaint.

²⁹ *See* CP 9-15, Meridian's Motion for Summary Judgment.

³⁰ *See Id.* and CP 16-23, Ex. 1 to the Declarations of Ali Amin and Daniel O'Neill, Meridian's Draft.

³¹ *See* CP 16-23, Ex. 1 to the Declarations of Ali Amin and Daniel O'Neill.

opposition to Meridian's motion and Meridian failed to file a reply.³² The summary judgment hearing was held on April 22, 2016, and the trial court ultimately granted Meridian's motion.³³

On April 29, 2016, 620, LLC filed its motion for reconsideration.³⁴ Meridian filed a response,³⁵ and 620, LLC filed a reply.³⁶ The trial court denied 620, LLC's motion for reconsideration on May 26, 2016.³⁷ On June 3, 2016, 620, LLC filed its Notice of Appeal of the trial court's grant of Meridian's Motion for Summary Judgment and the trial court's denial of 620, LLC's Motion for Reconsideration.³⁸

IV. SUMMARY OF ARGUMENT

The trial court did not explain its reasoning for granting Meridian's Motion for Summary Judgment and denying 620, LLC's Motion for Reconsideration. Presumably, the trial court concluded that the only reasonable interpretation of the Final Agreement was to construe the language of the "mutual hold harmless" provision to release any potential claims 620, LLC had against Meridian for breaches of contract arising out of Meridian's defective work, despite the fact that the parties reduced the

³² See CP 88, Order Granting Meridian's Summary Judgment Motion.

³³ *Id.*

³⁴ CP 70, 620, LLC's Motion for Reconsideration.

³⁵ CP 79-81, Meridian's Response to the Motion for Reconsideration.

³⁶ CP 82-87, 620, LLC's Reply to Meridian's Response.

³⁷ CP 88-89, Order Denying Reconsideration.

³⁸ CP 90, Notice of Appeal.

release provision's language from "any liability" in Meridian's Draft to "any warranty work" in the Final Agreement.

In rendering its decisions, the trial court erred in ruling that the only reasonable inference that could be drawn from the evidence is that the Final Agreement precluded 620, LLC's breach of contract claims. The trial court failed to recognize that, by releasing Meridian from "warranty work," 620, LLC did not release Meridian from breach of contract claims arising from construction defects. Further, the trial court's interpretation of the Final Agreement would render the Final Agreement's terms inoperative, would produce absurd results, and is not supported by the context surrounding the parties' execution of the Final Agreement.

Accordingly, this Court should remand this matter back to the trial court and instruct the trial court to overturn its grant of Meridian's motion for summary judgment and denial of 620, LLC's motion for reconsideration.

V. ARGUMENT

- A. The Trial Court Erred in Granting Meridian's Motion for Summary Judgment and Dismissing the Plaintiffs' Complaint with Prejudice Because the Final Agreement Can Reasonably Be Interpreted to Preserve 620, LLC's Breach of Contract Claims Against Meridian for Construction Defects.

1. Standard of Review

The appellate court reviews summary judgment orders de novo.³⁹ When reviewing summary judgment orders, the appellate court engages in the same inquiry as the trial court, viewing the facts and all reasonable inferences in the light most favorable to the nonmoving party.⁴⁰ Summary judgment is appropriate only if the moving party can show that “there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.”⁴¹ “A material fact is one upon which the outcome of the litigation depends in whole or in part.”⁴²

The burden is on the moving party to show an absence of an issue of material fact.⁴³ If the moving party submits adequate affidavits to meet its burden, the burden shifts to the nonmoving party to set forth specific facts to rebut the moving party's contentions and show that a genuine issue of material fact exists.⁴⁴ The nonmoving party may not rely on speculation or argumentative assertions to defeat summary judgment.⁴⁵

2. The Law of Contract Interpretation

³⁹ *Lunsford v. Saberhagen Holdings, Inc.*, 166 Wn.2d 264, 270, 208 P.3d 1092 (2009).

⁴⁰ *Riojas v. Grant County Pub. Util. Dist.*, 117 Wn. App. 694, 697, 72 P.3d 1093 (2003).

⁴¹ CR 56(c).

⁴² *Atherton Condo. Apartment–Owners Ass'n v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990).

⁴³ *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989).

⁴⁴ *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986).

⁴⁵ *Id.*

Summary judgment on the interpretation of a contract is “proper where ‘the parties’ written contract, viewed in the light of the parties’ other outward objective manifestations, has only one reasonable meaning.’”⁴⁶ “When reviewing a decision on a motion for summary judgment, ‘[a] question of contract interpretation may be determined as a matter of law if it does not turn on the credibility of extrinsic evidence or ... a choice among reasonable inferences to be drawn from extrinsic evidence.’”⁴⁷

When interpreting a contract, courts give ordinary meaning to the words in the contract and try to effect the parties’ mutual intent.⁴⁸ “To interpret a contract, [courts] must determine the parties’ intent, for which [courts] apply the ‘context rule.’”⁴⁹ The purpose of the context rule is to determine the parties’ “meeting of the minds, as opposed to [their] insufficient written expression of ... intent.”⁵⁰ The context rule allows a court, when “viewing the contract as a whole, to consider extrinsic evidence, such as the circumstances leading to the execution of the

⁴⁶ *Spradlin Rock Prods., Inc. v. Pub. Util. Dist. No. 1 of Grays Harbor County*, 164 Wn. App. 641, 655, 266 P.3d 229 (2011) (quoting *Hall v. Custom Craft Fixtures, Inc.*, 87 Wn. App. 1, 9, 937 P.2d 1143 (1997)).

⁴⁷ *Donatelli*, 179 Wn.2d at 107, 312 P.3d 620 (quoting *Kofmehl v. Baseline Lake, LLC*, 177 Wn.2d 584, 594, 305 P.3d 230 (2013)) (alteration in original).

⁴⁸ *City of Tacoma v. City of Bonney Lake*, 173 Wn.2d 584, 590, 269 P.3d 1017 (2012); see *Realm, Inc. v. City of Olympia*, 168 Wn. App. 1, 4, 277 P.3d 679 (2012).

⁴⁹ *Fedway Marketplace West, LLC v. State*, 183 Wn. App. 860, 871, 336 P.3d 615 (2014) (quoting *Roats v. Blakely Island Maint. Comm’n, Inc.*, 169 Wn. App. 263, 274, 279 P.3d 943 (2012)).

⁵⁰ *Tjart v. Smith Barney, Inc.*, 107 Wn. App. 885, 895, 28 P.3d 823 (2001).

contract, the subsequent conduct of the parties and the reasonableness of the parties' respective interpretations.”⁵¹ “This rule applies ‘even when the disputed provision is unambiguous.’”⁵²

3. 620, LLC Released Meridian from Warranty Work, but Not from Breach of Contract Claims

The plain language of the Final Agreement and the context surrounding its formation show that the parties did not intend to release Meridian from breach of contract claims. Warranty work claims are not synonymous with breach of contract claims resulting from a party’s failure to follow the building code. Here, Meridian signed a contract promising that its work would abide by the building code and that Meridian would perform its work in a workmanlike manner.⁵³ Warranty work, on the other hand, refers to the builder’s obligation to return to the project and perform repairs on specific items that violate the warranty that the property owner brought to the builder’s attention within a specific time frame.⁵⁴ Breach of contract and breach of warranty claims may sometimes overlap because they can both arise from the builder’s defective construction work. However, they are distinct concepts and causes of action – one requires the builder to abide by the building code as part of its construction

⁵¹ *Fedway Marketplace West*, 183 Wn. App. at 871, 336 P.3d 615 (quoting *Roats*, 169 Wn. App. at 274, 279 P.3d 943).

⁵² *Id.*

⁵³ CP 50, 51, Ex. 1 to Declaration of Luay Joudeh, Construction Agreement, “Codes” (CP 50) and “Supervision” (CP 51).

⁵⁴ See “warranty.” *Merriam-Webster.com*. 2016. <http://www.merriam-webster.com/dictionary/warranty>.

contract with the property owner, and the other requires the builder to return to the property to repair items that violate the warranty. The *Panorama Village* case distinguishes the two claims:

Panorama's repair costs are clearly recoverable under this rule and under Restatement (Second) of Contracts section 348, as discussed above. *See Eastlake*, 102 Wash.2d at 49, 686 P.2d 465. Nevertheless, Golden Rule contends that these costs are not recoverable because there was no evidence that it breached its repair warranties. Panorama did not, however, seek recovery for breach of the repair warranties, but sued for breach of contract. Following its discovery of material defects in the roofs, Panorama properly sought damages for breach of the construction contracts instead of demanding performance under the warranties.⁵⁵

Panorama Village demonstrates that a party may maintain a breach of contract action based on construction defects notwithstanding the existence of repair warranties, and that these breach of contract claims are independent of breach of repair warranty claims. It follows that a party may relinquish its claims to repair warranties and warranty work, but still maintain its claims for breaches of contract arising from construction defects.

By limiting the release's language to "any warranty work" instead of "any liability," the parties did not intend to release Meridian from breach of contract claims for construction defects. Regardless of whether

⁵⁵ *Panorama Vill. Homeowners Ass'n v. Golden Rule Roofing, Inc.*, 102 Wn. App. 422, 430, 10 P.3d 417, 422 (2000) (citing E. Allan Farnsworth, *Contracts* § 8.15 (1982); *Campbell v. Hauser Lumber Co.*, 147 Wash. 140, 144–45, 265 P. 468 (1928)) (emphasis added).

Meridian had an obligation to return to the property and perform warranty work, the parties' construction contract still required Meridian to abide by the building code.⁵⁶ Releasing Meridian from warranty work did not release Meridian from its then-existing and still existing contractual obligation to construct the building free from defects, so nothing precluded 620, LLC from bringing breach of contract claims against Meridian when defects arose.

4. Construing the Mutual Hold Harmless to Exclude 620, LLC's Breach of Contract Claims Renders Other Provisions of the Final Agreement Inoperative

Meridian's interpretation of the Final Agreement renders at least one of its provisions ineffective, and so its interpretation is unreasonable. "An interpretation of a contract that gives effect to all provisions is favored over an interpretation that renders a provision ineffective, and a court should not disregard language that the parties have used."⁵⁷

In its summary judgment motion, Meridian only provided the trial court with the first of three drafts of the settlement agreement to support its argument that the settlement agreement barred 620, LLC's breach of contract claims. Meridian did not provide sworn testimony or any other evidence concerning the context surrounding the settlement agreement or

⁵⁶ See CP 50, 51, Ex. 1 to Declaration of Luay Joudeh, Construction Agreement, "Codes" (CP 50) and "Supervision" (CP 51).

⁵⁷ *Snohomish County Public Transp. Benefit Area Corp. v. FirstGroup America, Inc.*, 173 Wn.2d 829, 840, 271 P.3d 850, 856 (2012).

the parties' intent at the time when the settlement agreement was executed.⁵⁸

Meridian relied entirely on two provisions of Meridian's Draft to support its motion.⁵⁹ One provision called for the parties to "hold each other harmless for any future claims on this project,"⁶⁰ and the other provision released Meridian "of any liability in [the] building."⁶¹ If retained, the net effect of these terms would arguably have been to preclude 620, LLC from bringing any claims against Meridian during the project and arising from Meridian's construction work. However, the parties materially altered the scope of the release before executing the Final Agreement.⁶²

When 620, LLC submitted its summary judgment response, it provided the trial court with two additional versions of the parties' agreement, neither of which Meridian had disclosed.⁶³ 620, LLC also provided sworn testimony about the context surrounding the settlement agreement, its multiple drafts, and the communications between the parties

⁵⁸ See CP 16-23, Declarations of Amin and O'Neill in Support of Meridian's Motion for Summary Judgment.

⁵⁹ See CP 19, 23, Ex. 1 to Declarations of Amin and O'Neill in Support of Meridian's Motion for Summary Judgment.

⁶⁰ CP 57, Ex. 4 to the Declaration of Luay Joudeh, ¶2.

⁶¹ *Id.*, ¶3.

⁶² See CP 55-57, Ex. 3 and 4 to the Declaration of Luay Joudeh, Revised Draft Agreement and Final Agreement.

⁶³ *Id.*

relating to construction defects before and after the parties executed the agreement.⁶⁴

Critically, the parties adopted changes in the subsequent drafts that limited the scope of the settlement agreement's claim release. Instead of releasing Meridian from "any liability" on the project, paragraph 3 of the settlement agreement now only released Meridian only from "warranty work" on the building.⁶⁵ This change was crucial because it objectively shows that the parties intent to release Meridian from warranty work only.

At the summary judgment hearing, Meridian completely ignored the limited scope of the release and argued that the agreement's "hold harmless" language in paragraph 2 entirely precluded 620, LLC from bringing any claims.⁶⁶ However, such an expansive reading of paragraph 2 violates one of the most basic tenets of contract law because it renders the parties' amendments to paragraph 3 entirely ineffectual. The parties left paragraph 2's language unchanged in each draft of the agreement. But, as stated above, the parties eventually reduced the scope of paragraph 3 to release only claims related to "warranty work," and not claims concerning "any liability." If the parties actually intended for paragraph 2's "hold harmless" language to release each other from all conceivable claims, it would have been pointless for the parties to reduce the scope of paragraph 3's release because paragraph 2's terms would have excluded

⁶⁴ See CP 43-46, Declaration of Luay Joudeh, ¶¶3-12.

⁶⁵ CP 57, Ex. 4 to the Declaration of Luay Joudeh, Final Agreement.

⁶⁶ See RP 9-14, 17-18.

any claim the parties would have retained after reducing the scope of paragraph 3's release. In short, the parties simply could not have intended to simultaneously preclude all claims in paragraph 2, while at the same time releasing something less than all claims in paragraph 3. Because it would render provisions of the Final Agreement inoperative, Meridian's proposed interpretation must fail.

The trial court erred when it granted Meridian's summary judgment motion because it did not construe all facts and reasonable inferences in 620, LLC's favor. In light of the uncontested facts, it is clear – or, at a minimum, it is a more reasonable interpretation – that the parties intended to release Meridian only from its repair warranty obligations, and not from any other claims. The trial court should have denied Meridian's motion.

5. The Mutual Hold Harmless Provision Cannot be Construed as Meridian Contends Because This Would Produce Absurd Results

Meridian's broad interpretation of the mutual hold harmless provision would produce absurd results because it would ultimately prohibit the parties from enforcing the Final Agreement. A basic tenet of contract interpretation is to avoid construing contracts in a manner that would produce absurd results.⁶⁷ "Hold harmless" is synonymous with

⁶⁷ *Eurick v. Pemco Ins. Co.*, 108 Wn.2d 338, 341, 738 P.2d 251, 252 (1987).

“indemnification.”⁶⁸ Under Meridian’s interpretation of the hold harmless provision, the parties could completely avoid their contractual obligations under the Final Agreement by claiming that any enforcement action to compel performance is a “claim” arising under the contract. In *City of Tacoma v. City of Bonney Lake*, the Washington Supreme Court declined to adopt such a broad interpretation of a hold harmless provision with similar “any and all claims” language because it would have produced absurd results.⁶⁹ Broadly interpreted, the hold harmless provision in *City of Tacoma* would have precluded the parties from enforcing the terms of their agreement.⁷⁰ To avoid absurd results, the Court in that case construed the contract to allow the contracting parties to sue each other.⁷¹ Similarly, Meridian’s interpretation of the Final Agreement produces absurd results because it precludes either party from enforcing the Final Agreement’s terms. Therefore, Meridian’s broad interpretation of the mutual hold harmless provision is not reasonable and it must fail.

6. Other Aspects of the Final Agreement and the Context Surrounding the Final Agreement Show that Meridian’s Interpretation is Unworkable

⁶⁸ “HOLD-HARMLESS AGREEMENT,” Black’s Law Dictionary (10th ed. 2014).

⁶⁹ *City of Tacoma v. City of Bonney Lake*, 173 Wn.2d 584, 593, 269 P.3d 1017 (2012).

⁷⁰ *Id.*

⁷¹ *Id.*

620, LLC submitted sworn testimony showing that it repeatedly notified Meridian of construction defects before and after the parties executed the agreement.⁷² There would be no reason for 620, LLC to provide Meridian with such notices if the parties intended the agreement to release Meridian from its contractual obligation to perform work pursuant to the building code. In one of these emails, Meridian even acknowledged that it needed to have contractors come back out to address garage insulation and leaking windows, which were defective.⁷³

In addition, the agreement expressly states that it settles Meridian's outstanding lien, and nothing more:

THIS AGREEMENT, dated 6-9-2014 is made by and between Meridian, Inc., hereinafter called Meridian, and 620, LLC, hereinafter called 620, and lays out the terms of this contract regarding the settlement of the outstanding lien by meridian inc.⁷⁴

This demonstrates that the parties intended the agreement to resolve Meridian's lien claim, and not future claims 620, LLC may have for Meridian's failure to abide by the building code.

The agreement also states that its terms only *outline* the full agreement of the parties:

“[t]he following is the outline of the agreement...”⁷⁵

⁷² See CP 60-67, Ex. 5-8 to the Declaration of Luay Joudeh, Construction Defect Emails.

⁷³ CP 67, Ex. 8 to the Declaration of Luay Joudeh, December 10, 2014 Meridian Email to 620, LLC.

⁷⁴ CP 57, Ex. 4 to the Declaration of Luay Joudeh, Final Agreement (emphasis added).

⁷⁵ *Id.* (emphasis added).

An *outline* of an agreement, by definition, does not contain all of the details and terms of a fully integrated and complete agreement.

This means that there were operative terms that the parties did not incorporate into the written agreement. “With a written contract, ‘it is the court’s duty to ascertain from all relevant, extrinsic evidence, either oral or written, whether the entire agreement has been incorporated in the writing or not. That is a question of fact.’”⁷⁶ If the writing “is not intended to be the complete expression of the parties’ intent - in other words, if it is only partially integrated - the writing may be supplemented or replaced by consistent terms or agreements shown by a preponderance of the evidence.”⁷⁷ Here, 620, LLC provided the only extrinsic evidence in the record.⁷⁸ This extrinsic evidence, such as 620, LLC’s multiple notices to Meridian of construction defects, shows that there is at least a question of fact whether supplemental terms should be incorporated into the incomplete Final Agreement to identify the limited situations in which the mutual hold harmless provision would apply.

Moreover, it is reasonable to infer from the language of the Final Agreement that the parties intended the mutual hold harmless and release provisions to apply to entirely different types of claims. The mutual hold harmless provision applies to future claims “*on [the] project,*” and the

⁷⁶ *Lopez v. Reynoso*, 129 Wn. App. 165, 171, 118 P.3d 398, 402 (2005) (quoting *Barber v. Rochester*, 52 Wn.2d 691, 698, 328 P.2d 711 (1958)).

⁷⁷ *Id.*, at 171.

⁷⁸ See CP 16-23.

release provision applies to warranty work “on [the] building.”⁷⁹ The next provision requires Meridian to take care of any liens “on [the] project.”⁸⁰ The Final Agreement repeatedly uses “on [the] project” for several types of claims, but then switches to “on [the] building” for others, which suggests that claims “on [the] project” are not synonymous with claims “on [the] building.”

For example, claims on the project could reasonably cover claims for payment, liens, and injuries that related directly to the functioning and progression of the project. Claims on the building could reasonably cover claims related directly to the completed building, such as construction defect claims and warranty work. So, a reasonable interpretation of the Final Agreement, which is also consistent with the Final Agreement’s stated purpose of resolving lien and payment claims, is that the mutual hold harmless provision applied to claims that occurred while the Project was ongoing, whereas the release applied to warranty claims that occurred after the building was completed. As 620, LLC’s breach of contract claims arose from defects in the completed building, the mutual hold harmless provision would not apply, and the limited warranty work release would not preclude 620, LLC’s claims.

7. If the Court finds that Meridian’s Interpretation of the Final Agreement is Reasonable, the Final Agreement’s Terms are Ambiguous and Must Be Construed Against Meridian

⁷⁹ CP 57, Ex. 4 to the Declaration of Luay Joudeh, Final Agreement.

⁸⁰ *Id.*

Given the uncontroverted facts and extrinsic evidence, the only reasonable interpretation of the Final Agreement would not limit 620, LLC's breach of contract claims because Meridian's interpretation of the Final Agreement is unreasonable. However, if the Court finds that Meridian's interpretation is reasonable, then the Final Agreement is ambiguous. "A contract provision is ambiguous when its terms are uncertain or when its terms are capable of being understood as having more than one meaning."⁸¹ Ambiguities in settlement agreements must be construed against the drafter.⁸²

Meridian drafted the Final Agreement's terms with the exception of the "warranty work" release language. If the Court somehow finds that Meridian's interpretation of the Final Agreement's terms are reasonable, the Final Agreement's terms are ambiguous because, in light of the uncontroverted facts, 620, LLC's interpretation of the Final Agreement is also reasonable. The evidence in the record shows that the parties intended the mutual hold harmless provision to only cover lien claims, claims for payment, and other claims that directly dealt with the workings of the Project; that the parties only intended to release Meridian from

⁸¹ *Dan's Trucking, Inc. v. Kerr Contractors, Inc.*, 183 Wn. App. 133, 141, 332 P.3d 1154, 1158 (2014) (quoting *Mayer v. Pierce County Med. Bureau, Inc.*, 80 Wn. App. 416, 421, 909 P.2d 1323 (1995)).

⁸² *Rouse v. Glascam Builders, Inc.*, 101 Wn.2d 127, 135, 677 P.2d 125 (1984).

having to perform warranty work; and that 620, LLC's other claims, including breach of contract claims arising from construction defects, would be preserved. Whether the Final Agreement affected 620, LLC's breach of contract claims would depend on a choice among reasonable inferences drawn from extrinsic evidence, which must be a question of fact for the finder of fact⁸³; it cannot be and should not have been resolved at summary judgment.

At best for Meridian, the Final Agreement's terms are ambiguous, and so the Final Agreement's terms must be construed against Meridian and in favor of 620, LLC's reasonable interpretation, which retains 620, LLC's breach of contract claims. Because the trial court must construe all questions of fact and reasonable inferences therefrom in the light most favorable to 620, LLC, the trial court should have denied Meridian's motion for summary judgment.

B. The Trial Court Abused Its Discretion in Denying Plaintiffs' Motion for Reconsideration Because the Trial Court's Ruling was Based on an Erroneous View of the Law.

1. Standard of Review

The appellate court reviews a trial court's decision to deny a

⁸³ *Berg v. Hudesman*, 115 Wn.2d 657, 667-68, 801 P.2d 222, 229 (1990).

reconsideration motion for an abuse of discretion.⁸⁴ “A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds. . . . [Or i]f the trial court’s ruling is based on an erroneous view of the law or involves application of an incorrect legal analysis it necessarily abuses its discretion.”⁸⁵

2. The Trial Court Abused Its Discretion By Finding that the Only Reasonable Interpretation of the Final Agreement Precluded 620, LLC’s Breach of Contract Claims

Here, the trial court necessarily based its decision to deny 620, LLC’s motion for reconsideration on untenable grounds and on an erroneous view of the law. To prevail at summary judgment, 620, LLC only needed to show that one reasonable interpretation of the Final Agreement allowed 620, LLC to proceed with its breach of contract claims.⁸⁶ As demonstrated *supra*, there are numerous, reasonable interpretations of the Final Agreement under which 620, LLC retains its breach of contract claims against Meridian. For example, under the terms of the Final Agreement and given the context surrounding its execution, it

⁸⁴ *Mitchell v. Washington State Institute of Public Policy*, 153 Wn. App. 803, 832, 225 P.3d 280 (2009) (citing *Rivers v. Wash. State Conference of Mason Contractors*, 145 Wn.2d 674, 685, 41 P.3d 1175 (2002)).

⁸⁵ *Dix v. ICT Group, Inc.*, 160 Wn.2d 826, 833, 161 P.3d 1016 (2007) (citations to *Washington State Physicians Insurance Exchange & Ass’n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993), and *State v. Kinneman*, 155 Wn.2d 272, 289, 119 P.3d 350 (2005) omitted).

⁸⁶ See *Spradlin Rock Prods., Inc.* 164 Wn. App. at 655 (quoting *Hall*, 87 Wn. App. at 9).

is much more reasonable to interpret the Final Agreement as releasing Meridian only from warranty work, and not breach of contract claims. Further, the parties likely only intended the mutual hold harmless to affect claims (e.g., third party claims) that were direct related to the project's progression (e.g., lien, payment, and injury claims that occurred while the project was ongoing). As such, the trial court abused its discretion by not denying Meridian's motion for summary judgment, and the summary judgment order must be overturned.

VI. CONCLUSION

Based on the facts and law presented above, appellant 620, LLC respectfully requests this Court to:

- (1) Reverse the trial court's order granting summary judgment in favor of defendants and remand for further proceedings;
- (2) Rule that 620, LLC has valid breach of contract claims against Meridian arising from construction defects in the building and that the Final Agreement's terms do not preclude these claims; and
- (3) Rule that 620, LLC has a valid claim against Meridian's contractor's bond arising from Meridian's alleged breaches of its construction contract with 620, LLC and that the Final Agreement's terms do not preclude these claims.

NO. 75331-2-I

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

620, LLC,

Appellant,

v.

MERIDIAN, INC. dba MERIDIAN CONSTRUCTION,

Respondent.

ON APPEAL FROM KING COUNTY SUPERIOR COURT
(Hon. Monica Benton – Cause No. 15-2-14567-3 SEA)

PROOF OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on October 4th, 2016, I dispatched true copies of the following documents:

BRIEF OF APPELLANT

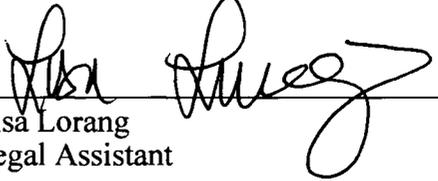
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COURT OF APPEALS DIV
STATE OF WASHINGTON

via ABC Legal Messengers and email for delivery on the same date to
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DATED this 4th day of October, 2016.



Lisa Lorang
Legal Assistant