

No. 47345-3-II  
COURT OF APPEALS  
DIVISION II  
STATE OF WASHINGTON

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MILLENNIUM BULK TERMINALS—LONGVIEW, LLC, a Delaware  
limited liability corporation,

Respondent-Plaintiff,

v.

PHILLIPS 66 COMPANY, a Delaware corporation, and  
CONOCOPHILLIPS COMPANY, a Delaware corporation,

Appellants-Defendants.

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ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF  
WASHINGTON IN AND FOR THE COUNTY OF COWLITZ

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**RESPONDENT'S OPENING BRIEF**

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## I. INTRODUCTION

Two sophisticated companies spent over a year negotiating and ultimately executing a contract. Defendant Phillips 66<sup>1</sup> ("P66") did not like the deal it made, and so, instead of living up to its obligations under the contract, P66 simply refused to perform, forcing plaintiff Millennium Bulk Terminals—Longview, LLC ("MBT Longview"), to initiate this litigation. P66's strategy has become clear: obtain through litigation what it could not through negotiations. In short, and as explained more fully below, P66 has asked the Court to rule that P66 is not liable for its own property, in contravention of the contract between the parties and common law.

The basis of MBT Longview's claims against P66 is simple:

- P66 owned valuable petcoke present on land leased by MBT Longview.<sup>2</sup>
- On taking possession of the land, MBT Longview immediately demanded that P66 remove the petcoke.<sup>3</sup>
- P66 did not remove it for over a year.<sup>4</sup>

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<sup>1</sup> Phillips 66 is the assignee of ConocoPhillips. Collectively, the two are referred to in this brief as "P66."

<sup>2</sup> CP 49; 52-53; 63-64.

<sup>3</sup> CP 55-57; 83-84.

<sup>4</sup> CP 86-90.

- In the interim, MBT Longview incurred costs of about \$700,000 to manage and ultimately remediate the petcoke's presence.<sup>5</sup>
- P66 knew that MBT Longview was incurring these costs.<sup>6</sup>
- P66 admits that the costs incurred by MBT Longview were reasonable and comparable to other costs paid by P66 to remove and remediate the petcoke.<sup>7</sup>
- Ultimately, P66 agreed to pay those costs<sup>8</sup> and should pay the costs, but now—after reaping the benefit of selling the petcoke for approximately \$5 million—refuses to pay the costs that MBT Longview incurred to manage and remediate its effects.

Because none of the facts above are or can be disputed, MBT Longview asks this Court to affirm the trial court's award of summary judgment to MBT Longview on its claims against P66 for breach of contract, attorney fees under the contract, and trespass/nuisance. Because P66 has not been able to identify facts sufficient to support its claims for fraud and misrepresentation, MBT Longview also asks this Court to affirm the trial court's award of summary judgment to MBT Longview denying P66's claims for fraud and misrepresentation.

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<sup>5</sup> CP 77-78.

<sup>6</sup> CP 1465-67.

<sup>7</sup> CP 75-76.

<sup>8</sup> CP 86-90.

**II. RESTATEMENT OF ISSUES PERTAINING TO P66'S ASSIGNMENTS OF ERROR**

Although P66 identifies six assignments of error, the issue on appeal is simple: because MBT Longview's motion was based entirely on relevant law, the terms of an unambiguous document, and P66's own deposition testimony, was the trial court correct in granting summary judgment to MBT Longview and denying P66's motion for summary judgment?

**III. STATEMENT OF THE CASE**

**A. RELEVANT FACTS**

P66 employs the same strategy here that it did on summary judgment: provide pages of facts to try to create a fact issue while hiding that it has already admitted the facts needed for MBT Longview to establish its claims. Although many of the "facts" recounted by P66 are disputed and unsupported, the disputed facts are all legally irrelevant to MBT Longview's claims.

Accordingly, MBT Longview provides below only the relevant facts; for the source, MBT Longview relies exclusively on the deposition testimony of J. David Gipson, P66's designee under CR 30(b)(6). In short,

and as it did on summary judgment, MBT Longview relies here **on the testimony of P66 itself.**

**B. FACTUAL BACKGROUND**

1. Background.

On January 11, 2011, MBT Longview started leasing property in Cowlitz County known as the Former Reynolds Aluminum Smelter Facility (the "Plant Facility"). MBT Longview leased the Plant Facility to export coal. When MBT Longview took possession of the Plant Facility, approximately 110,000 tons of petcoke remained on the property. Petcoke is a solid by-product of petroleum refining and is a substance subject to regulation under several environmental statutes.

2. Chinook, the Previous Tenant of the Plant Facility, Had Its Lease Terminated.

P66 owned the petcoke at the Plant Facility.<sup>9</sup> Chinook Ventures, the Plant Facility's previous tenant, had contracted with P66 to store and handle the petcoke for export.<sup>10</sup> That contract with Chinook specifically provided that P66 "shall at all times be deemed to be the owner of the fuel coke [petcoke] and COP [P66] shall be responsible for all liabilities

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<sup>9</sup> CP 49.

<sup>10</sup> CP 48.

arising from such ownership."<sup>11</sup> Despite expressly retaining all liability for the petcoke, P66 did nothing more than ask Chinook for "assurance" that the petcoke would be properly stored and handled.<sup>12</sup> It did not look into what permits, if any, would be needed; it did not ask Chinook what permits were needed; it did not ask to see Chinook's permits.<sup>13</sup>

In February 2010, approximately one year before MBT Longview's execution of its lease, the Washington Department of Ecology discovered a petcoke spill into the Columbia River at the Plant Facility. At that point, WDOE issued an order ceasing all activities related to the loading and unloading of petcoke at the Plant Facility. Ultimately, Chinook's lease was terminated on January 11, 2011; any right or license for P66 to have its petcoke on the property terminated with Chinook's lease.

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<sup>11</sup> CP 91-100.

<sup>12</sup> CP 49-51.

<sup>13</sup> *Id.*

3. As Soon as MBT Longview Entered Into Its Lease of the Plant Facility, It Told P66 to Remove Its Petcoke—and P66 Refused.

On January 11, 2011, MBT Longview entered into its Plant Facility lease.<sup>14</sup> Approximately 110,000 tons of petcoke were present at the Plant Facility at that time, with an export value of about \$5 million for P66.<sup>15</sup> After beginning operations on the Plant Facility, MBT Longview immediately contacted P66 about removal of the petcoke, and in the following months repeatedly reiterated that MBT Longview did not assume Chinook's contract and that P66 needed to remove the petcoke:

- On January 19, 2011, Joe Cannon, MBT Longview's president, had a conversation with Mr. Gipson, at the time P66's manager of coke and sulfur schedulers,<sup>16</sup> and informed him that MBT Longview would not be exporting petcoke, that MBT Longview did not assume Chinook's contract with P66, and that P66 needed to remove the petcoke.<sup>17</sup>
- On February 16, 2011, Trevor Simmons met with Mr. Gipson in Longview. Mr. Simmons reiterated that MBT Longview did not assume Chinook's contract.<sup>18</sup>

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<sup>14</sup> MBT Longview did not assume Chinook's lease. CP 1108. Chinook's lease was terminated; MBT Longview then entered into a new lease with the landlord for the Plant Facility.

<sup>15</sup> CP 63-64. The petcoke had an export value for P66 of approximately \$5 per ton net. CP 52-53.

<sup>16</sup> CP 47.

<sup>17</sup> CP 55; 83-84.

<sup>18</sup> CP 57.

- And again, on April 27, 2011, Mr. Simmons told Mr. Gipson that MBT Longview did not assume Chinook's contract.<sup>19</sup> He also told Mr. Gipson that a new access agreement would be needed for P66 to remove the petcoke, that P66 would be responsible for the costs of obtaining the permits needed to remove the petcoke, and that MBT Longview would fence in the petcoke pile, but that all liability (health, safety, environment—all liability) would be P66's.<sup>20</sup>

Ultimately, the parties began negotiating an access agreement under which P66 would remove the petcoke from the Plant Facility.

4. In Negotiating the Access Agreement, P66 Repeatedly Tried to Limit Its Liability for the Petcoke—and MBT Longview Refused.

As negotiations continued, MBT Longview remained firm that as part of the deal, P66 must take the property "back to the condition before the petcoke arrived," but P66 would agree only to remove a portion of the petcoke and vacuum the pad that the petcoke was on.<sup>21</sup> P66 wanted to remove the valuable petcoke, but leave MBT Longview with the bulk of cleanup and remediation costs. MBT Longview would not agree to this, and the parties were at a stalemate.

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<sup>19</sup> CP 58-59.

<sup>20</sup> *Id.*; CP 60.

<sup>21</sup> CP 1122.

Months of negotiation as to the terms of the access agreement

ensued. Salient details from the negotiations include the following:

- By no later than June 15, 2011, Mr. Gipson knew that MBT Longview was incurring costs related to petcoke and would incur additional costs before remediation was completed. He specifically knew that water remediation was a major issue. Mr. Gipson knew that at that time approximately 4 million gallons of runoff water was already being stored in tanks on the Plant Facility. Mr. Gipson also knew that the "rainy" season started in October and that there would be even more runoff water at that point.<sup>22</sup>
- P66 never asked MBT Longview the amount of costs being incurred.<sup>23, 24</sup>
- P66's initial proposed access agreement contained the following language: "The parties expressly agree that COP shall have no liability for any contamination or pollution from hazardous or toxic materials present or past at the terminal."

MBT Longview responded with the following language: "Except for the liability, claims, or causes of action relating to the Petcoke or the Removal, the parties expressly agree, that COP shall have no liability for any contamination or pollution from hazardous or toxic materials present or past at the MBT terminal where, as of the date of this agreement, the petcoke is being stored."

P66 sought to remove "Petcoke" and proposed the following language: "Except for the liability, claims, or causes of action relating to the Removal, the parties expressly agree . . . ."

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<sup>22</sup> CP 61-62; 101-02.

<sup>23</sup> CP 79-80.

<sup>24</sup> At his deposition, as the corporate designee of P66, Mr. Gipson admitted that if he had asked the amount of costs incurred, MBT Longview would likely have provided him with that information. CP 79-80.

MBT Longview rejected P66's proposed deletion of the word "Petcoke."

The final agreement provides: "Except for the liability, claims, or causes of action relating to the Petcoke and/or Removal, the parties expressly agree . . . ." <sup>25</sup>

- The agreement was reviewed and approved by Mr. Gipson, his boss, and P66's legal department before it was executed by P66. <sup>26</sup>

5. Terms of the Access Agreement.

On February 10, 2012, MBT Longview and P66 entered into an access agreement for P66 to remove the petcoke. <sup>27</sup> Under the terms of the agreement, P66 agreed to remove the petcoke at its own expense, and "in accordance with the Removal Plan." <sup>28</sup> The Removal Plan attached and as defined referred to a document prepared by environmental consultant Anchor QEA, LLC, dated January 2012, and entitled "Operations and Environmental Protection Plan for Green Petroleum Coke Removal." <sup>29</sup> In addition, as stated above, the access agreement contained the following provisions:

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<sup>25</sup> CP 65-66; 70-71.

<sup>26</sup> CP 67-69; 72.

<sup>27</sup> CP 86-90.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

- **Liability/Indemnification: ¶ 6a.** Except for the liability, claims, or causes of action relating to the Petcoke and/or Removal, the Parties expressly agree, that COP [P66] shall have no liability for any contamination or pollution from hazardous or toxic materials present or past at the MBT Site.<sup>30</sup>
- **Liability/Indemnification: ¶ 6b.** COP [P66] agrees to indemnify, defend, and hold harmless MBT against any liens asserted against the MBT Site by any contractor or subcontractor hired to perform the work described herein. COP [P66] agrees to indemnify, defend, and hold harmless MBT to the fullest extent permitted by law from any third-party claims, damages to persons or property, liabilities, or costs to the extent caused by COP [P66], its employees, agents, contractors, or representatives arising from or related to the Petcoke, the Removal, and the activities contemplated under this Agreement.<sup>31</sup>
- **Integration; Amendment: ¶ 13.** This Agreement constitutes the entire agreement of the parties relating to the subject matter hereof. There are no agreements, promises, terms, conditions, obligations, or warranties other than those contained in this Agreement. This Agreement supersedes all prior communications, representations, or agreements, verbal or written, among the parties relating to the subject matter hereof. This Agreement may not be changed or amended orally, but only by an agreement in writing, signed by the party against whom enforcement is sought.<sup>32</sup>

After the access agreement was finally entered into, which was more than a year after MBT Longview began operations at the Plant Facility, P66 removed the petcoke from the Plant Facility and remediated

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<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

the effects of the petcoke over a period of months. Once the petcoke was removed and the Plant Facility had been fully remediated, MBT Longview submitted under paragraph 6 the costs it had previously incurred as a direct result of managing and remediating the environmental effects of the petcoke to P66 for reimbursement. P66 refused to pay. This dispute arose.

6. MBT Longview's Damages.

MBT Longview incurred costs of over \$700,000 to manage the petcoke and remediate its environmental effects. The expenses included the cost to set up petcoke water storage, pumps, and pipelines; seal the containment wall around the petcoke pad; and dispose of excess petcoke water off-site to water-treatment facilities.<sup>33</sup> The sum of \$415,557.62 was incurred before the access agreement was executed; \$335,034.44 was incurred after the access agreement was executed.<sup>34</sup> All the expenses for which MBT Longview has sought reimbursement are directly related to P66's petcoke, and P66 has admitted that it has no evidence or reason to

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<sup>33</sup> MBT Longview has invoices for all these expenses, and they have been shared with P66. P66 has not disputed the amounts claimed or that the expenses were directly related to P66's petcoke.

<sup>34</sup> CP 77-78.

believe that the expenses at issue were caused by anything other than P66's petcoke.<sup>35</sup> In fact, P66 admits that the costs incurred by MBT Longview were reasonable and appear to be comparable to other costs paid by P66 to remove and remediate the petcoke.<sup>36</sup>

### **C. PROCEEDINGS BELOW**

P66's Procedural Posture of the Case is accurate.<sup>37</sup>

## **IV. ARGUMENT**

### **A. STANDARD OF REVIEW**

1. No Genuine Issue of Material Fact Exists Because MBT Longview Obtained Summary Judgment Based on the Law, the Unambiguous Terms of the Access Agreement, and the Testimony of P66.

This Court reviews the grant of summary judgment de novo, applying the same standards as applied in the trial court. *King v. Snohomish Cnty.*, 105 Wn. App. 857, 862, 21 P.3d 1151 (2001), *rev'd* 146 Wn.2d 420 (2002). Summary judgment is appropriate if no genuine issues of material fact exist, and the moving party is entitled to judgment as a matter of law. CR 56(c). The party opposing the motion must identify specific facts in dispute that support its claim, rather than rely on

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<sup>35</sup> CP 73.

<sup>36</sup> CP 75-76.

<sup>37</sup> Brief of Appellants at 7-8.

conclusory allegations, to defeat the motion. CR 56(e); *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 359, 753 P.2d 517 (1988).

The purpose of summary judgment is to avoid unnecessary trials. *Zweig v. Hearst Corp.*, 521 F.2d 1129, 1135-36 (9th Cir.), *cert. denied*, 423 U.S. 1025 (1975). "Where no genuine issue of material fact exists, a grant of summary judgment is necessary to avoid a useless trial." *Rothwell v. Nine Mile Falls Sch. Dist.*, 173 Wn. App. 812, 819, 295 P.3d 328 (2013). An affidavit that is submitted in response to a motion for summary judgment does not raise a genuine issue of material fact unless it sets forth facts evidentiary in nature, such as information as to what took place, an act, an incident, or a reality, as distinguished from supposition or opinion. *Snohomish Cnty. v. Rugg*, 115 Wn. App. 218, 224, 61 P.3d 1184 (2002).<sup>38</sup> A party's self-serving statement of conclusions is insufficient to defeat summary judgment motion. *Segaline v. State Dep't of Labor & Indus.*, 144 Wn. App. 312, 325, 182 P.3d 480 (2008), *rev'd on other grounds*, 169 Wn.2d 467 (2010).

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<sup>38</sup> See also *Doty-Fielding v. Town of S. Prairie*, 143 Wn. App. 559, 566, 178 P.3d 1054 (2008) (statements of ultimate facts, conclusions of fact, or conclusory statements of fact are insufficient to overcome a summary judgment motion).

Below, for the purpose of summary judgment, MBT Longview accepted as true the deposition testimony of Mr. Gipson, the individual whom P66 designated under CR 30(b)(6) to testify on its behalf. Therefore, under this rule, **Mr. Gipson's testimony is the testimony of P66**. Thus, MBT Longview's motion was entirely supported by the testimony *of the defendant* (P66), the law, and the unambiguous terms of the access agreement.

2. Summary Judgment Should Be Affirmed Because the Trial Court Reached the Right Result.

On appellate review of a summary judgment order, the trial court's ruling "can be sustained on any theory within the pleadings and the proof." *Thompson v. Thompson*, 82 Wn.2d 352, 355, 510 P.2d 827 (1973). Thus, if the trial court reached the correct result, even if for the wrong reasons, summary judgment should be affirmed. RAP 2.5(a); *LaPlante v. State*, 85 Wn.2d 154, 158, 531 P.2d 299 (1975). Here, MBT Longview plead alternative grounds to support its motion for summary judgment: (a) that the language of the access agreement was unambiguous and should be enforced, and (b) that the deposition testimony of P66 itself showed that MBT Longview wins on its common-law claims for nuisance and trespass.

So if this Court finds that MBT Longview is entitled to prevail on any claim, it need go no further.

**B. MBT LONGVIEW IS ENTITLED TO ENFORCEMENT OF THE ACCESS AGREEMENT BECAUSE IT IS CLEAR AND UNAMBIGUOUS**

1. MBT Longview's Contract Claim Is Based on the Plain Language of the Agreement.

The basis for MBT Longview's contract claim is simple: (a) the access agreement explicitly states that P66 **is and at all times has been** responsible for the petcoke and any damage caused by it; and (b) the access agreement is a fully integrated agreement that **expressly disclaims any prior agreements** made between the parties. As explained more fully below, these two basic points—which cannot be disputed—defeat P66's contract argument.

2. P66 Retained All Liability, Past and Present, for the Petcoke and Its Removal.

Washington follows the objective-manifestation theory of contracts. *Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503, 115 P.3d 262 (2005). Because of this, it is the Court's role to "determine the parties' intent by focusing on the objective manifestations of the agreement, rather than on the unexpressed subjective intent of the

parties." *Id.* at 503. In doing that, the Court should "impute an intention corresponding to the reasonable meaning of the words used" and "give words in a contract their ordinary, usual, and popular meaning unless the entirety of the agreement clearly demonstrates a contrary intent." *Id.* at 503-04. Thus, "the subjective intent of the parties is generally irrelevant" when interpreting a contract. *Id.* at 504.

The terms of the access agreement cannot be disputed—P66 is and was responsible at all times for the petcoke and its removal. The terms of the access agreement are as broad as they are clear: the liability/indemnification paragraph, 6a,<sup>39</sup> states that P66 will have no liability for contamination or pollution, "except for the liability, claims, or causes of action relating to the Petcoke and/or Removal." And paragraph 6b<sup>40</sup> provides that P66 would "indemnify, defend, and hold

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<sup>39</sup> "**Liability/Indemnification: ¶ 6a.** Except for the liability, claims, or causes of action relating to the Petcoke and/or Removal, the Parties expressly agree, that COP shall have no liability for any contamination or pollution from hazardous or toxic materials present or past at the MBT Site." CP 86-90 (emphasis added).

<sup>40</sup> "**Liability/Indemnification: ¶ 6b.** COP agrees to indemnify, defend, and hold harmless MBT against any liens asserted against the MBT Site by any contractor or subcontractor hired to perform the work described herein. COP agrees to indemnify, defend, and hold harmless MBT to the fullest extent permitted by law from any third-party claims, damages to persons or property, liabilities, or costs to the extent caused by COP, its employees, agents, contractors, or representatives arising from or related to the Petcoke, the Removal, and the activities contemplated under this Agreement." *Id.*

harmless" MBT Longview for any "damage to property" or "costs" that were "arising from or related" to the petcoke, its removal, or any other activities contemplated under the access agreement.

Here, MBT Longview incurred several hundred thousand dollars to remediate damage caused by the petcoke to its property.<sup>41</sup> Under paragraph 6b, P66 agreed to indemnify MBT Longview for all damages to property "arising from or related to the Petcoke." The costs incurred by MBT Longview were to remediate damage to its property. MBT Longview is entitled to reimbursement under the clear language of the access agreement.

3. P66's Construction of Paragraphs 6a and 6b Is Strained.

Given the plain language of the access agreement, P66's interpretation of paragraphs 6a and 6b does not make sense.

As a starting point, P66 argues that paragraph 6a "narrows" paragraph 6b. This does not make sense because paragraph 6a precedes paragraph 6b and does not refer to the content of paragraph 6b. They are two related provisions that make the same point clear: at all times, P66

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<sup>41</sup> CP 77-78.

was liable for the petcoke, its removal, and the related remediation. At no time did MBT Longview excuse P66 from this liability.

And paragraph 6a specifically references **present or past** liability; it reads, "[E]xcept for the liability, claims, or causes of action relating to the Petcoke and/or Removal . . . [P66] shall have no liability for any contamination or pollution from hazardous or toxic materials present or past at the [MBT Longview] Site." The only possible interpretation of this provision is that the agreement does not release P66 from **present or past** liability related to the Petcoke and/or its removal.<sup>42</sup>

P66's argument regarding paragraph 6b is equally nonsensical. P66 argues that paragraph 6b does not mean what it says because paragraph 6b is an indemnity clause that requires P66 to protect MBT Longview only from claims brought by a third party. P66 has no authority for its argument: the agreement does not say this, and the case that P66 cites does not support its argument and is not germane to construction of

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<sup>42</sup> Because P66 remained liable for past or present damage caused by the petcoke and/or its removal, its argument that pre-access agreement charges are not covered must fail.

paragraph 6b.<sup>43</sup> On the other hand, Black's Law Dictionary defines "indemnify" as "[t]o reimburse (another) for a loss suffered because of a third party's or one's own act or default." Black's Law Dictionary 886 (10th ed. 2014). This definition is in accord with the plain language of paragraph 6b, which provides that P66 would "indemnify, defend, and hold harmless" MBT Longview for **any** "damage to property" or "costs" that were "arising from or related" to the petcoke.

Under paragraph 6b, P66 agreed to "indemnify, defend, and hold harmless" MBT Longview "to the fullest extent permitted by law" from "any . . . damages to persons or property." Again, the only possible interpretation of this provision is that P66 retained liability for **any damage to property** caused by the petcoke or its removal.

In its brief, P66 argues at length that the access agreement addresses only P66's responsibility to remove the petcoke—that the agreement is essentially limited in scope to removal of the petcoke. P66's position defies belief: during the protracted negotiations between the parties, P66 repeatedly tried to limit its role (and liability) to removal of

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<sup>43</sup> In fact, the particular page that P66 cites does nothing more than discuss when an insurer's duty to indemnify is triggered. *Nunez v. Am. Bldg. Maint. Co. W.*, 144 Wn. App. 345, 351, 190 P.3d 56, *rev. denied*, 165 Wn.2d 1008 (2008).

the petcoke, and MBT Longview simply refused to execute an agreement that limited P66's liability for the petcoke or its remediation in any way. Ultimately, the access agreement was executed with the term that MBT Longview insisted on, excusing P66 from liability "[e]xcept for the liability, claims, or causes of action relating to the Petcoke and/or Removal."<sup>44</sup>

Thus, P66's argument that under the access agreement it can be liable only for costs related to removal of the petcoke<sup>45</sup> because removal was the "purpose" of the agreement does not hold water. P66 knows that it tried to limit its liability to removal of the petcoke during negotiations, and failed.

It is particularly remarkable that P66 argues that the liability clauses of paragraphs 6a and 6b are limited in scope, when it was clear during negotiations that P66 understood the import of these provisions:

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<sup>44</sup> CP 65-72; 1076-78; 1177-81.

<sup>45</sup> P66 argues that it cannot be responsible for costs incurred before the access agreement was executed and so cannot be responsible for anything other than removal of the petcoke.

P66 tried on more than one occasion to convince MBT Longview to drop or limit the liability language.<sup>46</sup>

But MBT Longview has always been adamant that P66 was liable for the petcoke and for any damage by or remediation needed because of the petcoke, a fact that MBT Longview made sure was memorialized in the access agreement itself. MBT Longview repeatedly refused to agree to any limitation on P66's liability with regard to the petcoke, and P66 entered into the access agreement anyway. It now tries to gain in litigation what it could not obtain during more than a year of negotiations—a limitation on its liability for the petcoke and/or the petcoke removal.

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<sup>46</sup> P66's initial proposed Access Agreement contained the following language: "The parties expressly agree that COP shall have no liability for any contamination or pollution from hazardous or toxic materials present or past at the terminal."

MBT Longview responded with the following language: "Except for the liability, claims, or causes of action relating to the Petcoke or the Removal, the parties expressly agree, that COP shall have no liability for any contamination or pollution from hazardous or toxic materials present or past at the MBT terminal where, as of the date of this agreement, the petcoke is being stored."

P66 then sought to remove "Petcoke" and proposed the following language: "Except for the liability, claims, or causes of action relating to the Removal, the parties expressly agree . . . ."

MBT Longview rejected P66's proposal and insisted that P66 remain liable for anything related to both "petcoke" and its "removal."

The final agreement provides: "Except for the liability, claims, or causes of action relating to the Petcoke and/or Removal, the parties expressly agree . . . ."

CP 65-72; 1076-78; 1177-81.

4. P66 Argues Context to Vary, Contradict, and Modify the Terms of the Access Agreement.

P66 also argues that the "context" surrounding the access agreement is such that this Court should not enforce the plain terms of the agreement. Washington's Supreme Court has been very clear, however: "surrounding circumstances and other extrinsic evidence are to be used 'to determine the meaning of *specific words and terms used*' and not to 'show an intention independent of the instrument' or to 'vary, contradict or modify the written word.'" *Hearst Commc'ns, Inc.*, 154 Wn.2d at 503 (quoting *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 695-96, 974 P.2d 836 (1999)) (emphasis by *Hearst* court).

In arguing that the "context" of the access agreement should prevent this Court from enforcing it as written, P66 fails to identify what "specific words and terms used" have a different meaning because of the circumstances surrounding execution of the agreement. Instead, P66 tries to do exactly what Washington law forbids by asking this Court to enforce the alleged "spirit" (but not the plain language) of the agreement.

Part of P66's context argument relies on statements and acts of MBT Longview made during the period when MBT Longview was

conducting its due diligence on acquisition of the Plant Facility.<sup>47</sup> That P66—an extremely sophisticated Fortune 500 company—seeks to rely on statements made by MBT Longview before any deal related to the Plant Facility closed defies belief. It particularly defies belief because the access agreement itself contains an integration clause:

**Integration; Amendment: ¶ 13.** This Agreement constitutes the entire agreement of the parties relating to the subject matter hereof. There are no agreements, promises, terms, conditions, obligations, or warranties other than those contained in this Agreement. This Agreement supersedes all prior communications, representations, or agreements, verbal or written, among the parties relating to the subject matter hereof. This Agreement may not be changed or amended orally, but only by an agreement in writing, signed by the party against whom enforcement is sought.

Accordingly, even assuming for the sake of argument that the "facts" P66 raises as to events leading up to execution of the access agreement are true, they are irrelevant to MBT Longview's breach-of-

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<sup>47</sup> MBT Longview does not deny that the initial version of the asset purchase agreement (between MBT Longview and Chinook, not P66) included a provision to assume the contract between Chinook and P66. When MBT Longview entered into the initial version of the asset purchase agreement, it had not yet completed due diligence on the Plant Facility. During the months between execution of the initial and final asset purchase agreement, MBT Longview conducted due diligence at the Plant Facility. Based on that due diligence, MBT Longview elected not to assume Chinook's contract with P66, which resulted in execution of the fourth amendment to the asset purchase agreement. What MBT Longview did is exactly the point of due diligence: to research problems or potential problems with the Plant Facility and alter the agreement before closing accordingly.

contract claim against P66 and require no consideration because of paragraph 13, which could not be clearer: the access agreement is the **only** agreement between MBT Longview and P66. **All** prior agreements, promises, terms, conditions, obligations, or warranties are disclaimed and superseded. P66's lead negotiator of the access agreement, Mr. Gipson, specifically testified that he was aware of and understood this paragraph.<sup>48</sup>

5. MBT Longview Is Entitled to Reimbursement Even if It Did Not Give Notice of the Reasonable and Necessary Charges Incurred.

P66 also argues that it need not pay MBT Longview the amounts owed under the access agreement because, under paragraph 5, "[a]ny charges and fees associated with the Removal of the Petcoke, levied by MBT to COP [P66], shall be agreed in writing in advance by the Parties." This argument must fail for two reasons: (a) by its plain language, the agreement refers to charges and fees *levied by MBT Longview* to P66; and (b) Washington courts hold that a notice provision like this one is not a condition precedent to enforcement of the agreement, such that if a charge is necessary and reasonable, a party who fails to give notice is still entitled to reimbursement for the necessary and reasonable amount of the charge.

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<sup>48</sup> CP 81.

Here, P66 admits that costs incurred by MBT Longview were reasonable and comparable to other costs paid by P66 to remove the petcoke and engage in the necessary remediation.<sup>49</sup>

- a. The plain language of the agreement states that MBT Longview was required to provide advance notice only of charges "levied by" it to P66, not charges incurred to third-party vendors.

P66's construction of paragraph 5 seeks to ignore part of paragraph 5: namely, the provision that charges "levied by MBT [Longview] to [P66]" required prior written approval. This provision means, as it reads, that if MBT Longview used its own employees or resources to remove the petcoke and wanted to seek reimbursement for its internal costs, those charges would need to be agreed to by P66 in writing ahead of time. If the provision did not mean that, but meant *any* charges incurred as a result of the petcoke or its removal (as P66 proposes), then the phrase "levied by MBT Longview" to P66 would be extraneous; it could simply read: "Any charges and fees associated with the Removal of the Petcoke must be agreed to in writing in advance by the Parties." It does not. The access agreement was the subject of over a year of

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<sup>49</sup> CP 75-76.

negotiations between two sophisticated companies. It can be reasonably assumed that, after all this, words with no meaning were not left in the access agreement. Further, it is a cardinal rule of contract construction that words should be read to have meaning. *Ball v. Stokely Foods, Inc.*, 37 Wn.2d 79, 83, 221 P.2d 832 (1950); *Diamond B Constructors, Inc. v. Granite Falls Sch. Dist.*, 117 Wn. App. 157, 165, 70 P.3d 966 (2003).

- b. Under Washington law, failure to provide notice of reasonable and necessary charges is not fatal to a contractual reimbursement claim.

Regardless, even if the provision did read as P66 proposes, Washington law on this point is clear: when there is no prejudice from a failure to provide notice, the nonprejudiced party is not excused from performing solely because of the lack of notice. *Pederson's Fryer Farms, Inc. v. Transamerica Ins. Co.*, 83 Wn. App. 432, 437-42, 922 P.2d 126 (1996).<sup>50</sup> Thus, MBT Longview's failure to notify P66 of the costs incurred is not fatal to its claim for reimbursement under the agreement because P66 has admitted that its only basis for refusing to pay these costs

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<sup>50</sup> In its brief, P66 argues that *Pederson's* is distinguishable because it was in the context of an insured/insurer relationship. The principle, however, is the same, and notably, P66 cites no authority to the contrary.

is that MBT Longview failed to provide advance notice, and it knows of no other reason for challenging the validity of the costs.<sup>51</sup>

The purpose of a provision like this can only be to ensure that costs incurred under the agreement are reasonable. It is worth noting that paragraph 5, which reads, "Any charges and fees associated with the Removal of the Petcoke, levied by MBT to COP [P66], shall be agreed in writing in advance by the Parties," does not give P66 the unilateral right to deny paying costs incurred because of its petcoke (if it did, MBT Longview would never have agreed to this provision).

Had MBT Longview given P66 written notice of the charges at issue, there are only two possible options: either (1) P66 would have agreed to pay the charges, in which case this action would not be necessary, or (2) P66 would have denied paying the charges, in which case MBT Longview would have filed suit against it, and it would have become the Court's role to determine what charges were reasonable and necessary. Thus, whether or not MBT Longview gave notice, the end result is the same: P66 would have to pay reasonable and necessary

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<sup>51</sup> CP 75-76.

charges caused by its petcoke or be required to remediate the damage caused by its petcoke.

And in its deposition, P66 admitted that its failure to receive notice is its basis for refusing to reimburse MBT Longview, and it knows of no other reason to challenge the validity of the costs incurred.<sup>52</sup> Thus, it was not injured by MBT Longview's failure to provide notice of the charges that were reasonable and necessary. Although MBT Longview was not required to notify P66 of this type of charge, because it was not a charge "levied" by MBT Longview to P66, the lack of notice would not be fatal to MBT Longview's right to seek reimbursement under the agreement anyway.

6. All of MBT Longview's Damages Were Caused by P66's Petcoke.

P66 argues that a fact issue exists as to how much of MBT Longview's damages were caused by wastewater from Weyerhaeuser coal. The basis for this argument is that at one point, coal owned by Weyerhaeuser was stored on the same pad as P66's petcoke, a fact that

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<sup>52</sup> CP 75-76.

MBT Longview does not dispute.<sup>53</sup> But it is an undisputed fact that, had it not been for the petcoke, **no** runoff water would have been removed.<sup>54</sup>

MBT Longview has never gathered water discharged from coal.<sup>55</sup> This is the definition of but-for causation: were it not for P66's petcoke, no water would have needed removing.

In support of its response to P66's motion for summary judgment, MBT Longview introduced evidence that it was only the presence of the petcoke that made water remediation necessary.<sup>56</sup> Notably, P66 still has not introduced or identified admissible evidence that the coal caused more water to be removed, and it admitted at its corporate deposition that it had no proof (and really did not know) whether the presence of the coal on the pad made a difference on water remediation.<sup>57</sup>

It is not enough to raise the possibility of an argument to defeat summary judgment; evidence supporting that argument must also exist

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<sup>53</sup> The coal was removed from the pad by September 21, 2011. Even if this argument had any merit, which it does not, it would not apply to any of the costs incurred to manage and remediate the petcoke after September 21, 2011. CP 1437.

<sup>54</sup> CP 1438.

<sup>55</sup> *Id.*

<sup>56</sup> CP 1437-39.

<sup>57</sup> CP 1468.

and be identified. This is particularly true when, as here, P66 admitted at its corporate deposition that it did not know whether the coal's presence made a difference in the amount of water remediated. In short, to date P66 has not produced or identified any evidence supporting this argument, and it was not able to point to any evidence supporting this argument at its deposition. P66's opportunity to introduce evidence supporting this argument has passed. It cannot now make up an issue of fact because MBT Longview has shown that none exists.

Further, P66's argument—that it should not have to pay to remove coal wastewater—makes sense only if the presence of the coal caused more water to be removed. This was not the case. The water (wastewater) is a static amount, caused by nature and not affected by anything done by P66 or MBT Longview. Any water that hit the pad had to be treated because of P66's petcoke. The coal did not increase the amount of water treated.

So P66's argument fails: MBT Longview had to remove wastewater runoff only because of P66's petcoke. No more or less treatment was required because of the coal. Nothing that P66 argues in its motion for summary judgment gets around this simple fact.

**C. P66 HAS ADMITTED THE FACTS NECESSARY FOR MBT LONGVIEW TO ESTABLISH ITS TRESPASS CLAIM<sup>58</sup>**

1. It Is Undisputed That P66 Committed Trespass on MBT Longview's Land.

"[A]n unprivileged remaining on land in another's possession" is trespass under Washington common law. *Bradley v. Am. Smelting & Ref. Co.*, 104 Wn.2d 677, 693, 709 P.2d 782 (1985) (internal quotation marks and citation omitted); *see also Fradkin v. Northshore Util. Dist.*, 96 Wn. App. 118, 123, 977 P.2d 1265 (1999) (internal quotation marks and citations omitted). Similarly, an "intentional or negligent intrusion onto the property of another that interferes with the other's right to exclusive possession is a trespass." *Fradlin*, 96 Wn. App. at 123. And Washington has repeatedly affirmed the definition in Restatement (Second) of Torts § 158(c) (1965), which provides that one is subject to liability for trespass if he or she intentionally "fails to remove from the land a thing which he is under a duty to remove." When a trespass is abatable, the trespasser is "under a continuing duty to remove the intrusive substance or condition." *Fradkin*, 96. Wn. App. at 126. When actual

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<sup>58</sup> If the Court finds for MBT Longview on its claim for breach of contract, it is unnecessary to analyze MBT Longview's tort claims against P66.

damage has been suffered because of the trespass, the plaintiff is entitled to recover for that damage. *Bradley*, 104 Wn.2d at 691-92.

It is evident from the deposition of 30(b)(6) corporate designee Mr. Gipson that there is no dispute about the following facts:

- P66 owned and has at all times been liable for the petcoke;<sup>59</sup>
- Upon taking possession of the land, MBT Longview immediately informed P66 that it did not have permission to leave the petcoke at the Plant Facility;<sup>60</sup>
- P66 did not remove the petcoke until over a year later; and
- P66's petcoke caused MBT Longview to incur costs to manage and remediate the petcoke.

In short, the presence of P66's petcoke on the Plant Facility became a continuing trespass after MBT Longview informed P66 on January 11, 2011, that P66 no longer had permission to store its petcoke at the Plant Facility. MBT Longview has *never* authorized presence of the petcoke at the Plant Facility. For over a year, MBT Longview had the petcoke on a pad at the Plant Facility; MBT Longview had to seal the petcoke pad, store the petcoke, and remove any water that came in contact with the petcoke. That petcoke had substantial value—of approximately

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<sup>59</sup> CP 49; 86-90; 91-100.

<sup>60</sup> CP 55-56; 83-84.

\$5 million—to P66. And under both the contract with Chinook<sup>61</sup> and the access agreement<sup>62</sup> with MBT Longview, P66 retained liability at all times for the petcoke. In fact, when MBT Longview and P66 negotiated the access agreement, P66 asked to include a release of all liability regarding the petcoke, and MBT Longview refused.<sup>63</sup> Even so, P66 did enter into the access agreement.<sup>64</sup> MBT Longview has never agreed to a waiver or reduction of P66's liability for the petcoke. To the contrary, it has specifically and repeatedly maintained the opposite: that P66 is and has been liable for anything related to the petcoke.

There is no dispute about the facts required for MBT Longview to succeed on its claim, as a matter of law, for continuing trespass under Washington common law: P66's petcoke remained on MBT Longview's land for over a year after MBT Longview demanded that P66 remove it, and caused MBT Longview damage as a result. All damages (over \$700,000) were a direct cause of P66's petcoke. There would be no

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<sup>61</sup> CP 101-02.

<sup>62</sup> CP 86-90.

<sup>63</sup> CP 65-66; 70-71.

<sup>64</sup> *Id.*

damage but for the petcoke. Thus, P66 must reimburse MBT Longview for that damage.

2. Because P66's Liability to MBT Longview Is Independent of Its Obligations Under the Access Agreement, the Economic-Loss Rule/Independent-Duty Doctrine Does Not Apply.

P66 argues that the economic-loss rule/independent-duty doctrine bars MBT Longview's trespass claim. It misapplies the doctrine in doing so: the independent-duty doctrine "does not bar recovery in tort when the defendant's alleged misconduct implicates a tort duty that arises independently of the terms of the contract." *Eastwood v. Horse Harbor Found., Inc.*, 170 Wn.2d 380, 393, 241 P.3d 1256 (2010).

Here, the tort duty that P66 had to MBT Longview did not arise out of the access agreement (if it did, the independent-duty doctrine would then apply). The tort duty arises from the fact that P66's petcoke was on MBT Longview's land when MBT Longview took possession of the Plant Facility and terminated P66's consent. There is no contract between P66 and MBT Longview that allowed P66 to place the petcoke on MBT Longview's land. The only contract between P66 and MBT Longview is the access agreement, which was entered into for P66 to take its petcoke **off** MBT Longview's land. It addresses removal of the petcoke only (and

specifically provides that no liability with regard to the petcoke and/or its removal is waived via that agreement).

Because the tort duty arose before (from the presence of the petcoke on MBT Longview's land, without MBT Longview's permission) and is entirely independent of the agreement between the parties, which addresses removal of the petcoke only, the economic-loss rule/independent-duty doctrine cannot bar MBT Longview's tort claims. This argument fails as a matter of law.

3. It Cannot Be Disputed That MBT Longview Never Consented to the Presence of the Petcoke.

P66 never had consent from MBT Longview for its petcoke to be at the Plant Facility. It had had consent under the contract with Chinook, which MBT Longview did not assume. When MBT Longview took possession of the Plant Facility, it explicitly terminated P66's consent and demanded that P66 remove its petcoke. In short, MBT Longview **explicitly revoked** any consent to presence of the petcoke at the Plant Facility shortly after taking possession.<sup>65</sup> It is blackletter law that a party in possession of land can terminate consent granted by a predecessor.

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<sup>65</sup> CP 55-56; 83-84.

Restatement (Second) of Torts § 160(a).<sup>66</sup> P66 had no consent from this day forward, and yet the petcoke was not removed for over a year.

In its brief, P66 acknowledges that MBT Longview "withdrew its consent," but then, amazingly, P66 seems to argue that it removed the petcoke within a "reasonable" amount of time thereafter. In doing so, it tries to assert that the reason it could not remove the petcoke sooner than over a year after MBT Longview acquired the Plant Facility is that MBT Longview had not acquired the permits necessary for P66 to remove the petcoke. In fact, P66 refused **for more than eight months** to take responsibility for the petcoke.<sup>67</sup>

Even if P66 had removed its petcoke within a reasonable amount of time, it would still be responsible for damages caused to MBT Longview by the petcoke's presence during the "reasonable" amount of time that it remained on MBT Longview's land without permission. Under P66's logic, if the owner of an expensive car leased a garage to

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<sup>66</sup> A trespass may be committed by the continued presence on the land of a structure, chattel, or other thing which the actor or his predecessor in legal interest has placed on the land

(a) with the consent of the person then in possession of the land, if the actor fails to remove it after the consent has been effectively terminated. . . ."

<sup>67</sup> CP 1122; 1433-34.

store the car, and if the garage was then sold to a new owner who immediately demanded that the car be removed, and if before removal the car leaked oil that contaminated the ground (such that the garage's new owner had to contain and clean up the oil), then the car's owner could remove the car without paying the garage owner costs to contain the oil and clean the contaminated ground.

This is not a fair result: the car owner would not be able to remove the expensive car, but leave the costs of oil containment and cleanup to the new garage owner, who never gave the car owner permission to place the car in the garage in the first place. That is what P66 wants to happen here: that it be allowed to take the valuable substance (the petcoke) while leaving the costs of management and remediation to MBT Longview. This is not allowed under the law, nor should it be, because it is an inequitable result.

4. P66's Equitable Estoppel Defense Is Flawed.

Again, P66's argument as to equitable estoppel fails on its face: it states that MBT Longview represented that it would assume P66's contract with Chinook and that P66 relied on this representation, such that equity does not allow MBT Longview to pursue this claim. This argument is

flawed because MBT Longview's trespass claim is based on the demand it made to P66 to remove the petcoke, which occurred after it entered its lease of the Plant Facility on January 11, 2011. The misrepresentations alleged by P66 are, as previously noted, unsupported by MBT Longview documents and in any event were made **before** MBT Longview completed its due diligence at the Plant Facility—before MBT Longview took possession of the Plant Facility and made a demand to P66 to remove the petcoke. At that point, MBT Longview's trespass claim began.

It is undisputed that from January 11, 2011, forward, after taking possession of the Plant Facility, MBT Longview repeatedly and consistently maintained (a) that it had not assumed P66's contract with Chinook, and (b) that P66 needed to remove its petcoke and pay for management of and remediation cause by the petcoke.<sup>68</sup> MBT Longview consistently maintained both points up to and until the petcoke was removed. It is not reasonable for an extremely sophisticated company such as P66 to state that it relied on preclosing statements, made during

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<sup>68</sup> On January 19, 2011, Mr. Cannon, MBT Longview's president, had a conversation with Mr. Gipson, at the time P66's manager of coke and sulfur schedulers,<sup>68</sup> and informed him that MBT Longview would not be exporting petcoke, that MBT Longview did not assume Chinook's contract with P66, and that P66 needed to remove the petcoke. CP 55-56; 83-84.

the due diligence period, when it was indisputably and repeatedly told the opposite from the date of closing until the petcoke was removed<sup>69</sup>—a period of over one year.

**D. P66'S COUNTERCLAIMS OF NEGLIGENT MISREPRESENTATION AND FRAUD ARE FRIVOLOUS BECAUSE THEY ARE ENTIRELY UNSUPPORTED BY FACT**

The trial court also awarded MBT Longview summary judgment on P66's counterclaims of fraud and negligent misrepresentation, which—even taking P66's testimony as true—are wholly unsupported by evidence. In fact, P66 did not even meet the pleading requirements for a fraud claim.

Under CR 9(b), a claim for fraud must be plead with particularity. And to succeed on a claim for fraud, a plaintiff must establish the following elements: "(1) representation of an existing fact; (2) materiality; (3) falsity; (4) the speaker's knowledge of its falsity; (5) intent of the speaker that it should be acted upon by the plaintiff; (6) plaintiff's ignorance of its falsity; (7) plaintiff's reliance on the truth of the

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<sup>69</sup> P66 also maintains that this prevented it from seeking recourse against Chinook before the closing. But P66's recourse against Chinook is based on the contract between it and Chinook. Claims for breach of contract can be made for six years following breach of the contract. So P66 is still entitled to seek recourse against Chinook. Thus, it has not been harmed by its alleged (unreasonable) reliance on MBT Longview's alleged (pre-closing) misstatements.

representation; (8) plaintiff's right to rely upon it; and (9) damages suffered by the plaintiff." *Adams v. King Cnty.*, 164 Wn.2d 640, 662, 192 P.3d 891 (2008) (internal quotation marks and citation omitted).

Similarly, to succeed on a claim for negligent misrepresentation, "a plaintiff must prove by clear, cogent, and convincing evidence that he or she justifiably relied on the information that the defendant negligently supplied." *Lawyers Title Ins. Corp. v. Baik*, 147 Wn.2d 536, 545, 55 P.3d 619 (2002). The plaintiff must prove six elements:

(1) That [the defendant] supplied information for the guidance of others in their business transactions that was false; and

(2) That [the defendant] knew or should have known that the information was supplied to guide [the plaintiff] in business transactions; and

(3) That [the defendant] was negligent in obtaining or communicating false information; and

(4) That [the plaintiff] relied on the false information supplied by [the defendant]; and

(5) That [the plaintiff's] reliance on the false information supplied by [the defendant] was *justified* (that is, that *reliance was reasonable under the surrounding circumstances*); and

(6) That the false information was the proximate cause of damages to [the plaintiff].

*Id.* (internal quotation marks and citations omitted) (emphasis added by *Baik* court).

Here, P66 cannot come close to the factual showing necessary to meet either standard. When asked at its deposition what evidence P66 had of MBT Longview's negligent representation and/or fraud, P66 alleged only one<sup>70</sup> false statement: that Mr. Simmons had told Mr. Gipson that MBT Longview was not aware of the contract between Chinook and P66.<sup>71</sup> But Mr. Gipson also testified that he knew MBT Longview was aware of the contract because of his prior conversations with MBT Longview's president, Mr. Cannon, and that Mr. Cannon had told him that MBT Longview was aware of the Chinook contract.<sup>72</sup> Both Mr. Simmons and Mr. Cannon told Mr. Gipson that MBT Longview was not assuming P66's contract.<sup>73</sup> Accordingly, P66 could not as a matter of law have relied on the one allegedly false statement of Mr. Simmons, because MBT Longview clearly told P66—through Mr. Simmons and Mr. Cannon—that MBT Longview would not assume Chinook's contract.

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<sup>70</sup> CP 81.

<sup>71</sup> *Id.*; CP 82-84.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

The additional arguments that P66 identifies in support of its fraud and misrepresentation claims are equally meritless. For example, P66 points to a number of statements that occurred before execution of the access agreement, while ignoring the integration clause<sup>74</sup> of that agreement. The integration clause expressly provided that all prior communications, representations, and agreements were superseded by the access agreement. P66 testified that it was aware of and understood this paragraph.<sup>75</sup> P66 cannot now ignore this provision to argue that it relied on statements allegedly made before the access agreement was executed when it **expressly, knowingly** disclaimed these same prior statements via the access agreement.

Similarly, P66 cannot argue that it was fraudulent of MBT Longview not to assume P66's contract with Chinook because (1) immediately after closing, MBT Longview informed P66 that it had not assumed the contract and that P66 needed to remove its petcoke, and

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<sup>74</sup> **Integration; Amendment: ¶ 13.** This Agreement constitutes the entire agreement of the parties relating to the subject matter hereof. There are no agreements, promises, terms, conditions, obligations, or warranties other than those contained in this Agreement. This Agreement supersedes all prior communications, representations, or agreements, verbal or written, among the parties relating to the subject matter hereof. This Agreement may not be changed or amended orally, but only by an agreement in writing, signed by the party against whom enforcement is sought.

<sup>75</sup> CP 81.

(2) these discussions (and any related representations) occurred before execution of the access agreement, so again—as a matter of law—P66 cannot rely on them in light of the integration clause.

P66 also argues that MBT Longview "surprised" it with the costs that are the subject of this litigation, as though this somehow supports its baseless fraud claim. Once again, this is revisionist history, as is evidence by P66's own testimony at its corporate deposition: by no later than June 15, 2011 (several months before execution of the access agreement), Mr. Gipson knew that MBT Longview was incurring costs related to petcoke and would incur additional costs before remediation was completed. He specifically knew that water remediation was a major issue. Mr. Gipson knew that at that time approximately 4 million gallons of runoff water **was already being stored in tanks** at the Plant Facility. Mr. Gipson also knew that the "rainy" season started in October and that there would be even more runoff water at that point.<sup>76</sup> Furthermore, Mr. Gipson admitted that P66 knew that MBT Longview never wavered in asserting that "all liability" related to the petcoke belonged to P66, and

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<sup>76</sup> CP 61-62; 101-02.

made that abundantly clear to P66.<sup>77</sup> In short, P66 knew that MBT Longview was incurring significant costs to manage and remediate the petcoke and P66 knew that MBT Longview considered P66 to be responsible for those costs.

Finally, P66 falls back on its argument that the parties had agreed to a "spirit" of the agreement that is different from the terms of the contract. This is simply not the case. MBT Longview did not agree to anything except for the terms of the access agreement as written. There is no evidence in the record that MBT Longview agreed to the so-called "spirit" of the contract, as P66 argues. In fact, the evidence that P66 cites in support of this argument is the affidavit of Mr. Gipson that was filed with P66's motion for summary judgment. It is no more than Mr. Gipson's "remembering" what Mr. Simmons told him during the negotiation process, although Mr. Gipson testified at P66's deposition that the "spirit" of the agreement (as he calls it) was not reflected by the language of the agreement.<sup>78</sup> P66 cannot create an issue of fact on construction of the

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<sup>77</sup> CP 60; 1059-60; 101-02.

<sup>78</sup> CP 1472.

agreement by submitting a declaration that contradicts its deposition testimony.<sup>79</sup>

Nothing that P66 recounts as a "fact" supporting its claims for fraud and misrepresentation comes remotely close to what is required to succeed on either claim. As a matter of law, P66 cannot succeed on its claims for fraud and misrepresentation. Accordingly, MBT Longview asks this Court to affirm the trial court's ruling of summary judgment on P66's counterclaims for fraud and misrepresentation.

**E. MBT LONGVIEW SHOULD BE AWARDED ITS REASONABLE ATTORNEY FEES AND COSTS ON APPEAL**

The access agreement provides:

10. Attorneys' Fees. If either party should find it necessary to employ an attorney to enforce a provision of this Agreement or to recover damages for the breach hereof (including proceedings in bankruptcy, litigation and appeals), the prevailing party shall be entitled to be reimbursed for its court costs and reasonable attorneys' fees, in addition to all damages.<sup>80</sup>

Under the terms of the access agreement, MBT Longview should be awarded its reasonable attorney fees and costs on appeal.

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<sup>79</sup> *Ramos v. Arnold*, 141 Wn. App. 11, 169 P.3d 482 (2007).

<sup>80</sup> CP 88-89.

V. CONCLUSION

Petcoke owned by P66, which P66 affirmed its responsibility for in the access agreement, caused damage to MBT Longview. Under the access agreement and common law, P66 was obligated to reimburse MBT Longview for the damage. Despite the dual basis for liability, P66 flat-out refused to reimburse MBT Longview for the amounts owed—amounts that P66 has admitted were reasonable and necessarily incurred.

Recognizing the simple undisputed facts underlying this case, the trial court correctly granted MBT Longview summary judgment, both on MBT Longview's claims against P66 and on P66's claims against MBT Longview. MBT Longview respectfully asks this Court to affirm the trial court's decision in its entirety and award its reasonable attorney fees and costs on appeal.

DATED this 14 day of August, 2015.

MILLER NASH GRAHAM & DUNN LLP

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**CERTIFICATE OF SERVICE**

I hereby certify and declare under penalty of perjury under the laws of the State of Washington that on August 14, 2015, I caused the original of the accompanying Respondent's Opening Brief to be filed with the following Court via Federal Express overnight mail, postage prepaid:

Court of Appeals for the State of Washington, Division 2  
950 Broadway, Suite 300  
Tacoma, Washington 98402-4454

In addition, I caused a true and correct copy of Respondent's Opening Brief to be served on the following counsel for appellants-defendants via Federal Express overnight mail, postage prepaid:

Mr. Logan E. Johnson  
Schiffer Odom Hicks & Johnson PLLC  
701 Fifth Avenue, Suite 4200  
Seattle, Washington 98104

DATED this 14 day of August, 2015.

MILLER NASH GRAHAM & DUNN LLP



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