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No. 69838-9-I

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IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

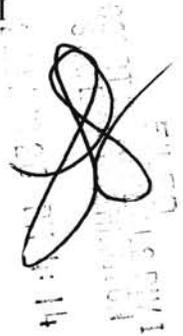
GIFFORD INDUSTRIES, INC., a Washington corporation,

Appellant,

v.

CHRISTIN TREUER d/b/a BRANCHFLOWER PROPERTIES, INC.,

Respondent.



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**REPLY OF APPELLANT**

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**ORIGINAL**

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## I. INTRODUCTION TO REPLY

Respondent's opposition fails to address the general disclaimer's lack of express language specifically disclaiming liability for damage due to the landlord's own negligence and breach of contractual duties; fails to address the material differences in the *Gabl* case from the general disclaimer Respondent relies upon here; fails to demonstrate the disclaimer's requisite conspicuousness; fails to point to any support in the record for the proposition that Gifford is "sophisticated" with respect to lease law such that ambiguity should not, as required, be construed against the landlord; and relies upon an alternate remedy to save itself where the remedy Respondent cites to applies to damage to the leased premises not damage to the tenant's property and where, in all events, following Respondent's logic would reward the landlord for, not just breaching the contract, but so utterly failing to meet its contractual duties that the leased premises itself (landlord's property) became untenable. Each of these failings individually (and even more so combined) are fatal to Respondent's liability defense.

Appellant also stands on its Opening Brief, which fully addresses the errors below and sets forth the controlling authority upon which to

reverse the Order at issue and to enter judgment in favor of Appellant here. Appellant preserves all arguments and references to the controlling authority cited in its Opening Brief, but does not duplicate all citations here for brevity.

## II. ARGUMENT

### A. Respondent's Admissions.

Respondent admits the following, at a minimum:

1. Respondent owed a contractual duty to its tenant to maintain and repair the roof, exterior walls and foundation of the leased premises. (CP 12, 25; Respondent's Brief at p. 2).

2. For purposes of summary judgment below, Respondent admitted breach of its contractual duty to its tenant, which directly caused damage to the tenant's property. (CP 11 at fn1<sup>1</sup>; see also CP 55-65, 84, 96-119, Respondent's Brief at p. 6).

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<sup>1</sup> Respondent misstates regarding the prior condition of the leased premises, in its footnote 1. The premises were in satisfactory condition for more than seven years. Then, the landlord removed an old structure from the roof and the leaks began. (Appellant's Opening Brief at pp. 12-13).

3. Respondent and the trial court view the first sentence of paragraph 17 as a disclaimer or an attempt to disclaim landlord's liability. (CP 15, 121, 131).

4. Respondent admits that the first sentence of paragraph 17 stands alone and no words, or implied terms, should be added to it at all. (CP 12, 15, Respondent's Brief at pp. 6, 9-10, 14<sup>2</sup>).

5. The entire contract must be read as a whole and all of the provisions must be harmonized together. (Respondent's Brief at p. 8).

6. The contract must be read so as to give each provision effect.  
*Id.*

7. Finally, Respondent admits that it received notice of the roof leak and the need to repair the roof on September 8, 2009, before its tenant suffered damage, and that it did other work at the property that fall, but Respondent, for reasons unknown, delayed the roof repair and did not

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<sup>2</sup> Appellant contends that the two sentences in paragraph 17 are related and make up a single exculpatory clause. The first sentence makes a general statement. The second sentence follows up and sets forth the specific scope of the exculpatory clause. The second sentence of paragraph 17 is not a separate indemnity clause. It provides for a defense and bars certain claims through a hold harmless, defining the scope of the first sentence, but it does not agree to indemnify the landlord. If the first sentence of paragraph 17 was intended to properly disclaim all liability of the landlord caused in any manner whatsoever, there would be nothing to hold the landlord harmless from in the second sentence. Read the Respondent's way the hold harmless becomes superfluous, without any additional meaning or legal effect. One does not need to be held harmless from claims that one has no liability for, or has already disclaimed in the first instance.

even seek a bid to repair the roof until December of 2009 and did not commence the repairs until January 2010, after the damage to Appellant's property had already occurred. (Respondent's Brief at p. 3). This Court can take judicial notice of the fact that September/October is generally the start of the rainy season in Seattle, where the property is located, and Respondent was on notice of the same. (CP 67 "But, with the rainy season coming, we can't have a leaky warehouse.").

**B. Respondent Misstates Appellant's Position on Gross Negligence.**

Respondent makes the statement that Appellant has not alleged or is not claiming that "Branchflower acted with gross negligence" or "that Branchflower's 'negligent act falls greatly below the standard established by law for the protection of others.'" (Respondent's Brief at p. 13). This is not correct. Appellant is not required to prove gross negligence for all of the reasons set forth in its briefing; however, Appellant believes that the unexcused neglect and delay on Respondent's part and obvious disregard for tenant's property, rights, and welfare fall to the level of reckless disregard or below the standard of slight care. Reference to Respondent's gross negligence, reckless disregard for its duties and inexcusable neglect falling far below its standard of care is made in at least the following:

Appellant's Assignment of Error No. 5 and Statement of Issues No. 4; fn1 in Appellant's Statement of the Case; Appellant's Opening Brief at pp. 14, 15, 16, 30, 35.

**C. The General Disclaimer in Paragraph 17 is Effective So Far as It Applies, But the Law Does Not Extend the Disclaimer to the Landlord's Own Negligence or Breach of its Own Duties, Where the Disclaimer Does Not Include the Required Express Language For This Application.**

Respondent fails to address the law of disclaimers, which requires a party seeking to disclaim liability for its own negligence or breach of duty to clearly and expressly state the intent in plain and actual, or express words, in the disclaimer. *Vodopest v. MacGregor*, 128 Wn.2d 840, 848, 913 P.2d 779 (1996) and cases cited therein; *Markel AM Ins. v. Dagmar's Marine*, 139 Wn. App. 469, 475, 161 P.3d 1029 (2007) and cases cited therein. A general disclaimer, that may be effective in other instances of liability, is not effective as against the released party's own negligence or breach of duty. *Id.*

Respondent cites no authority to refute the law, which requires strict construction of exculpatory clauses and requires clear, express disclaimers, as cited above. Respondent does, however, cite to additional case law that specifically reiterates and agrees with controlling law

presented by Appellant. “. . . parties to a contract have a right ‘**expressly** to agree in advance that the defendant is under no obligation of care for the benefit of the plaintiff . . .’” (Respondent’s Brief at p. 14, citing *Chauvlier v. Booth Creek Ski Holdings, Inc.*, 109 Wn. App. 334, 339, 35 P.3d 383 (2001) (emphasis supplied). What Respondent’s lease clause fails to include is the “express” disclaimer language that the law requires.

“Exculpatory clauses are strictly construed under Washington law and are enforceable only if their language is sufficiently clear.” *Chauvlier*, 109 Wn. App. at 339-340. The *Chauvlier* disclaimer, a ski resort release, was sufficiently clear where the promise included bold all capital letters notice of the intent and promise to **RELEASE, HOLD HARMLESS AND INDEMNIFY** against, among other things, the risk of colliding with “man-made structures or objects”, which is how the accident happened in that case, and contained a promise not to bring a claim against or sue the ski resort and the agreement “released Booth Creek ‘from any and all liability for personal injury, including death, and property damages resulting from [Booth Creek’s] negligence or otherwise.’” *Id.* at 338, 340.

To highlight why Respondent is liable to its tenant, we assume for purposes of this argument that the first sentence of paragraph 17 stands alone, is unambiguous, cannot be supplemented with any implied terms

and forms the entire disclaimer or exculpatory clause, as Respondent has argued. Respondent argues that the first sentence of paragraph 17 does not include an exception, or exemption for the landlord's negligence or breach of duty in the disclaimer. (Respondent's Brief at 9-10). While this is true, as to the first sentence, what controls here, is the fact that the general disclaimer does not **include** any specific or express language regarding damage caused by the landlord's negligence or breach of duty. As outlined above, and even in Respondent's own brief, the express agreement to disclaim negligence and a parties own legal duties is required to be effective in that regard.

On Respondent's interpretation, the general disclaimer, if this is what the first sentence of paragraph 17 is, remains effective for all other purposes, but cannot operate to release the landlord from liability for its own negligence or breach of its own duties because it does not include affirmative words to that effect. While the first sentence of paragraph 17 is broad, it is nothing if not general in its one brush stroke. (CP 26). Respondent argues as if the words [including damages caused by Landlord's negligence, breach of Landlord's duties or caused in any manner whatsoever] were included in the first sentence of paragraph 17. They are not.

Some leases do include the specific and express disclaimers that are deemed effective. This is not one of them. The *Gabl* case, put at issue here by Respondent on Reply below, and for a different reason, dealt with a case where a fire had broken out in a residential apartment, above a tenant's commercial business space, in the same building.

In distinct contrast, to the single sentence, general disclaimer in the lease at issue here, the *Gabl* leases used express and detailed disclaimers including, but not limited to, "and lessor shall not be liable for any damage . . . from any act or neglect of employees, co-tenants or other occupants of said building, or any other persons, including lessors' agents, or due to the happening of an accident from whatsoever cause . . ." and "all property . . . shall be at the Lessees' sole risk, and Lessor shall not be liable for any damage . . . arising from any act or neglect of co-tenants or other occupants of the building or their employees or of other persons, . . . or from electric wires, or from gas, or caused in any manner whatsoever". *Id.* at 882-883.

Moreover there was no evidence in *Gabl*, again in contradistinction to the facts here, that the Lessor caused the fire, as opposed to one of its residential tenants. If a co-tenant had caused a fire in this case, the general disclaimer at Paragraph 17 would be effective, if the landlord was not also negligent or in breach of a duty.

**D. Disclaimers Are Not Enforceable Where They Are Not Conspicuous.**

Respondent admits that disclaimers are not enforceable where they are not conspicuous. (Respondent's Brief at p. 13 citing *Vodopest* 128 Wn.2d at 848). Here, the attempted disclaimer, in the first sentence of paragraph 17, is not conspicuous. (CP 26). In Respondent's *Chauvlier* case the disclaimer was deemed conspicuous where it used large, bold, all capitalized letters to set off the "**LIABILITY RELEASE & PROMISE NOT TO SUE PLEASE READ CAREFULLY**" next to the "**RELEASE**" and "**HOLD HARMLESS AND INDEMNITY**". 109 Wn. App. at 342. It was also the Release, Hold Harmless and Indemnity Agreement itself that was signed, not a document with another purpose that buried the release within it. *Id.* Here, the document that Appellant signed is a real property lease. It contains many provisions. Paragraph 17 is titled ACCIDENTS AND LIABILITY. While that title is capitalized, it is the exact same color and font as all of the other paragraph titles in the lease. And, the title gives no notice or indication that the Landlord would be seeking to apply an "ACCIDENT" clause to shield itself from its own unexcused delay and neglect of its own contractual duty to maintain and

repair the roof, which it had just affirmatively promised to the tenant, in paragraph 7 of the same instrument, on the preceding page. (CP 25).

The statement at paragraph 17 of the Respondent's lease is far more like the disclaimer placed in the middle of a golf cart rental agreement in *Baker v. City of Seattle*, 79 Wn.2d 198, 199, 484 P.2d 405 (1971), than the detailed, bolded, single purpose, separately signed disclaimer that was enforced in *Chauvlier*. In *Baker*, the entire rental agreement was only one paragraph long, not a multi-page document, but the disclaimer was placed in the middle of the paragraph, in the same color and size of font as the rest of the paragraph. It was held to be inconspicuous and unenforceable on that account. "The disclaimer was contained in the middle of the agreement and was not conspicuous. To allow the respondent to completely exclude himself from liability by such an inconspicuous disclaimer would be truly unconscionable." *Baker*, 79 Wn.2d at 202. Similarly, to allow Respondent to exclude itself from liability, for its own inexcusable neglect, with a single sentence disclaimer, buried in the middle of a lease, in the same size and color font as the rest of the text, for damage caused by the Landlord's own breach of a promise that it had just made to its tenant on the preceding page of the

lease, under the guise of dealing with what happens when “ACCIDENTS” occur on the property, would be unconscionable.

**E. Disclaimer Unenforceable for Landlord’s Gross Negligence.**

Respondent admits that even express disclaimers are ineffective to shield Respondent from its own gross negligence. (Respondent’s Brief at p. 13). Gross negligence is an exception to the enforcement of even clear and conspicuous exculpatory clauses. *Id.* and cases cited therein. As outlined above, Respondent’s actions fall well below its standard of care, to act with the care of a reasonably careful person and to act with good faith in carry out all of its contractual duties. Respondent’s gross negligence, acting without care, or only slight care, for its tenant’s rights, property and welfare, should have been taken into account by the trial court when making its ruling.

The evidence in the record demonstrates a reckless disregard by Respondent for its tenant and for Respondent’s duties to its tenant, where Respondent was put on notice of the roof leak, asked to repair it before the rainy season arrived, received follow up notices and had workers out at the property for other reasons, but failed utterly to even obtain a bid for the roof repair until three months after the initial notice and did not bother to

commence the first attempted repair (which did not work) until after tenant's property was ruined. The undisputed factual record supports a finding of gross negligence. (Respondent's Brief at p. 3; CP 55-119).

**F. Ambiguity in Leases are Construed Against the Landlord and in Favor of the Lessee.**

Respondent makes the unsupported assertion that Gifford Industries, Inc. is a "sophisticated" party based upon the single fact that it is a corporation. Gifford Industries is a Washington corporation in the business of installing specialty flooring and in particular for athletic facilities. (CP 2). Harv Gifford, the President of the company, signed the lease. There is no evidence in the record that Harv Gifford or Gifford Industries, Inc. is "sophisticated" with respect to leasing or lease law and certainly no evidence that either the corporation or its principal were "sophisticated" with respect to leases in 2002, when the lease was signed<sup>3</sup>.

More importantly, Respondent cites to no authority that refutes the case law cited in Appellant's Opening Brief that where leases are concerned, ambiguity in a lease is specifically construed against the lessor, landlord. This is a lease case, and case law states that ambiguity is to be

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<sup>3</sup> On summary judgment all inferences are to be drawn in favor of the non-moving party.

construed against the landlord. Where a lease clause is susceptible to more than one meaning, the one more favorable to the lessee controls. *Murray v. Odman*, 1 Wn.2d 481, 485-486 (1939); *Gates v. Hutchinson Inv. Co.*, 88 Wash. 522, 153 P. 322 (1915).

**G. The First Two Sentences of Paragraph 17 Form One Single Exculpatory Clause, Not a One Sentence Exculpatory Clause Followed By a One Sentence Indemnity Clause.**

There are two related sentences in paragraph 17 that together make up a single exculpatory clause. (CP 26). Both of these sentences reference personal injury as well as property damage. The first sentence makes a general statement. The second sentence follows up with the actual hold harmless and sets forth the specific scope of the exculpatory clause. The second sentence of paragraph 17 is not a separate indemnity clause. It provides for a defense and bars certain claims through a hold harmless, defining the scope of the first sentence, but it does not agree to indemnify the landlord or contain any other indemnity language.

If the first sentence of paragraph 17 was intended to properly disclaim all of the landlord's liability, caused in any manner whatsoever, there would be nothing to hold the landlord harmless from in the second sentence. On Respondent's theory, the hold harmless becomes ineffective,

superfluous, without any meaning or legal effect. One does not need to be held harmless for claims that one has effectively just disclaimed liability for, in the first sentence. Moreover, the exculpatory clause specifically exempts from the hold harmless damage or injury “caused by Landlord’s negligence.” (CP 26). If that liability had already been disclaimed in the first sentence, there would be nothing to save from the hold harmless agreement. Put another way, sentence number two would be carving out a worthless exemption, because on Respondent’s theory all such liability is waived in sentence one.

In addition, as outlined above, one cannot make a valid disclaimer for one’s own negligence without stating so in express and clear terms. Such a disclaimer, even where it includes express terms and is clearly stated, must also be conspicuous and does not apply to save Respondent from its gross negligence, in all events.

**H. Respondent’s Alternate Remedy Theory Applies to Damage to the Leased Premises, Which is Not at Issue Here.**

Respondent commits three pages of briefing to an argument for an alternate remedy that does not here apply. Withholding rent for constructive eviction or termination of the lease are remedies for damage

to the leased premises. Damage to the leased premises is not at issue here. According to the treatises that Respondent cites, termination of the lease and constructive eviction apply where the use, title, occupancy or condition of the leased premises is at issue, none of which are relevant here.

It is true that after the landlord breached its first duty to maintain and repair the roof, which then directly caused damage to the tenant's property, the landlord further breached its duties under the lease by failing to keep the leased property in a habitable or tenantable condition. This is a second breach of a separate duty. Standing water was allowed to accumulate and the property was full of un-remediated mold which the landlord willfully refused to address. (CP 109-119). This is, however, a separate issue and not part of this appeal. Thus, all of Respondent's citations to real property treatises are inapposite as they specifically deal with remedies where the title, use or condition of the leased premises is compromised.

Even if the authority upon which the argument relies was not misplaced, and it is, justice and equity would not support Respondent's position. Respondent claims, in essence, that because it left its duties unperformed for so long that its initial breach spawned additional breaches

such that, not only was the tenant's property damaged, but the leased property (the landlord's property) became unusable as well, and because the property became so unusable that the tenant was forced to abandon the property and terminate the lease this somehow absolves the landlord from responsibility for the damage that it caused when it first breached the contract. We are not aware of any authority that stands for the proposition that a second breach of contract by a breaching party, excuses damage caused by that same party's earlier breach.

On Respondent's theory of construction for paragraph 17, if the landlord breached its duty to repair the roof and the roof leaked and damaged the tenant's property, but the landlord did not further neglect the property or allow the property to become untenable, in that case the tenant would not have a remedy for the breach of landlord's duties, thus making the repair clause ineffective, thus making that construction of paragraph 17 no good. It would be disallowed under the rules of contract construction because it failed to give effect to an important promise in the contract.

But, Respondent argues, in a case, such as the one here, where the landlord breaches its duty to repair the roof and the tenant's property is damaged, and then the landlord through further, inexcusable breach and

neglect allows the landlord's own property to become completely untenable, (standing water and significant mold growth is allowed to persist unabated), then, in that case, the landlord gets a hall pass and does not have to pay for the damage to its tenant's property because the landlord made things so bad that the tenant had to just go ahead and move out. Equity does not support this construction of the contract. Equity abhors a forfeiture. *Port of Walla Walla v. Sun-Glo*, 8 Wn. App. 51, 55, 504 P.2d 324 (1972). Equity does not reward conduct lacking in good faith. *Id.* at 60-61. Allowing the landlord to act with so little care that it damages its own property, as well as the tenant's, then using that second failure in its duties as a shield to liability for the first failure is an unconscionable construction of the contract and should not be allowed.

#### **I. Attorney Fees**

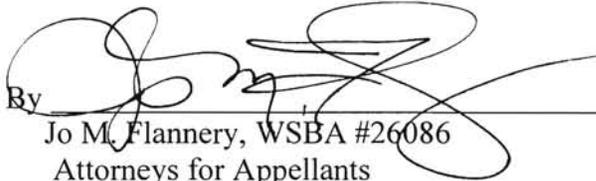
Appellant renews its request for an award of its attorney fees and other costs on appeal for all of the reasons and upon the bases outlined in its Opening Brief.

### III. CONCLUSION

Based upon the law of contracts, the applicable rules of construction and interpretation, the authority cited in the briefing and the record herein, the trial court's ruling on Respondent's motion for summary judgment below should be reversed. Attorney fees and costs on appeal should be awarded to Appellant.

DATED this 25<sup>th</sup> day of August, 2013.

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**DECLARATION OF SERVICE**

I declare that on this 26th day of August, 2013 I caused to be served the foregoing document on counsel for Respondents, and the named court reporters, as noted, at the following addresses:

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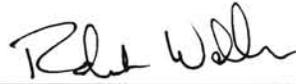
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Robert Walker

Dated: August 26, 2013.

Place: Seattle, Washington.