

75331-2

75331-2

NO. 75331-2-I

COURT OF APPEALS, DIVISION ONE  
OF THE STATE OF WASHINGTON

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620, LLC

Appellant,

v.

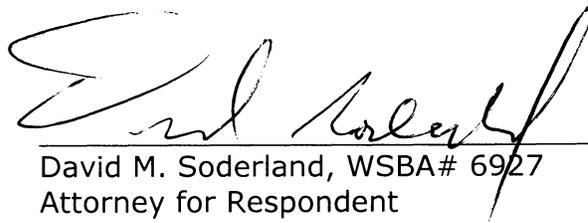
MERIDIAN, INC., dba MERIDIAN CONSTRUCTION,

Respondent.

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BRIEF OF RESPONDENT

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STATE OF WASHINGTON  
COURT OF APPEALS, DIVISION ONE

**TABLE OF CONTENTS**

	<u>Page</u>
I. Statement of the Case . . . . .	1
II. Argument . . . . .	3
A. The Trial Court Did Not Err In Granting Meridian’s Motion For Summary Judgment . . . . .	3
B. Washington Courts Have Upheld Hold Harmless Agreements . . . . .	5
III. Conclusion . . . . .	15

## TABLE OF CONTENTS

	<u>Pages</u>
<i>Beaver v. Estate of Harris</i> , 67 Wash.2d 621, 627 – 628 (1965) . . . . .	4
<i>First Communication, Inc. v. Seattle Times Co.</i> , 143 Wash.2d 493, 115 P.3d 262 (2005). . . . .	13
<i>Hadley v. Cowan</i> , 60 Wash.App. 433, 804 P.2d 1271 (1991). . . . .	7, 10, 11,
<i>National Bank of Washington v. Equity Investors</i> , 81 Wash.2d 886 at 912 (1973) . . . . .	4
<i>Shields v. Sta-Fit, Inc.</i> , 79 Wash.App. 584, 903 P.2d 525 (1995) . . . . .	6
<i>Wagenblast v. Odessa School District #105</i> , 110 Wash. 845, 758 P.2d 986 (1988) . . . . .	5, 6, 7

## **I. STATEMENT OF THE CASE**

In August of 2012, Meridian entered into a contract for the construction of an office building known as the 620 Office Building located at 620 Seventh Avenue in Kirkland, Washington. Meridian undertook the construction of the building at that location.<sup>1</sup> The building was substantially completed in July of 2013. During the course of construction there were change orders agreed to by the parties. Meridian contended that the value of these change orders totaled approximately \$180,000. 620, LLC disagreed that the change orders were justified and asserted that no additional money was owed to Meridian. Meridian filed a lien for the \$180,000 it claimed it was owed for the additional work.<sup>2</sup>

On or about June 9, 2014 an agreement was reached between 620, LLC and Meridian to resolve the claims arising out of the 620 Building.<sup>3</sup> Meridian agreed to drop its claim for \$180,000 for additional work

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<sup>1</sup> CP 34, Declaration of Luay Joudeh.

<sup>2</sup> CP 34, Declaration of Luay Joudeh.

<sup>3</sup> CP 34, Declaration of Luay Joudeh.

performed on the building and to take care of any and all liens on the 620 project. 620, LLC agreed to pay Meridian \$30,000. Luay Joudeh, a member of 620, LLC was interested in having a house designed and built on property he owned in Kirkland, Washington. As part of the settlement agreement, Meridian agreed to design and build Mr. Joudeh's personal residence for a fixed fee of \$200,000. Meridian was released from any continuing obligation to perform warranty work on the 620 Building. 620, LLC and Meridian agreed to hold each other harmless for any future claims on this project.

Approximately a year after the settlement agreement was reached, 620, LLC commenced a breach of contract action in King County Superior Court against Meridian arising out of alleged defects in the 620 Building.

Meridian filed a Motion for Summary Judgment based upon Paragraph 2 of the settlement agreement the parties reached on June 9, 2014. Paragraph 2 states as follows:

"2. 620 LLC and Meridian shall hold each

other harmless for any future claims on this property.”

Meridian’s Motion for Summary Judgment was granted by the trial court on April 22, 2016.

## **II. ARGUMENT**

### **A. The Trial Court Did Not Err In Granting Meridian’s Motion For Summary Judgment.**

Every preliminary version of the June 9, 2014 agreement and the final version contained the same hold harmless language. In the agreement, 620, LLC and Meridian agreed to “hold each other harmless for any future claims on this project”. There is no limitation restricting this clause to claims made by third parties. Had the parties wanted to limit the scope of the hold harmless agreement to cover only claims by third parties, they could have done so. They did not. There is no language in the agreement limiting the mutual hold harmless agreement to claims asserted by third parties. The wording of the hold harmless agreement covers all future claims. It includes the future claim asserted by

620, LLC more than a year after the agreement was made.

Washington courts have consistently held that releases and indemnification agreements are contracts. They are to be governed and construed by contract principles. *Beaver v. Estate of Harris*, 67 Wash.2d 621, 627 – 628 (1965). Washington adheres to general contract principles that the parties have a duty to read the contracts they sign. *National Bank of Washington v. Equity Investors*, 81 Wash.2d 886 at 912 (1973). In the case at bar, both parties are sophisticated and well educated businessmen. There is no evidence that either party did not read nor understand the agreement that they signed.

The parties agreed to hold each other harmless for any future claims on the project. The lawsuit against Meridian was not in existence at the time the agreement was signed in June of 2014. The breach of contract action is clearly a “future claim” that is precluded by the mutual hold harmless agreement.

B. Washington Courts Have Upheld Hold Harmless Agreements.

Washington courts have upheld exculpatory and hold harmless agreements unless they violate public policy. *Wagenblast v. Odessa School District #105*, 110 Wash. 845, 758 P.2d 986 (1988). *Wagenblast* sets forth six factors that the court is to consider on whether or not a hold harmless agreement violates public policy. The six factors set out in *Wagenblast* are whether: 1) the agreement concerns a business of a type generally thought suitable for public regulation; 2) the person seeking exculpation is engaged in a service which is of great importance to the public, which is often a matter of practical necessity for some members of the public; 3) the party seeking exculpation holds himself or herself out as willing to perform the service for any member of the public seeking it, or at least any member of the public coming within certain established standards; 4) because of the essential nature of the service, the parties seeking exculpation possesses a decisive advantage of bargaining

strength against members of the public seeking the service; 5) in exercising superior bargaining power, the party seeking exculpation confronts the public with a standardized adhesion contract of exculpation and makes a provision for the purchaser to pay additional reasonable fees and obtain protection against negligence, and 6) the person or property of the public purchaser seeking such service is placed under the contract of the seller or his agents.

*Wagenblast, supra*, involved the issue of whether a school district should require its potential student athletes to sign an exculpatory agreement as a condition of engaging in school athletics. The factors outlined by the court in *Wagenblast* do not apply to private agreements reached between two sophisticated business entities resolving construction claims arising out of the construction of an office building.

In the case of *Shields v. Sta-Fit, Inc.*, 79 Wash.App. 584, 903 P.2d 525 (1995), the court upheld a hold harmless agreement. The agreement was in

connection with the use of a private health club. The court viewed the *Wagenblast* factors and concluded that the hold harmless agreement did not violate public policy. The court held that the common thread running through cases finding hold harmless agreements void as against public policy all involved essential public services, including hospitals, housing, public utilities and public education. For a private contract between private parties, *Wagenblast* factors are not satisfied and the agreement can be enforced.

*Hadley v. Cowan*, 50 Wash.App. 433, 804 P.2d 1271 (1991) involved the construction of a settlement agreement in connection with a will contest. The decedent, Claudette Hadley died in September of 1985. The bequests in the will included \$50,000 in trust to each of her two children, there were specific bequests to Claudette's mother and Claudette's two sisters. The balance of the estate was left in trust with a net income to go to the mother for life and then pass to the mother's sisters (the childrens' aunts).

After the admission of the will to probate, the children filed a petition contesting the will. In June of 1986, the children agreed to settle and dismiss their will contest in exchange for an additional \$30,000 contribution into each child's trust. The settlement terms provided that:

- "1. The children shall dismiss with prejudice their Petition pending in the Superior Court of the State of Washington for King County under Cause No. 85-4-03411-0.
2. The Children acknowledge that the Will is valid and binding in all respects.
3. All parties shall endeavor to foster the close and loving relationship that exists between the Children and the Legatees and further that each will use all reasonable efforts with others to cause such others to refrain from in any manner or form, disrupting such relationship. . . "

An earlier draft of the proposed settlement agreement which was not included in the final version contained the provisions that:

- "(1) That the will contestants agree that Claudette Hadley was not mentally incompetent at the time of the execution of the Will;
- (2) That there exists no case against any of the beneficiaries for any influence that the beneficiaries are alleged to have exerted over Mrs. Hadley."

The children rejected the inclusion of this proposed settlement language in the agreement but did not provide any reasons why they rejected the proposed terms.

Two years after the execution of the June 1986 agreement, the children filed a tort action against the other legatees asserting that they had exercised undue influence upon the decedent, committed the tort of outrage and interfered with the parent/child relationship.

The defendants moved for summary judgment on the basis that the June 1986 agreement resolved all claims connected with the will. The trial court granted the motion for summary judgment. This ruling was affirmed on appeal.

The plaintiffs contended that the June 1986 agreement required them only to dismiss their petition challenging the probate of the will and that it did not preclude them from bringing a separate superior court tort action based upon undue influence and other tort claims. The court disagreed. The court stated as follows:

“The Children argue that they reserved issues

of fraud, undue influence, overreaching, duress an abuse of confidence for future tort litigation independent of the will contest by deleting the proposed settlement clauses. They are incorrect; the agreement settled all issues concerning their loss of inheritance. In construing the contract, this court must first look to the language of the agreement, not expressions absent from the agreement. Moreover, the parol evidence rule precludes such testimony where the agreement is unambiguous.

The reasonable reading of the parties' agreement is that in exchange for \$60,000, the Children waived their right to undermine the validity of the will or undo its property distribution. The Legatees reasonably believed that all claims directly or indirectly attacking Claudette's will, such as fraud, undue influence, or duress, had been settled. . . ."

60 Wash.App. 433 at 438.

The court was critical of the childrens attempt to make an agreement and accept its benefits and then later, through a subjective and undisclosed belief, assert additional claims. If the agreement was to preserve claims for the future, the children should have expressly indicated that in the agreement. On this point the court stated as follows:

"If the Children consciously intended to preserve causes of action challenging the distribution provided by their mother's will, they could have done so in the settlement agreement itself. Of course, had they explicitly stated their

intention, settlement would have been highly unlikely. It follows that the intention to preserve their causes of action was secret. This court will not strain to interpret a contract in favor of secret or undisclosed intentions that are at odds with the fair meaning of the document. We therefore find that the settlement agreement binding as to all issues and facts bearing on the validity of the will and consequent loss of inheritance.”

The same logic that applied in *Hadley v. Cowan, supra*, applies in the case at bar. There were existing contract based claims between 620, LLC and Meridian. Meridian claimed that it was owed approximately \$180,000 for additional work on the 620 building. 620, LLC disagreed. A lien was filed for the disputed amount. Both parties, at this point, had the right to bring a breach of contract claims against the other. The parties resolved their dispute as reflected in the June 9, 2014 agreement. If 620, LLC had intended the June 9, 2014 settlement agreement to preserve 620, LLC’s right to bring a future contractual claim, it should have set forth this term in the settlement agreement. It failed to do so. As the court indicated in *Hadley v. Cowan, supra*, 620, LLC’s intention to preserve its cause of action was “secret” and

undisclosed. The court should not strain to interpret a contract to preserve a "secret" intension.

In the case at bar, the issue before the trial court was the effect of Paragraph 2 of the agreement. Paragraph 2 stated 620 and Meridian shall hold each other harmless for any future claims on this project. At this point in time the lien on the project had been "taken care of" by Meridian as required in Paragraph 4 of the agreement. Both Meridian and 620, LLC were parties to the written contract they entered to build the 620 Building in August of 2012. The six year statute of limitations for bringing a breach of contract action by either Meridian or 620, LLC had not expired. Both parties had a potential right to bring a breach of contract claim. As of June 2014, neither party had filed a breach of contract claim. Any breach of contract claim filed by either party would be a "future claim" related to the 620 project. The mutual hold harmless agreement would apply to any contract claims brought by either party. By mutually agreeing to hold each other harmless, the

parties essentially “washed out” any breach of contract claims they could have brought.

Paragraph 2 of the June 9, 2014 agreement is not ambiguous. It is not limited to claims by third parties. It includes all future claims, including claims by both 620, LLC and Meridian.

Washington follows the “objective manifestation theory of contracts. *First Communication, Inc. v. Seattle Times Co.*, 143 Wash.2d 493, 115 P.3d 262 (2005). Under the objective manifestation theory, a party’s unexpressed subjective intent is irrelevant if intent can be determined from the actual words used. The court gives the words in the contract the ordinary, usual and popular meaning unless the entirety of the agreement clearly demonstrates a contrary intent. The court does not interpret what was intended to be written but what was written. *First Communication, Inc. v. Seattle Times, Co.*, 143 Wash.2d 493 at 404 – 405. The mutual hold harmless agreement covers “any future claims on this project”. The clear, common meaning of the words “any

future claims” includes future breach of contract claims brought by the parties.

There is no ambiguity raised in the agreement by the use of the word “warranty work” instead of liability in Paragraph 3 of the agreement. Warranty work refers to a builder’s future and continuing obligation to return and make certain repairs to building components. By releasing Meridian from any obligation for warranty work is consistent with the parties resolving all claims and potential claims they had against each other in the June 9, 2014 agreement. At the time the June 9, 2014 agreement was signed, Meridian had a claim for \$180,000 worth of additional work against 620, LLC. This was resolved through the payment of cash and the agreement to have Meridian design and build Mr. Joudeh’s personal residence for \$200,000. Meridian agreed to take care of the lien that it had filed on the 620, LLC property. The parties agreed that Meridian was released from any warranty obligations in connection with the 620 building. This would end any existing or future obligations that

Meridian would have regarding the building. All of the issues between the parties had been resolved. The hold harmless agreement speaks to the future. The parties agreed to mutually hold each other harmless for any future claims on this project. A future claim would include any future breach of contract claim asserted by either 620, LLC or Meridian.

### **III. CONCLUSION**

In June of 2014, 620, LLC and Meridian entered into an agreement to resolve all claims connected with the construction of the 620 Building. As part of that agreement, the parties agreed to mutually hold each other harmless "for any future claims on this project". The mutual hold harmless agreement is not limited to claims asserted by third parties. It covers "any future claim". At the time the parties entered into the agreement, both parties had the right to bring a breach of contract claim. Had Meridian brought a breach of contract action for the \$180,000 it was owed, 620, LLC would have contended that the June 2014 settlement agreement

precluded all future claims. The converse is also true. Both parties gave up the right to bring future claims by agreeing to hold each other harmless for future claims on this project.

The parties also agreed that Meridian would have no future obligations by way of warranty work on the project. This is consistent with the parties intent that the parties June 9, 2014 settlement was a "walk away" agreement. It resolved all claims and future claims the parties might have out of the construction of the 620 Building. To allow 620, LLC to ignore the clear language of the mutual hold harmless agreement regarding "any future claims on the project" is contrary to the clear intent of the parties as reflected in the written agreement.

The trial court's ruling dismissing 620, LLC's complaint on Meridian's Motion for Summary Judgment based upon the mutual hold harmless agreement should be affirmed.

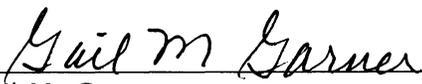
*CERTIFICATE OF SERVICE*

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, and over the age of eighteen years, not a party to or interested in the above entitled action, and competent to be a witness herein.

On the date below, I caused to be served the foregoing to the following individuals in the manner indicated:

Seth E. Chastain  
Attorney at Law  
600 University Street, #3300  
Seattle, WA 98101

DATED this 2<sup>nd</sup> day of November, 2016.

  
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Gail M. Garner