

No. 69838-9-I

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.,

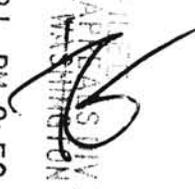
Respondent.

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

This case arises out of a landlord's, Respondent's, breach of its contractual duties to repair and maintain the roof and exterior walls of its building. The Appellant leased and occupied the space for seven years, 2002 to 2009, without incident or damage to its property due to rain water or moisture intrusion. In 2009, the landlord removed an old shed-like structure from the roof. Removal of the structure created a hole in the roof and may have exposed others. The hole allowed rainwater into the Appellant's leased space. The Appellant immediately notified the landlord and requested the landlord to perform required repairs to prevent damage.

The landlord did not repair the hole that it had created. Exposed to wind and rainy weather, the hole(s) increased in size. More water came in. The Appellant continued to notify the landlord of the worsening problem and of damage being suffered. The landlord assured the Appellant it would take care of the problem. The landlord did not perform its contractual obligations. The landlord's neglect of its duties and unexcused delay caused direct and substantial damage to its tenant's property.

In the trial court below the landlord argued that it was not liable for the tenant's damages by inviting the court to read and apply only one

sentence of the contract, out of context from other controlling terms. The trial court accepted this invitation in error.

The trial court below ignored the landlord's affirmative contractual promises and duties, construed the contract in a manner that struck the landlord's duties from the contract, improperly implied additional exculpatory terms into the contract, ignored the balance of the actual exculpatory clause where it states that the promise to hold the landlord harmless does not apply to protect against the landlord's own negligence, ignored the undisputed evidence in the record of the landlord's negligence, and relied upon a case put forward by Respondents, on reply, that involved lease clauses which differ materially from the lease at issue here.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in granting the Respondent's motion for summary judgment below, and entering the Order Granting Defendants' Motion for Summary Judgment on September 22, 2011. CP 127-128.

2. The trial court erred when it failed to construe the contract as a whole and focused on only one sentence, out of context. It was error to fail to take account of the fact that the Respondent had an affirmative contractual duty to repair and maintain the roof, exterior walls, and foundation, and that the breach of this duty directly caused the damage to the Appellant. It was error to construe the contract in a manner that struck this important promise from the contract, made it null and void, and rewrote the contract as if the promise did not exist.

3. The trial court erred when it impermissibly implied additional exculpatory terms into the first sentence of

paragraph 17, failed to construe the exculpatory clause narrowly, failed to apply the more reasonable and just meaning and failed to construe the ambiguity in favor of the lessee and against the drafter.

4. The trial court erred when it failed to read the exculpatory clause as a whole, and failed to take account of the fact that the exculpatory clause expressly does not hold the landlord harmless for property damage caused by the landlord's own negligence.

5. The trial court erred when it failed to take account of the pleadings and undisputed evidence in the record of the landlord's negligence, or gross negligence, yet explicitly stated that "Plaintiff made no allegation of negligence, gross negligence, or willful misconduct" when it explained its ruling. CP 130-131.

6. The trial court erred when it failed to apply the controlling standard on summary judgment and failed to view all of the facts in the light most favorable to the Appellant, the non-moving party below, and failed to draw all inferences from the facts in favor of the Appellant.

7. The trial court erred when it applied *Gabl v. Alaska Loan & Inv. Co.*, 6 Wn. App. 880, 496 P.2d 548 (1972), relied upon *Gabl* alone to formulate its ruling, and considered itself constrained by *Gabl*, because the trial court failed to take into account that the lease terms in *Gabl* differed materially from the lease here at issue; namely the instant lease limits the promise to hold the landlord harmless to situations where the landlord is not negligent, where the *Gabl* leases had no such limitation, the instant lease does not expressly disclaim the cause of the damage, the *Gabl* leases did, and the instant lease contains an affirmative duty on the part of the landlord to maintain and repair the roof, exterior walls, and foundation, but no evidence of any such affirmative contractual duty was at issue in *Gabl*. The trial court in applying *Gabl* further failed to follow settled law that requires the contract to be construed as a whole and not to construe contracts so as to

make a part of the contract meaningless, as outlined in Assignment of Error No. 2 and 3. CP 130-131.

8. It is Appellant's contention that the undisputed record below showed that the Respondent had an affirmative contractual duty to repair and maintain the roof, exterior walls and foundation, that Respondent breached that duty and that Respondent was negligent in the breach of that duty, which directly caused damage to Appellant; however, in the alternative, Appellant further assigns error to the trial court below for finding that no material facts were in dispute, based upon the record before it.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Should this Court construe the contract as a whole, giving meaning to all of the parties' contractual promises? Put another way, did the trial court err when it failed to construe the contract as a whole, and instead focused only on one sentence, construing it out of context from the balance of its paragraph and out of context from the contract as a whole, such that the effect was to eliminate the contractual duty of the Respondent to repair and maintain the roof, exterior walls and foundation of the building, rewriting the contract as if this promise did not exist? (Assignment of Error Nos. 1, 2, 3 and 4).

2. Should this Court interpret the first sentence of paragraph 17 such that additional exculpatory terms are not implied or read into the sentence as if they were express terms, construe the exculpatory clause narrowly, refuse to find a disclaimer of duty and liability unless it is

clearly and expressly stated, apply the more reasonable and just meaning to the sentence where two possible meanings exist, and construe the ambiguity in favor of the lessee and against the Respondent, Drafter. (Assignment of Error Nos. 1, 2, and 3).

3. Should this Court construe the exculpatory clause in Paragraph 17 of the contract as a whole, taking into account the entire paragraph, apply the rule of construction that exculpatory clauses are disfavored in the law and so should be construed narrowly, and give meaning to all of the words in the exculpatory clause including the express limitation that the Respondent would not be held harmless for Appellant's damages if the damages were caused by the Respondents' negligence. (Assignment of Error Nos. 1, 2 and 4).

4. Should this Court take into account the pleadings and undisputed evidence in the record of the Respondent's negligence, and/or gross negligence and Respondent's reckless disregard for its own contractual duties and for the damage that it was thereby causing to the Appellant, and find that the trial court erred when it stated that "Plaintiff made no allegation of negligence, gross negligence, or willful misconduct" in its explanation of its ruling below. CP 130-131. (Assignment of Error Nos. 1, 5 and 6).

5. Should this Court apply the correct standards for summary judgment, and view all of the facts in the light most favorable to the Appellant, the non-moving party below, and draw all inferences from the facts in favor of the Appellant, and find that the trial court erred when it failed to view all of the facts in the light most favorable to the Appellant and failed to draw all inferences from the facts in favor of the Appellant. CR 56. (Assignment of Error Nos. 1 through 8).

6. Should this Court distinguish the application of *Gabl v. Alaska Loan & Inv. Co., supra*, as inapposite to eliminate Respondent's liability in this case. (Assignment of Error Nos. 1 through 7).

6A. Did the trial court err in its application of *Gabl*, when it decided that its ruling was constrained by *Gabl*, where the leases at issue in *Gabl* did not involve affirmative contractual promises, duties or obligations on the part of the landlord to the tenants to maintain and repair the very system that caused the tenants' damage, but where in the instant case, the parties' contract does obligate the Respondent to maintain and repair the roof, the exterior walls and the foundation, the failure of which caused the damage at issue, and where to ignore this difference in the cases reads the Respondents' contractual duty to maintain and repair out of the lease? (Assignment of Error Nos. 1 through 7).

6B. Did the trial court err when it applied *Gabl* and decided that its ruling was constrained by *Gabl* where the exculpatory clauses in the *Gabl* leases were materially different from paragraph 17 of the instant lease, where the *Gabl* clauses involved express, unqualified allocation of risk of loss to the tenants, caused in any manner whatsoever, and included a disclaimer of negligence, but here paragraph 17 of the Appellant's lease does not contain *Gabl's* broad inclusive language, does not include an express disclaimer of duty or liability for negligence, and is further expressly limited to situations where the landlord is not negligent. (Assignment of Error Nos. 1 through 7).

7. In the alternative to an affirmative ruling on Assignments of Error 1 through 7 and issues 1 through 6, or any of them¹, should this Court find that the record before it presents material questions of fact that are in dispute such that the trial court erred when it found that no material questions of fact were in dispute and granted summary judgment to Respondent. CP 127-128. (Assignment of Error No. 1 and 8).

¹ The Appellant takes the position that the undisputed facts warrant a ruling that the Respondent breached its contractual duties and obligations to the Appellant, that the breach directly and proximately caused Appellant's damages, and that the Respondent's conduct in failing to meet its contractual duties and obligations fell below the standard of care of a reasonable person and/or the Respondent acted in reckless disregard of its duties and the damages that it was causing to the Appellant; therefore, the Appellant is entitled to an award of its damages, the amount of which should be determined in further proceedings.

8. Should this Court award Appellant's attorney fees and expenses on appeal where the Order Granting Defendants' Motion for Summary Judgment below was granted in error, as further outlined in this brief, the contract at issue in Respondent's motion below contains a prevailing party attorney fee provision at paragraph 21, and where RCW 4.84.330 provides for an award of attorney fees where, as in this case, the lease or contract includes an attorney fee provision, and where pursuant to RAP 18.1 a section of Appellant's opening brief is devoted to the request for these fees and expenses. (Assignment of Error Nos. 1-8).

IV. STATEMENT OF THE CASE

A. Undisputed Facts:

1. The space was leased for more than seven years without incidence of damage. The parties entered into the subject lease in 2002. CP 11, 24-32, 42, 55, 60-61. Appellant leased the space to store its specialized inventory and equipment, which it used in specialty construction and the installation of flooring in athletic facilities. *Id.* Appellant occupied the space for more than seven years, from before the 2002 lease to September 2009, without incidence of rain water or other moisture intrusion or mold growth compromising the space. *Id.*

2. Significant roof leaks commenced in September 2009, but repairs were not commenced for more than four months. CP 23², 42-46, 55-119. By this time serious damage had already occurred. *Id.* The roof leak was first discovered and reported on September 8, 2009. CP 42-43, 55-56, 62, 67. Appellant followed up with Respondent and complained about the roof leak a number of times. CP 42-46, 55-75. The leak was getting worse, so much so that the space had to be de-watered before a sump pump could be installed, in November of 2009. CP 42-46, 55-75, 84, 96. The sump pump installed by Respondent was defective and did not address the water coming in through the roof. CP 42-46, 55-119 and in particular CP 96-99.

Although the Appellant saw activity around the building causing it to believe that the leak was being addressed, according to the Respondent's own records, Respondent did not actually make any repairs to the roof or related exterior wall areas, for the first time, until January 18, 2010. CP 55-119 and in particular CP 56-57, 101. This repair was not carried out until after Respondent's delay had caused serious damage to Appellant. CP 69. Even then, Respondent only addressed one small area and the roof continued to leak. CP 101-102.

² Respondent admits it was put on notice of the leak in the "Fall of 2009", but is pointedly non-specific as to the dates when it hired contractors to install a sump pump or

An additional two month delay ensued. In March 2010, Respondent carried out additional patch work, but knew that it still had not addressed all of the problems with the roof that were admitting water into the Appellant's space. CP 102, 62.

Respondent took no action to abate the mold growth it had caused in the Appellant's space. CP 84, 109-119. Appellant was forced out of the space. CP 63-64, 74. Virtually all of its property in the warehouse, with the exception of certain steel racks, was destroyed. *Id.*

3. Key Lease Provisions. The lease includes several key provisions including: an affirmative contractual duty on the part of Respondent to maintain and repair the roof, exterior walls and foundation (Paragraph 7); an agreement by the Appellant to hold Respondent harmless for damages except where the Respondent is negligent (Paragraph 17); an agreement by the parties to waive certain claims against each other, except where the parties are negligent (Paragraph 18); a prevailing party attorney fee provision (Paragraph 21). CP 24-32.

Paragraph 7 of the contract sets forth the following duties and obligations:

7) REPAIRS AND MAINTENANCE: Premises have been inspected and are accepted by Tenant in their present condition. Tenant shall, at its own expense and at

repair the roof, or that Appellant quit complaining after early 2010 because the damage was done by then. CP 23.

all times, keep the Premises neat, clean and in a sanitary condition, and keep and use the premises in accordance with applicable laws, ordinances, rules, regulations and requirements of governmental authorities. Tenant shall permit no waste, damage or injury to the premises; keep all drain pipes free and open; protect water, heating, gas and other pipes to prevent freezing or clogging; repair all leaks and damage caused by leaks; replace all glass in windows and door of the premises which may become cracked or broken; and remove ice and snow from sidewalks adjoining the premises. **Except for the roof, exterior walls and foundation, which are the responsibility of the Landlord, Tenant shall make such repairs as necessary to maintain the premises in as good condition as they are now,** reasonable use and wear and damage by fire and other casualty excepted. [Emphasis supplied]. CP 25.

Respondent also admits that it had the contractual responsibility to maintain and repair “the roof, exterior walls, and foundation of the building.” CP 12.

Respondent retained the contractual right to access Appellant’s space at all reasonable times to carry out these repairs.

14) ACCESS: Landlord shall have the right to enter the premises at all reasonable times for the purpose of inspection or of making repairs, additions or alterations, and to show the premises to prospective tenants for sixty (60) days prior to the expiration of the leases term. CP 26.

Paragraph 17 provides as follows:

17) ACCIDENTS AND LIABILITY: Landlord or its agent shall not be liable for any injury or damage to persons or property sustained by Tenant or others, in and about the Premises. Tenant agrees to defend and hold Landlord and its agents harmless from any claim action and/or judgment [*sic*] for damages to property or injury to persons suffered

or alleged to be suffered on the Premises by any person, firm or corporation *unless caused by Landlord's negligence*. [Emphasis supplied]³. CP 26.

Paragraph 18 provides as follows:

18) SUBROGATION AND WAIVER: Landlord and Tenant each herewith releases and relieves the other and waives its entire right of recovery against the other for loss or damage arising out of or incident to the perils described in standard fire insurance policies and all perils described in the "Extended Coverage" insurance endorsement approved for use in the state of Washington, which occurs in, on or about the Premises, *unless due to the negligence of either party, their agents, employees or otherwise*. [Emphasis supplied]. CP 26.

Paragraph 21 provides as follows:

21) COSTS AND ATTORNEY FEES. If, by reason of any default or breach on the part of either party in the performance of any of the provisions of this Lease, a legal action is instituted the losing party agrees to pay all reasonable costs and attorney fees in connection therewith. If [*sic*] is agreed that the venue of any legal action brought under the terms of this lease may be in the country [*sic*] in which the Premises are situated. CP 27.

B. Unsupported Assertions Introduced by Respondent:

Respondent makes the unsupported assertion that the space was leased as a 'wet space', that the warehouse was "an old ice house", that the property "has always been damp inside". CP 22-23. Appellant denied these unsupported assertions. CP 60-61. The record also includes undisputed testimony regarding the absence of any damage from

³ A second paragraph at 17) requires the tenant to provide a liability policy of insurance

dampness or moisture intrusion from the period of time before 2002 to September 2009, when the rain started coming in through the roof. CP 55, 60-61.

C. Summary of Procedure Below:

Respondent moved for summary judgment on the theory that the single introductory line in paragraph 17 effectively disclaimed all liability for damage to the tenant's property, regardless of the cause, including a direct breach of another contractual promise on the part of the Respondent. CP 10-16. Respondent further chose not to quote the entire paragraph, which limits the actual agreement to hold the Respondent harmless for damages, "unless caused by Landlord's negligence." CP 12, 122, 26.

Appellant argued in opposition, among other things, that paragraph 17 had to be read in connection with the other promises in the contract and that the entire contract must be construed as a whole, that the contract could not be read to effectively delete Respondent's repair obligations under the contract. Appellant pointed out the full text of paragraph 17 and argued that Respondent's behavior fell below the standard of care and that Respondent's delay and neglect defeated Respondent's motion for summary judgment. CP 41-54.

and name the landlord as an additional insured. CP 26.

Respondent offered the *Gabl* case, for the first time on Reply below, only to counter the assertion that paragraph 17 was *per se* void as against public policy. CP 120-124. The trial court then over applied *Gabl*. It agreed with Respondent regarding the public policy argument, which we do not take issue with here, but then went on to determine that *Gabl* controlled the outcome on summary judgment, failing to analyze or account for the important material differences in the leases at issue in *Gabl*, and the language of the lease at issue here, and also failing to acknowledge the other bases upon which summary judgment should have been denied that were presented in the briefing. CP 126-131.

The trial court's ruling was based, at least in part, upon the finding that "Plaintiff made no allegation of negligence, gross negligence or willful misconduct." CP 131. But, the record below did include Appellant's allegations of negligence and/or gross negligence.

Appellant made the following allegations in its Amended Complaint, attached as an exhibit to the Declaration of Steven Goldstein, submitted as a part of Respondent's Motion for Summary Judgment below. CP 17-21:

2.5 Pursuant to explicit language contained in Paragraph 7 of the lease agreement, defendant Truer was responsible for repairs and maintenance at the roof, exterior walls and foundation.

2.6 During the course of Gifford's lease term, Defendant Truer made or allowed some alternations to the roof and other areas of the building to be made.

2.7 On information and belief, these alterations modified the envelope of the building and allowed water to leak into the plaintiff's space. This ultimately led to the destruction of much of the plaintiff's inventory and equipment which was housed in the subject building.

2.8 Once it became aware of the extensive damage that had taken place, Plaintiff took immediate steps to protect what was left of its' inventory, stock and equipment. Plaintiff immediately notified Defendant of the damages and it asked Defendant to take immediate steps to prevent the damages from continuing and even escalating.

2.9 Even after it had become aware of the damage that was occurring, Defendant took no action to assist in making repairs to the building so as to protect Plaintiff's inventory. Gifford [*sic*] [Defendant] took no action to compensate or assist in reducing the scope of damage that Gifford was experiencing, even though it was requested to do so. CP 19-20.

In Appellant's opposition briefing below it made a number of relevant allegations contained in CP 41-119. Its recital of Facts at CP 42-46 include the elements of negligence and/or gross negligence, including duty (CP 46-47), breach of that duty (CP 42-47), direct and proximate causation (CP 42-46), damages (CP 43-44).

Appellant asserted that the necessary repairs were "never addressed in a reasonable or timely fashion . . ." (CP 44 at ln 8).

Defendant's behavior has fallen far below the standard of reasonableness. (CP 46 at Fn 4).

Appellant argued that “. . . a landlord has an obligation to repair the premises and has liability to its tenant and others on the premises from unreasonable risks of physical harm if the landlord negligently repairs the premises, or negligently fails to make repairs . . .” CP 53 lns 15-18.

Appellant asserted that its landlord was negligent at CP 52, ln 16, “even when the landlord was negligent”.

The Declarations of Ken Downs, Harv Gifford and Charles Greenberg and the documents attached as Exhibits thereto set forth an undisputed record expanding upon the elements alleged in the Appellant's Amended Complaint of duty, breach of the duty, proximate cause through unexcused delay and unreasonable neglect, even reckless disregard for the damage that Respondent was causing in the Appellant's space, and serious damage to the Appellant as a direct result of Respondent's neglect. CP 56-119.

V. SUMMARY OF ARGUMENT

It was error to fail to construe the contract as a whole, and in a manner that denied the Appellant the benefit of the Respondent's

contractual promise to it, causing the Respondent's promise to maintain and repair the roof, exterior walls and foundation to become ineffective, meaningless.

It was error to read the introductory sentence to the exculpatory clause as if it included an express disclaimer for damages caused by the Respondent's breach of contract and/or negligence, when it does not. The full extent of the text reads: "Landlord or its agent shall not be liable for any injury or damage to persons or property sustained by Tenant or others, in and about the Premises". To reach its ruling the trial court implied an express disclaimer of duty and express disclaimer of negligence that are not in the agreement. CP 26.

It was error to interpret and construe the parties' contract such that the implied terms superimposed on the contract by Respondent yielded an unreasonable result. The trial court reached its decision based solely on the introductory sentence to paragraph 17. The contract here at issue does not say that the landlord can breach the contract with impunity and be held harmless from damages, in all events. It was error to read it as if it did.

It was error to rely upon the general introductory sentence to the exculpatory clause and ignore the balance of the exculpatory clause which specifically limits the hold harmless agreement to situations where the landlord is not negligent.

The trial court overlooked key distinctions in the *Gabl* case when it determined that it was “constrained” by *Gabl*. CP 130-131. The *Gabl* leases included broad exculpatory clauses that did include express allocation of sole risk to the tenants for damages “caused in any manner whatsoever”, “from whatsoever cause” and included express disclaimers of negligence. 6 Wn. App at 882-883. *Gabl* further did not involve a landlord’s breach of an affirmative contractual duty to its tenant that directly caused the damage at issue. There were vague allegations in *Gabl* that the landlord “continued to control the area”, but the fire broke out in a non-party residential tenant’s apartment. There were no allegations that the landlord caused the fire. The instant lease does not include the sweeping language of the *Gabl* lease, it does not expressly exculpate the landlord from damage caused by its own breach of duty or negligence, and it specifically excludes from the hold harmless damage caused by the landlord’s negligence.

The Order entered below should be reversed and relief should be granted consistent with the record on appeal.

VI. ARGUMENT

A. Standard on Review

The Court of Appeals reviews an order granting summary judgment *de novo*. *City of Seattle v. Mighty Movers, Inc.* 152 Wn.2d 343, 348, 96 P.3d 979 (2004). On review of a summary judgment order the Court of Appeals “engages in the same inquiry as the trial court and only considers evidence and issues raised below.” *Halbert v. Forney*, 88 Wn. App. 669, 673, 945 P.2d 1137 (1997), citing *Wash. Fed’n of State Employees v. Fin. Mgmt.*, 121 Wash.2d 152, 157, 849 P.2d 1201 (1993); RAP 9.12.

Summary judgment is only appropriate if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56(c); *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). The moving party has the burden to show that no genuine issue of material fact exists. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). The Court must view all of the facts in the light most favorable to the Appellant, the non-moving party below, and all inferences to be drawn from the facts must be drawn in

favor of the Appellant. *Green v. A.P.C.*, 136 Wn.2d 87, 94 (1998) (and cases cited therein).

B. General Rules of Contract Interpretation and Construction

1. Interpretation Distinguished From Construction.

Berg v. Hudesman, 115 Wn.2d 657, 663, 801 P.2d 222 (1990), includes a helpful, if brief discussion regarding interpretation and construction of contracts, interpretation being the assignment of meaning or intent of the parties and construction being the application of legal consequences.

We use the word "interpretation" in the sense described by Corbin and the Restatement and distinguish it from "construction." Corbin states: "Interpretation is the process whereby one person gives a meaning to the symbols of expression used by another person." 3 A. Corbin, *CONTRACTS* 532, at 2 (1960). The Restatement definition is: "Interpretation of a promise or agreement or a term thereof is the ascertainment of its meaning." Restatement (Second) of Contracts 200 (1981).

Construction of a contract determines its legal effect. "Construction . . . is a process by which legal consequences are made to follow from the terms of the contract and its more or less immediate context, and from a legal policy or policies that are applicable to the situation." Patterson, *The Interpretation and Construction of Contracts*, 64 Colum. L. Rev. 833, 835 (1964). SEE 3 A. Corbin, *Contracts* 534 (1960 & Supp. 1990).

2. The Purpose of Interpretation is to Ascertain the Intention of the Parties.

The cardinal rule with which all interpretation begins is that its purpose is to ascertain the intention of the parties." Corbin, *The Interpretation of Words and the Parol Evidence Rule*, 50 *Cornell L. Quar.* 161, 162 (1965). 4 S. Williston, *Contracts* 601, at 306 (3d ed. 1961). See *Eurick v. Pemco Ins. Co.*, 108 Wn.2d 338, 340, 738 P.2d 251 (1987); *In Re Estates of Wahl*, 99 Wn.2d 828, 830-31, 664 P.2d 1250 (1983); *Dwellely v. Chesterfield*, 88 Wn.2d 331, 335, 560 P.2d 353 (1977).

Berg v. Hudesman, 115 Wn.2d at 663.

3. The Intention of the Parties is Determined by Viewing the Contract as a Whole.

‘Determination of the intent of the contracting parties is to be accomplished by viewing the contract as a whole, the subject matter and objective of the contract, all the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of respective interpretations advocated by the parties.’

Id. at 667 citing *Stender v. Twin City Foods, Inc.*, 82 W.2d 250, 254, 510 P.2d 221 (1973).

Leases, in particular, must be read as a whole. “It is well settled in this state that a contract of lease must be read as a whole, and, when so read, the intention of the parties must govern” *Murray v. Odman*, 1 Wn.2d 481, 485 (1939) and cases cited therein.

4. Contracts Must Be Construed in Such a Way to Give Meaning and Effect to All of the Parties Promises.

Contracts are to be read so that each promise is given meaning. “Each portion of an agreement should be construed to avoid ineffectiveness.” *McIntyre v. Plywood Company*, 24 Wn. App. 120, 600 P.2d 619 (1979) (construing employment contract), citing *Patterson v. Bixby*, 58 Wn.2d 454, 460 (1961) (property agreement between husband and wife). When construing a contract the court must avoid rendering a promise superfluous. *Id.*

5. Where Two Meanings are Possible the Reasonable and Just One Should be Applied.

“A contract susceptible to a reasonable or unreasonable construction should be given a reasonable one.” *Universal/Land Const. Co. v. Spokane*, 49 Wn. App. 634, 638, 745 P.2d 53 (1987) citing *McIntyre v. Fort Vancouver Plywood Co.*, 24 Wn. App. 120, 124, 600 P.2d 619 (1979).

‘When a provision is subject to two possible constructions, one of which would make the contract unreasonable and imprudent and the other of which would make it reasonable and just, we will adopt the latter interpretation.’ *Dickinson v. Unites States Fid. & Guar. Co.*, 77 Wn.2d 785, 790, 466 P.2d 515 (1970). *Fisher Properties, Inc. v. Arden-Mayfair, Inc.*, 106 Wn.2d 826, 837, 726 P.2d 8 (1986); See Restatement (Second) of Contracts 203(a) (1981).

Berg, 115 Wn.2d at 672.

6. Exculpatory Clauses are Construed Narrowly.

Exculpatory clauses are strictly construed and “must be clear if the exemption from liability is to be enforced.” *Vodopest v. MacGregor*, 128 Wn.2d 840, 848, 913 P.2d 779 (1996) and cases cited therein. “The intent to exculpate a party from its own negligence must “be clearly and unequivocally expressed.” (citations omitted). *Markel AM Ins. V. Dagmar’s Marin*, 139 Wn. App. 469, 475, 161 P.3d 1029 (2007) (lease of a marina space, applying maritime law). Similarly, any attempt to disclaim a duty must be express. *Id.* at 482.

7. Specific Terms are Given Greater Weight than General Terms.

“It is a well-known principle of contract interpretation that ‘specific terms and exact terms are given greater weight than general language.’ 2 RESTATEMENT (SECOND) OF CONTRACTS § 203(c) (1981). *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 354-355, 103 P.3d 773 (2004).

8. Ambiguity is Construed Against the Landlord/Drafter and in Favor of the Lessee.

“Contract language is to be interpreted most strongly against the party who drafted the contract.” *Universal/Land Const. Co. v. Spokane*, 49 Wn. App. at 638, citing *Guy Stickney, Inc. v. Underwood*, 67 Wn.2d 824, 827, 410 P.2d 7 (1966); *Neiffer v. Flaming*, 17 Wn. App. 443, 447, 563

P.2d 1300 (1977). *Accord Berg v. Hudesman*, 115 Wn.2d at 677; *Adler v. Fred Lind Manor*, 153 Wn.2d at 355 (any ambiguity between arguably conflicting provisions is resolved against the drafter).

Where a lease is susceptible of two competing interpretations it is construed against the Lessor. “It is also a familiar rule that, if the provisions of a lease be doubtful, in that they are reasonably capable of more than one interpretation, the court will adopt the interpretation which is the more, or most, favorable to the lessee. *Murray v. Odman*, 1 Wn.2d at 485-486 and cases cited therein. This is particularly true when the lease was drafted by the lessor. *Id.*; *Gates v. Hutchinson Inv. Co.*, 88 Wash. 522, 153 P. 322 (1915).

C. The Trial Court Failed to Apply These Settled Rules of Contract Construction.

1. The Trial Court Construed the Contract in a Manner that Made the Landlord’s Promise to Repair and Maintain the Roof, Exterior Walls and Foundation Meaningless.

The *Berg* Court specifically rejected the “plain meaning rule and expressly adopt[ed] the context rule as the applicable rule for ascertaining the parties’ intent and interpreting written contracts.” 115 Wn.2d at 678-679. Thus, the trial court erred when it appears to have applied a plain meaning analysis to one sentence of the contract, out of context from the balance of that sentence’s paragraph and out of context from the contract

as a whole, with the result that it rendered an important promise on the part of the Respondent ineffective and meaningless.

The Respondent admits that it had the contractual obligation to repair and maintain the roof, exterior walls and foundation of the building, as set forth in paragraph 7 of the lease, *supra*. The Respondent argued that the duty to maintain and repair was a “red herring”. CP 15. Respondent argued that because the lease does not prescribe an express remedy for the breach of the duty to repair and maintain, there isn’t one. No authority was cited for this slim proposition and we are aware of none.

Respondent argued that the first sentence of paragraph 17 alone disclaimed the Landlord’s liability for any injury or damage to persons or property, claiming that “[n]o other language in the controlling contract addresses the property damage at issue. CP 15. At a minimum, paragraph 7 addressed the responsibility for the cause of the property damage at issue. Moreover, the balance of paragraph 17 addressed the property damage at issue and although the Respondent did not make the assertion, paragraph 18 may address the property damage at issue as well. It was error to ignore these other important contractual provisions and to thereby render them meaningless. The rules for interpretation and construction outlined in 2, 3, and 4 above were violated.

2. The Trial Court Failed to Recognize that it was Reading Additional Implied Terms into the First Sentence of Paragraph 17; Failed to Apply the More Reasonable of Two Possible Meanings; Failed to Construe the Exculpatory Clause Narrowly; and Failed to Construe the Ambiguity Against the Landlord/Drafter.

Below, Respondent argued “Paragraph 17 unambiguously disclaims any liability for injury to property sustained by the tenant.” CP 15. Even without looking at the balance of paragraph 17, the introductory sentence itself is susceptible to two different meanings. One meaning, the position that Respondent argued for, includes additional implied terms as shown in the bolded insert: “Landlord or its agent shall not be liable for any injury or damage to persons or property sustained by Tenant or others, in and about the Premises” **[including damages directly caused by the Landlord’s breach of contract and the Landlord’s own negligence for failure to maintain and repair the roof]**. *See e.g.* CP 15 at lns 11-16, CP 121 lns 18-20, CP 26 ¶ 17. Respondent argued below, “Gifford alleges that because the landlord is responsible for the roof repairs, it does not follow that the landlord can [*sic*] disclaim any property damage relating to the roof. However, this is exactly what the lease agreement says, and the terms of the lease control.” CP 121 lns 18-20. But, that is not *exactly* what the lease says.

The second and more reasonable meaning is: **[except where damages are caused by breach of other provisions of this contract or**

the Landlord's own negligence] “Landlord or its agent shall not be liable for any injury or damage to persons or property sustained by Tenant or others, in and about the Premises.” CP 26 ¶ 17.

As outlined above, where a contract provision is susceptible to two different meanings the most reasonable and just meaning must be applied. In addition, all ambiguities must be construed in favor of the Appellant, lessee, and against the Respondent, drafter. Moreover, the second meaning proffered by Appellant preserves both the intended disclaimer and the contractual duty to maintain and repair and so does not run afoul of rendering any portion of the contract meaningless.

Finally, the rules of construction for exculpatory clauses in Washington do not permit reading additional exculpatory terms into the contract, as required for Respondent's intended meaning. *See e.g. Vodopest*, 128 Wn.2d at 848-850. Quite the opposite, liability may not be disclaimed, waived or released in advance, unless the exculpatory clause actually contains clear and express language to that effect. *Markel AM Ins.*, 139 Wn. App. at 475 and 482. It was error for the trial court to uphold the first sentence of paragraph 17 as an effective disclaimer of Respondent's liability where the provision does not contain clear and express language including disclaimer of liability for the Respondent's own breach of contract and/or negligence.

3. The Trial Court Failed to Take into Account the Context and Express Limitation Contained in the Hold Harmless Agreement in Paragraph 17.

Respondent appears to have intentionally ignored the balance of paragraph 17. The analysis above should resolve the interpretation of the first sentence of paragraph 17 in Appellant's favor, that is to say, Appellant did not expressly disclaim Respondent's liability for damages caused by Respondent's own breach of contract or negligence. However, if the context rule is followed, then the balance of paragraph 17, the context in which the introductory sentence to paragraph 17 appears, is important as well.

The entire paragraph reads as follows:

17) ACCIDENTS AND LIABILITY: Landlord or its agent shall not be liable for any injury or damage to persons or property sustained by Tenant or others, in and about the Premises. Tenant agrees to defend and hold Landlord and its agents harmless from any claim action and/or judgment [*sic*] for damages to property or injury to persons suffered or alleged to be suffered on the Premises by any person, firm or corporation unless caused by Landlord's negligence. CP 26.

The first sentence, upon which Respondent relies, can be read as the warm up; a statement of the parties' general intent, followed by the specifics of the agreement to hold harmless. The actual agreement to hold harmless is specifically limited to situations not caused by the Landlord's

negligence. This is consistent with the limitation on the waiver language in paragraph 18, *supra*, as well. Applying the rules of contract construction as outlined above, construing the contract as a whole, looking at the context in which the term is placed, giving meaning to each promise, and giving greater weight to the specific language in the second part of the paragraph as opposed to the general or introductory language in the first sentence, at a minimum, the trial court should have found that paragraph 17 did not hold the Respondent harmless for damages caused by its negligence. Respondent cannot be relieved of liability because it failed to fulfill the condition upon which the hold harmless for damages was based, namely to not act negligently.

D. Undisputed Evidence in the Record Demonstrates the Respondent's Negligence.

“Negligence is the failure to exercise ordinary care. It is the doing of some act that a reasonably careful person would not do under the same or similar circumstances or the failure to do some act that a reasonably careful person would have done under the same or similar circumstances.”

6 WASHINGTON PATTERN JURY INSTRUCTIONS: CIVIL 10.01, at 125 (6th ed. 2012) (“WPI”). “Ordinary care means the care a reasonably careful person would exercise under the same or similar circumstances.” WPI 10.02, at 126.

When it explained its ruling, the trial court stated that “Plaintiff made no allegation of negligence, gross negligence or willful misconduct.” CP 131. However, Appellant’s pleadings allege all of the elements of negligence. “In a claim for negligence, a party must prove: (1) the existence of a duty owed to the complaining party, (2) a breach of that duty, (3) a resulting injury, and (4) that the claimed breach was the proximate cause of the injury. *Markel*, 139 Wn. App at 475. Undisputed evidence in the record satisfies each of these elements. The Statement of the Case, *supra*, cites to the allegations and references to negligence, even gross negligence, in the record.

The parties’ relationship is governed by the contract. Therefore, Appellant’s counsel below did not plead a separate cause of action for negligence. However, to the extent that negligent acts and/or omissions limit or affect the parties’ contractual promises, the record shows that these matters were brought to the attention of the trial court.

Had the trial court correctly applied the standards for summary judgment, viewed all of the facts in the light most favorable to Appellant, the non-moving party below, and drawn all of the fair inferences from the facts in favor of the non-moving party, it would not have granted the Respondent summary judgment. A review of the undisputed record before this Court demonstrates Respondent’s negligence; its duty (to act with

care, not create holes in the roof, and refrain from causing damage to the Appellant's property and to repair and maintain the roof and exterior walls), a breach of that duty (failure to repair the hole it created and failure to timely respond to the notice of the need for repair, the warnings regarding damage, the unabated mold growth), which proximately caused (the unrepaired leak and extensive delay directly caused the damage), the Appellant's damages (Appellant's property, both inventory and equipment, was ruined). At a minimum, the court should have found that a disputed question of fact existed regarding the landlord's negligence and denied the Respondent's motion.

E. The *Gabl* Court Construed Leases Materially Different from the Lease Here at Issue.

Respondent was right that *Gabl* prevents a *per se* void as against public policy treatment of the first sentence in paragraph 17 of the lease. However, the trial court went beyond this analysis, the purpose for which the case was offered by Respondent in its Reply, and affirmatively applied *Gabl* as controlling precedent to exculpate the Respondent. The court should have distinguished *Gabl* for that purpose.

In *Gabl*, a fire occurred in certain residential apartments located on the upper floor of the building. The tenants on the first floor and basement

suffered damages as a result of the fire in the residential units above. *Id.* at

881. The *Gabl* lease contained the following clause:

All personal property of any kind or description whatsoever in the leased premises shall be at the Lessees' sole risk, and Lessor shall not be liable for any damage done to, or loss of, such personal property; or for damage or loss suffered by the business of the Lessees arising from any act or neglect of co-tenants or other occupants of the building or their employees or of other persons, or from bursting, overflowing or leaking of water, sewer or steam pipes, or from the heating or plumbing fixtures, or from electric wires, or from gas, or caused in any manner whatsoever. *Id.* at 882-883.

This clause places risk for damage to property on the tenant, at tenant's "sole risk". It further expressly includes acts of negligence and damage "caused in any manner whatsoever", within the scope of the exculpatory clause. *Id.*

Unlike *Gabl*, the Appellant's lease expressly limits the allocation of risk to the tenant by holding the landlord harmless, unless the landlord is negligent.

17) ACCIDENTS AND LIABILITY: Landlord or its agent shall not be liable for any injury or damage to persons or property sustained by Tenant or others, in and about the Premises. Tenant agrees to defend and hold Landlord and its agents harmless from any claim action and/or judgment [*sic*] for damages to property or injury to persons suffered or alleged to be suffered on the Premises by any person, firm or corporation ***unless caused by Landlord's negligence.*** [Emphasis added]. CP 26.

Moreover, as outlined above, the Appellant's lease does not include the express language disclaiming or waiving damage caused by negligence or even the general "caused in any manner whatsoever" language of *Gabl*.

The second lease clause at issue in *Gabl*, the McGinnis lease, is even more strongly worded, in contrast and distinction to the instant case:

All personal property on said leased premises shall be at the sole risk of lessees, and lessor shall not be liable for any damage, either to person or property sustained by lessees or others, caused by any defects now in said building in which said leased premises are situated, or any part or appurtenances thereof, becoming out of repair or caused by fire, or the bursting or leaking of water, gas, sewer or steam pipes, or 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 any accident from whatsoever cause in or about said building. Lessees agree to defend and hold harmless the lessor from any and all claims for damages suffered or alleged to be suffered in or about the leased premises by any person, firm or corporation.

Id. at 883. The trial court below failed to take into account these material differences in the lease clauses. In *Gabl*, this second lease clause specifically exculpated the landlord from the cause of the damage, "fire", the landlord's agents' and employees' negligence and the tenant's agreement to hold the landlord harmless was unqualified, unlimited.

In this case, Appellant's agreement to hold Respondent harmless is limited. In this case, the Appellant agreed to hold the Respondents harmless on the condition that the landlord was not negligent. The landlord failed to meet that requirement. Therefore, the hold harmless does not apply.

Moreover, the *Gabl* case did not deal with a situation where the contract included an affirmative promise on the part of the landlord to repair and maintain the very system that was allowed to fail, through the landlord's affirmative actions (removal of the shed) followed by the landlord's neglect and delay, which directly caused the damage to the tenant. There is no evidence in the *Gabl* case that the landlord made any contractual promise to the tenants to repair or maintain any portion of the Alaska Building involved in the fire, in stark contrast to the instant case, where the Respondent had an affirmative contractual duty to repair and maintain the roof and exterior walls. CP 25. This affirmative duty on the part of Respondent is admitted and not here in dispute.

Finally, the *Gabl* court noted in its conclusion that it was "not confronted with an allegation of gross negligence, willful misconduct or the maintenance of a nuisance." *Id.* at 884. The *Gabl* court indicates that gross negligence, willful misconduct or

the maintenance of a nuisance would alter its ruling, even as to lease clauses as strongly and unconditionally worded as those cited above that were under its consideration. Again, in our case, the lease is not unconditionally worded. No express disclaimer for damages caused by the landlord's breach of contract or negligence is included. The agreement to hold the landlord harmless is expressly conditioned upon the landlord not being negligent.

It is interesting that the trial court below keyed on this portion of *Gabl*. In its letter explaining its ruling the trial court stated, "Plaintiff made no allegation of negligence, gross negligence or willful misconduct" (CP 131) acknowledging that these conditions would affect the enforceability of the exculpatory clause. Unfortunately, the trial court made this observation without conducting a careful or thorough review of the record, as outlined in the Statement of the Case and paragraph C.5. *supra*.

F. Attorney Fees and Expenses Should be Awarded to Appellant on Appeal.

Pursuant to RAP 18.1 attorney fees and expenses are being requested by Appellant, in relation to this appeal, on the basis of the parties' contract and RCW 4.84.330.

The contract at issue in Respondent's motion for summary judgment contains a prevailing party attorney fee provision at paragraph 21.

21) COSTS AND ATTORNEY FEES. If, by reason of any default or breach on the part of either party in the performance of any of the provisions of this Lease, a legal action is instituted the losing party agrees to pay all reasonable costs and attorney fees in connection therewith. If [*sic*] is agreed that the venue of any legal action brought under the terms of this lease may be in the country [*sic*] in which the Premises are situated.

CP 27. RCW 4.84.330 further provides in pertinent part that:

In any action on a contract or lease entered into after September 21, 1977, where such contract or lease specifically provides that attorneys' fees and costs, which are incurred to enforce the provisions of such contract or lease, shall be awarded to one of the parties, the prevailing party, whether he or she is the party specified in the contract or lease or not, shall be entitled to reasonable attorneys' fees in addition to costs and necessary disbursements.

As outlined above, the trial court erred in granting the Respondent's motion for summary judgment below. Undisputed evidence in the record supports a finding that the Respondent breached its contractual duties to maintain and repair the roof, the exterior walls, and the foundation of the building. An award of attorney fees and expenses to the Appellant is appropriate and warranted on this appeal.

VII. CONCLUSION

Based on the foregoing, the trial court's Order Granting Defendants' Motion For Summary Judgment should be reversed and an award of fees and expenses on appeal to Appellant should be made.

To assure a just and efficient result upon remand, this Court should make the following findings and conclusions based upon the undisputed record here:

1. Absent excuse, all persons have a duty to act with ordinary care to refrain from actions that would directly cause harm or damage to the property of another; where there is no evidence of a privilege or excuse, Respondent had a duty to act with ordinary care to avoid causing harm to Appellant's property;
2. The Respondent had a duty to repair and maintain the roof, exterior walls and foundation of the building;
3. The Respondent breached these duties by creating a hole or holes in the roof when it tore down a structure from the roof;
4. The Respondent further breached these duties when it failed to timely repair the roof, represented to Appellant that it was taking care of the problem, and ignored Appellant's notice and warnings of impending damage;
5. Respondent's actions and inactions fell below the standard of care of a reasonably prudent person and demonstrated a lack of regard, if not reckless disregard, for the Appellant and the damage it was suffering;
6. Appellant suffered damage to its property; and

7. Appellant's damages were directly and proximately caused by the Respondent's breach of its duties to Appellant.

Tacoma Commercial Bank v. Elmore, 18 Wn. App. 775, 573 P.2d 798 (1977); *Ruddach v. Don Johnson Ford, Inc.* 97 Wn.2d 277, 644 P.2d 671 (1982).

Based upon these findings and conclusions, that flow from the record on appeal and the applicable law referenced herein, Judgment, in favor of Appellant, against Respondent, for breach of contract should be entered as a matter of law, pursuant to this Court's authority to grant this judgment on appeal, where reasonable minds could not differ based upon the evidence in the record. *Spratt v. Crusader Ins., Co.*, 109 Wn. App. 944, 37 P.3d 1269 (Div. 3 2002); *In re Marriage of Woffinden*, 33 Wn. App. 326, 654 P.2d 1219 (Div. 3 1982). Remand for a determination of the amount of Appellant's damages would then be appropriate.

In the alternative, if this Court finds that material questions of fact foreclosed summary judgment below, the Order Granting Defendants' Motion For Summary Judgment should be reversed and the case should be remanded to the trial court for further proceedings consistent with the determination on Appeal.

DATED this 31st day of May, 2013.

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DECLARATION OF SERVICE

I declare that on this 31st day of May, 2013 I caused to be served the foregoing document on counsel for Respondents, and the named court reporters, as noted, at the following addresses:

- APPELLANT'S OPENING BRIEF

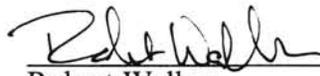
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Dated: May 31, 2013.

Place: Seattle, Washington.

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