

Court of Appeals No. 47749-1-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

IRON GATE PARTNERS 5, L.L.C.,

Appellant,

v.

TAPIO CONSTRUCTION, INC. and R.T. WHARTON ASSOCIATES,
INC.,

Respondents.

APPELLANT'S REPLY BRIEF

PHILLIP J. HABERTHUR, WSBA No. 38038
BRADLEY W. ANDERSEN, WSBA No. 20642
LANDERHOLM, P.S.
805 Broadway Street, Suite 1000
P.O. Box 1086
Vancouver, WA 98666-1086
(360) 696-3312
Of Attorneys for Appellant Iron Gate Partners 5,
L.L.C.

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I. INTRODUCTION

This is a case about two experienced contractors negotiating a contract for construction of the building envelope (retaining walls, concrete work, and building footings) for a self-storage facility along with a satisfactory performance guaranty of the work performed. After Respondent Tapio Construction, Inc.'s Work failed to perform satisfactorily, Appellant Iron Gate Partners 5, L.L.C., sued for damages. Now, Tapio tries mightily to characterize this breach of a contractual warranty/guaranty case as a complex construction defect case involving questions of causation, contributory fault, and scope of work performed by the contractors. Tapio's approach ignores broad sections of the Master Contract (the "Contract") it entered with Iron Gate that are essential to resolution of this case.

Iron Gate seeks the benefit of the bargain it negotiated with Tapio when it agreed to pay \$850,370 for all components of the building envelope, beginning at grade (the concrete slab of the second floor inside the building and weather exposed aprons outside the unit roll-up doors) and extending below grade to the building's footings, which was the centerpiece of the mini-storage facility. Tapio's work was not minimal, as it suggests, but rather it was *the* integral part of the project. Because Tapio subcontracted some of its Work, and because one contractor provided work that was integrated into Tapio's Work, Iron Gate required Tapio to inspect and accept the work of others in order to "insure the satisfactory completion of [Tapio's] work." In other words, Tapio was responsible for

pouring concrete into a “pan deck” installed by another contractor, and Tapio was required to inspect the pan deck and insure it was installed correctly before Tapio poured concrete and finished work on that area. Tapio assumed the responsibility to insure the pan deck was properly installed and that it would not cause Tapio’s Work to fail to perform. Tapio cannot now blame the work of others. Regardless, undisputed trial testimony proved water did not intrude through other contractor’s work—every mechanism of water intrusion involved a failure of Tapio’s Work.¹

The language in the Contract was negotiated to ensure Tapio’s work would perform satisfactorily for one year, and Iron Gate would not be required to show more than the work failed to perform for its intended purposes, *i.e.*, the units leaked. The trial court erred in not giving effect to this plain and unambiguous language.

II. FACTS

Tapio contorts the “facts” and testimony in a manner that simply cannot be left unrefuted. The following are just a few examples of the multiple inaccuracies: (1) Tapio is incorrect in stating it “waterproofed” the concrete where water could intrude when the contractor hired by Tapio testified that it was hired to only “damp proof” the concrete;² (2) Tapio did not have a “limited role,” its work was the centerpiece since it handled all

¹ This is outlined more fully below on pages 12-13 under Tapio’s water intrusion expert, Michael Milakovich’s testimony. As indicated in that portion of the briefing, Mr. Milakovich testified to avenues of water intrusion that Iron Gate was experiencing from rainwater. Every mechanism involved a failure in Tapio’s work.

² As explained later, damp proof is sufficient for rainwater hitting a structure, but not for an area where pressure could build and force the water through cracks—identical to what happened here.

concrete work from at grade (floor between second and first floor units) to below grade (bottom of building footings); (3) the Contract stated that Tapio handled the rebar package, contrary to Tapio's statements on appeal; (4) the Contract contained no less than three separate and distinct warranties or guaranties; (5) Tapio did not comply with manufacturer recommendations and guidelines, as it claims, when Tapio installed the drain mat; and, (6) Tapio's own water intrusion expert (Michael Milakovich) testified that water was intruding through Tapio's Work.³ Tapio's Work did not satisfactorily perform for one year after completion, in direct breach of the Contract.

A. Tapio played an integral role on the Iron Gate project.

Iron Gate paid \$4 million to various trades to construct the mini-storage facility, with approximately \$850,370 paid to Tapio to perform its contracted work.⁴ Tapio was a major player in constructing the facility. Tapio was on the project from its inception and performed work almost until the end.⁵

Tapio's employee, Kyle Tapio, testified that Tapio worked on the Iron Gate project from ground break (summer/fall of 2006) to the end (summer 2007).⁶ He testified that the Iron Gate project was Tapio's "primary project" and that he was at the Iron Gate site most of the time during that period.⁷

³ Supplemental CP ____, Michael Milakovich's Deposition published at trial.

⁴ RP, p. 307:6, Vol. 2, April 15, 2014.

⁵ RP, p. 280:4 to 280:17, Vol. 2, April 15, 2014.

⁶ RP, p. 1656:7 to 1656:15, Vol. 6B, April 22, 2014.

⁷ RP, p. 1656:15 to 1656:22, Vol. 6B, April 22, 2014.

Tapio contracted to perform all components of the building envelope beginning at grade (grade is defined as the line between the second floor units and the top of the first floor units) to the bottom of the building's footings.⁸ Tapio's work included constructing two retaining walls that were approximately 10 feet tall and over 350 feet in length that comprised the nucleus of the project.⁹ Storage units were constructed on the lower level on each side of the walls and the area in-between the retaining walls was filled with free draining dirt/gravel and then topped with concrete, such that the ground level between the buildings was elevated, to create a drive aisle area for access to the upper level storage units.¹⁰

Approximately 7,600 square feet of the retaining walls had to be "waterproofed" to prevent water from entering the units.¹¹ The image below depicts the retaining walls, the "grade" level, pan deck, driveway, and units.¹²

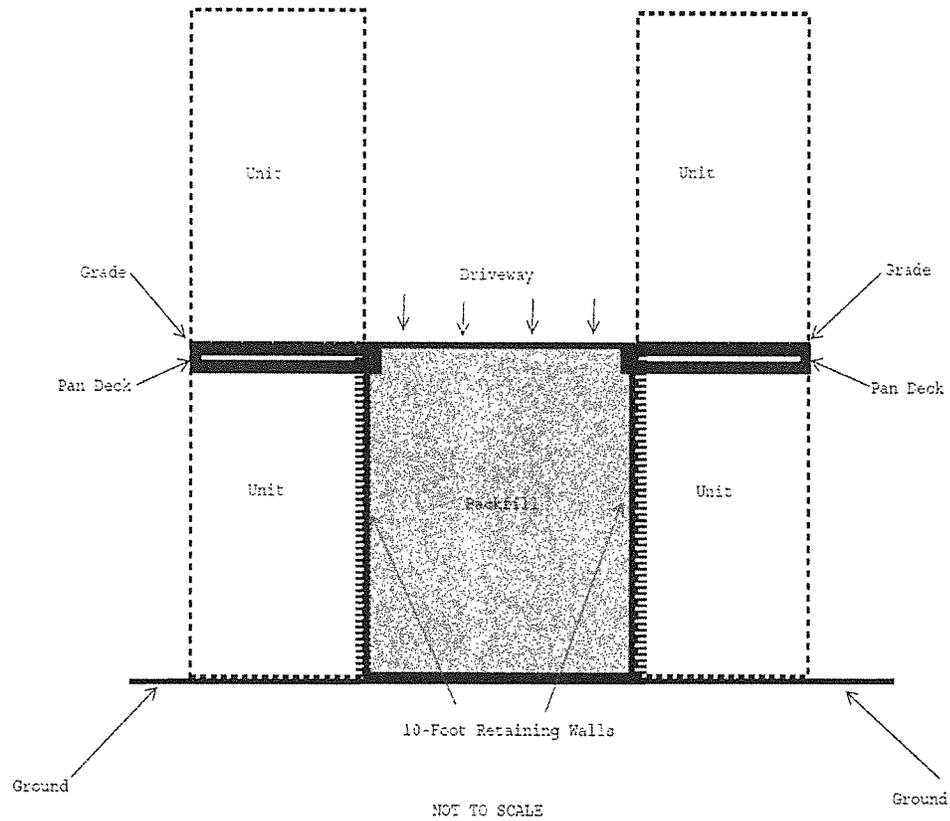
⁸ "Below grade is below the ground." RP, p. 789:16 to 789:19, Vol. 4A, April 17, 2014.

⁹ RP, p. 970:8, Vol. 9, May 1, 2014 and RP, p. 1571:24, Vol. 6B, April 22, 2014.

¹⁰ RP, p. 1676:1 to 1676:17, Vol. 6B, April 22, 2014.

¹¹ RP, p. 1561:17 to 1561:20, Vol. 6B, April 22, 2014, and RP, pp. 2453:11 to 2454:8, Vol. 9A, April 28, 2014.

¹² This was not a trial exhibit, and it is provided only to help illustrate the work Tapio provided.



The diagram and photos show the absolute necessity to waterproof Tapio’s work—if the building components are not waterproofed then rainwater would matriculate below grade and enter the storage units. The “waterproofing” and subsequent back fill work by Tapio was critical to the project because of the expense that would occur if not done properly: the units would fill with water and be rendered unusable.¹³

¹³ RP, pp. 1796:25 to 1797:11, Vol. 7A, April 23, 2014.

B. Tapio failed to waterproof and ensure the building envelope would satisfactorily perform by preventing water from intruding into units.

Tapio concedes it had to waterproof the retaining walls.¹⁴ Tapio also concedes its Work on the building envelope had to satisfactorily perform for one year,¹⁵ which necessarily includes usable storage units. Despite these admissions, Tapio blames others and alleges Iron Gate failed to prove that its Work was the source of the water intrusion into the storage units. The testimony at trial showed that Tapio's waterproofing contractor was only hired to perform *damp proofing* and not waterproofing of the building envelope as required by the Contract.

Tapio admits it was only a concrete specialist¹⁶ and not a waterproofing specialist.¹⁷ Not only did Tapio subcontract this portion of its Work, but Tapio's employees (supervisor Kyle Tapio) did not understand the difference between damp proofing and waterproofing.¹⁸

Tapio contracted the waterproofing work to A&A Contracting, Inc.,¹⁹ owned by Jeremy Richardson.²⁰ A&A Contracting specialized in below-grade waterproofing, sealants, and deck coatings.²¹ Tapio asked

¹⁴ Resp. Br. pp.7-8 and p. 22.

¹⁵ Resp. Br. p. 33.

¹⁶ Resp. Br., p. 8.

¹⁷ CP 57, Master Contract, Addendum A.

¹⁸ Kyle Tapio testified that damp proofing and waterproofing were the same thing, and that damp proofing was what was done not waterproofing. RP p. 1666:6 to 1666:10, Vol. 6B, April 22, 2014 and RP, p. 1668:5 to 1668:13, Vol. 6B, April 22, 2014.

¹⁹ RP p. 670:1 to 670:4, Vol. 3B, April 16, 2014 and RP, p. 975. Vol. IX, May 1, 2014.

²⁰ RP p. 663:14 to 663:17, Vol. 3B, April 16, 2014.

²¹ RP p. 664:5 to 664:9, Vol. 3B, April 16, 2014.

A&A to provide “liquid-applied damp-proofing....”²² Richardson asked Tapio to clarify what it needed, because “when it comes to waterproofing, damp-proofing scenario, you have two different scenarios that you would apply if there is—if there is absence or not absence of hydrostatic water pressure.”²³

A&A Contracting did what they were told to do by Tapio—they only damp-proofed certain sections of the building envelope. A&A was unaware the Contract required Tapio to provide **waterproofing** because Tapio shared none of the specifics with A&A.²⁴ Upon visiting the site, A&A was worried that Tapio only wanted damp-proofing and not complete waterproofing because it was evident the walls would allow water to intrude unless they were waterproofed.²⁵

Mr. Richardson provided an example where waterproofing is required: a house built into a hill where water runs down and hits a below grade wall.²⁶ His example was similar to the situation presented with the retaining walls and the filled area in-between the walls where the water should drain into the ground. If the retaining walls were not waterproofed, then hydrostatic pressure would force water through the cracks in the concrete and into the units.²⁷ Damp-proofing is only appropriate where a

²² RP p. 671:4 to 671:5, Vol. 3B, April 16, 2014.

²³ RP p. 673:16 to 673:22, Vol. 3B, April 16, 2014.

²⁴ RP p. 682:4 to 682:15, Vol. 3B, April 16, 2014.

²⁵ RP p. 730:4 to 730:25, Vol. 3B, April 16, 2014.

²⁶ RP p. 689:2 to 689:12, Vol. 3B, April 16, 2014.

²⁷ Although not mentioned by name, this is the process (i.e., hydrostatic pressure) that Glen Aronson witnessed occurring when he saw water protruding through the middle of the wall. RP p. 291:2 to 291:14, Vol. 2, April 15.

wall is exposed to water falling straight down, such as rain falling and hitting the side of an exposed wall.²⁸ In that situation, there is no hydrostatic pressure as the water merely hits and drains off the wall.

Had Tapio told A&A the Contract required waterproofing, then A&A would have applied 60 millimeters of the liquid membrane rather than the 40-millimeter thickness used for damp-proofing, plus A&A would have used a 50 to 70-millimeter-thick plastic sheet over the concrete surfaces.²⁹ That did not happen here.

In addition, Tapio allocates an entire section of its Brief on how Tapio allegedly complied with manufacturer guidelines.³⁰ This is inaccurate and misleading. Mr. Milakovich, Tapio's own expert, admitted that Tapio failed to terminate³¹ the drain mat as recommended by Tremco, the drain mat manufacturer.³² In fact, Mr. Milakovich's proposed corrective action included putting in a termination bar to cover the cold joint and the slab below grade.³³

C. The Contract required Tapio to warrant the Work of others and assume the risk if the design/plans were defective.

The Contract between Iron Gate and Tapio contained specific warranties and guaranties.³⁴ Tapio now argues that "Tapio did not warrant

²⁸ RP pp. 716:21 to 717:14, Vol. 3B, April 16, 2014.

²⁹ RP p. 717:4 to 717:14, Vol. 3B, April 16, 2014.

³⁰ Resp. Br., p. 22.

³¹ RP p. 823:17 to 823:23, Vol. VIII, May 1, 2014.

³² RP p. 824:6 to 824:12, Vol. VIII, May 1, 2014.

³³ RP, p. 816:14 to 816:18, Vol. VIII, May 1, 2014; RP pp. 818:22 to 819:8, Vol. VIII, May 1, 2014; and RP pp. 821:21 to 822:11, Vol. VIII, May 1, 2014.

³⁴ RP pp. 302:1 to 306:25, Vol. 2, April 15, 2014.

the project's design, nor did it warrant the work of other trades."³⁵ This is inaccurate.³⁶ The following are specific warranties or guaranties that Tapio made: (1) Tapio had to inspect and accept the work of others to insure the satisfactory performance of Tapio's Work;³⁷ (2) Tapio guaranteed the performance of its work even if the construction plans, drawings, etc., were deficient;³⁸ and, (3) Tapio warranted the satisfactory performance of its Work.³⁹

Tapio's Work overlapped work performed by other contractors, and Iron Gate understood Tapio may hire subcontractors to assist it with its Work. Because of the overlap and Tapio hiring subcontractors, the Contract stated that if the Work included installation of materials or equipment furnished by others, or work performed in areas to be constructed or prepared by others, Tapio had to examine and **accept** the work to insure a satisfactory completion of the Work.⁴⁰ Tapio undertook the responsibility to therefore ensure that the work performed by others was satisfactory, and if it was not, it then had to notify Iron Gate so the work could be corrected. Tapio agreed to guaranty the satisfactory performance of its own Work, even where Tapio's Work failed to perform by reason of another's work.

³⁵ Resp. Br., p. 3.

³⁶ CPs 48, 54, and 55, Master Contract, Sections 1 and 15.

³⁷ CP 48, Master Contract, Section 1, paragraph 3. Appendix 1.

³⁸ CP 48, Master Contract, Section 1, last part of paragraph 2. Appendix 2.

³⁹ CP 55, Master Contract, Section 15, p. 8. Appendix 3.

⁴⁰ CP 48, Master Contract, Section 1, p. 1. *See* Appendix 1.

D. Iron Gate’s Consultant testified the concrete apron was to be waterproofed.

Tapio misstates the trial testimony by Bob Pinder, Iron Gate’s consultant, regarding additional waterproofing of the facility. Mr. Pinder testified that the concrete apron on the drive aisle (second floor slab) was not to be waterproofed under the project’s plan and specifications,⁴¹ because water was to drain through the drive aisle. However, other waterproofing had to be performed.

Mr. Pinder testified the joint between the top of the wall and base of the slab “should definitely be waterproof[ed]—that would be the major intrusion of water into the project.”⁴² But Tapio failed to waterproof this area, or any other area of the facility as testified by Tapio’s own waterproofing contractor. The Contract expressly stated Tapio’s Work included all work reasonably implied by the Contract Documents, thus requiring waterproofing of the concrete in areas where water could leak through. Tapio failed to ensure the building envelope would not leak because it omitted all waterproofing, and it minimally damp-proofed certain areas, completely ignoring the edge of the slab and the joint between the slab and the wall.

E. Tapio misstates its scope of Work when it states it did not install the rebar packages.

One of the more blatant misstatements about the scope of Work is Tapio’s claim that it was not responsible for installing rebar in the

⁴¹ Resp. Br., p.8.

⁴² RP p. 2042:10 to 2042:12, Vol. 8A, April 24, 2014.

concrete.⁴³ Since Tapio was performing the majority of the concrete work, it only made sense that having Tapio install the rebar would be included within the scope of Work. And that is exactly what the Contract provides: Tapio will “furnish and install rebar package” on the retaining walls and the building foundation package.⁴⁴

F. Iron Gate was not required to provide notice to Tapio within the first year that the Work failed to satisfactorily perform.

Tapio argues extensively that Iron Gate did not conclusively prove that it gave *notice* of the water intrusion within one year of project completion. This straw man argument grossly distorts the actual warranty language in the Contract. Section 15 of the Contract states that “[Tapio] warrants and guarantees to [Iron Gate] (i) the satisfactory performance of the Work for a period of one (1) year from...the date of Completion...”⁴⁵ Iron Gate did not need to give notice of the unsatisfactory performance within one year. Because the contract is based upon a written agreement, Iron Gate had the full six years to pursue Tapio for the breach of warranty.⁴⁶

Trial testimony from Glen Aronson, David and Sue Ross (the live-in managers), and Brian Spear (maintenance person for Iron Gate) shows

⁴³ Resp. Br., p.16. As the Court is aware, rebar is a reinforcing steel used to strengthen and hold the concrete in tension.

⁴⁴ CP 57, Master Contract, Addendum A, Section 1.5.

⁴⁵ CP 55, Master Contract, Section 15, p. 8.

⁴⁶ See RCW 4.16.040(1).

that water intrusion into the storage units was evident within the first year after completion.⁴⁷

G. Abundant testimony proved water was coming through Tapio's Work.

Water intruded through Tapio's Work. Glen Aronson testified that he observed water coming into units via pressure through the middle of the wall.⁴⁸ Tim Yarnot, Tapio's project manager, testified that he "noticed water coming through the wall."⁴⁹ Mr. Yarnot testified that he witnessed water "pushing" itself "through" the wall below the pan deck.⁵⁰ Mr. Yarnot further testified that the water coming through the wall should not have been pushing itself through because it should have drained underneath the footing drain.⁵¹

Tapio's water intrusion expert, Michael Milakovich,⁵² testified that water was intruding into units in the following manner:⁵³ (1) 35 - 40% through the pan deck;⁵⁴ (2) 25 - 30% through the cold joint at the bottom

⁴⁷ RP p. 291:2 to 291:14, Vol. 2, April 15, 2014. David and Sue Ross both testified that they observed water intrusion after the first heavy rains in the fall of 2007, and Brian Spear testified that he also first became aware of water intrusion in the fall of 2007 after the first heavy rains. RP p. 524:17 to 524:25, Vol. 3A, April 16, 2014; RP p. 563:18 to 563:21, Vol. 3A, April 16, 2014; and RP p. 605:7 to 605:13, Vol. 2B, April 16, 2014.

⁴⁸ RP p. 291:2 to 291:14, Vol. 2, April 15, 2014.

⁴⁹ RP p. 318:19 to 318:20, Vol. IV, April 29, 2014.

⁵⁰ RP p. 319:4 to 319:13 and RP, pp. 365:15 to 366:7, Vol. IV, April 29, 2014.

⁵¹ RP p. 366:12 to 366:16, Vol. IV, April 29, 2014.

⁵² Supplemental CP ____, Michael Milakovich's Deposition, p. 67, published at trial.

⁵³ Supplemental CP ____, Michael Milakovich's Deposition, pp. 211-212, published at trial.

⁵⁴ This is Tapio's Work as it poured the concrete in the pan deck. Mr. Milakovich testified that water was intruding through cracks in the concrete in the pan deck. Mr. Milakovich placed a RILEM test tube (with red dyed water) on one of the cracks in the concrete in the pan deck. He noted that he needed to refill the tube at least 4 times because it was losing so much water. He also noted that the water from that tube was later

of the wall between the base of the wall and the top of the footing/foundation;⁵⁵ (3) 10% through where the rebar was installed in the concrete;⁵⁶ (4) 10% at the cold joint at the top;⁵⁷ (5) 10% through cracks in portions of the retaining wall not covered by membrane;⁵⁸ and, (6) 5% through portions of the retaining wall covered by membrane.⁵⁹ Every one of these mechanisms of water intrusion involved Tapio's work.

III. ARGUMENTS

A. Tapio cannot insert ambiguity into an unambiguous contract or add new causation theories into the contract.

Tapio attempts to conflate and misconstrue the scope of Work provision in Addendum A with the Performance Warranty and Guaranty of the Contract to argue an ambiguity. Along the way, Tapio attempts to insert radical concepts about causation that were specifically bargained for

discovered in the lower unit. RP pp. 696:4 to 697:25, Vol. VII, April 30, 2014 and CPs 219-220 (Milakovich's Declaration).

⁵⁵ Tapio performed this work, *see* CP 57, Master Contract, Addendum A.

⁵⁶ Mr. Milakovich testified that he saw evidence of prior active water intrusion in the form of staining and efflorescence that "seem[ed] to be coming off the rebar at the top." RP pp. 667:10 to 668:8, Vol. VI, April 30, 2014. Under the Master Contract, Tapio was responsible for furnishing and installing the rebar package, and water was intruding through the rebar. *See* CP 57, Master Contract, Addendum A.

⁵⁷ This joint is a necessary transition point between the top of the retaining wall and the bottom of the pan deck. While the installation of the metal pan deck was done by Kiwi, Tapio's Work was sandwiched between the bottom of the concrete Tapio poured into the metal pan deck and the top of the retaining wall, both of which were Tapio's Work. RP pp. 497:25 to 498:9, Vol. V, April 30, 2014. Under the Master Contract, Tapio was responsible for inspecting and accepting Kiwi's work and if it did accept Kiwi's work then Tapio was warranting and guarantying the performance of its work regardless of whether Kiwi installed the pan deck properly (*see* CP 48, Master Contract, Section 1, paragraph 3).

⁵⁸ It is undisputed Tapio constructed the retaining walls, and was supposed to waterproof the retaining walls.

⁵⁹ *Id.*

and expressed in the Contract to create ambiguity and questions of fact. Tapio's arguments fail as a matter of law.

Where the terms of a contract taken as a whole are plain and unambiguous, the meaning of the contract is to be deduced from its language alone, and it is unnecessary for a court to resort to any aids to construction.⁶⁰ A contract is not ambiguous when a reading of the contract as a whole leads to only one meaning. Where contractual language is unambiguous courts will not read ambiguity into the contract.⁶¹

The parties agree that "construction of a contract is a question of law."⁶² Tapio goes awry when it alleges that Iron Gate had to prove that Tapio was the source of the water intrusion to recover on its breach of contract claim. Tapio next argues that Iron Gate "invited the error" when it included a jury instruction on causation.⁶³ Iron Gate has consistently argued that Tapio breached the Performance Warranty (the Work would satisfactorily perform for one year following construction) when water intrusion was found in the units shortly after construction was completed.

In Washington, a breach of an express warranty gives rise to a cause of action.⁶⁴ Courts should construe contracts, if reasonably possible,

⁶⁰ *Schauerman v. Haag*, 68 Wn.2d 868, 416 P.2d 88 (1966).

⁶¹ *Felton v. Menan Starch Co.*, 66 Wn.2d 792, 405 P.2d 585 (1965).

⁶² *Pardee v. Jolly*, 163 Wn.2d 558, 566, 182 P.3d 967 (2008).

⁶³ Resp. Br., p.38.

⁶⁴ *Crandall Eng'g Co. v. Winslow M. R. & S. Co.*, 188 Wash. 1, 9, 61 P.2d 136 (1936) and *Norway v. Root*, 58 Wn.2d 96, 98, 361 P.2d 162 (1961).

in a way that effectuates all of its provisions.⁶⁵ If unambiguous, it should be construed under the parties' plain intent.⁶⁶

Tapio improperly attempts to interject tort theories (comparative fault) into the parties' bargained for Contract to shift blame to others and to argue that Iron Gate must prove it *was* only Tapio's Work that failed to perform satisfactorily. Tapio's position has been rejected numerous times by Washington courts and is contrary to black letter law.

"[Courts] hold parties to their contracts. If tort and contract remedies were allowed to overlap, certainty and predictability in allocating risk would decrease and impede future business activity."⁶⁷ The court in *Berschauer/Phillips* held "when parties have contracted to protect against potential economic liability, as is the case in the construction industry, contract principles override the tort principles..."⁶⁸

Washington law distinguishes between contract and tort remedies and theories, holding the parties to the bargain of their contract. "Contracting parties have their remedies for breach and can negotiate for warranties if they so choose."⁶⁹ In Washington, parties may contract as they wish and the courts are reluctant to interfere with the parties' rights to

⁶⁵ *Colo. Structures, Inc. v. Ins. Co. of the W.*, 161 Wn.2d 577, 588, 167 P.3d 1125 (2007).

⁶⁶ *Id.*

⁶⁷ *Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1*, 124 Wn.2d 816, 826-27, 881 P.2d 986 (1994).

⁶⁸ *Id.* at 828.

⁶⁹ *Urban Dev., Inc. v. Evergreen Bldg. Prods., L.L.C.*, 114 Wn. App. 639, 646, 59 P.3d 112 (2002).

contract, and part of this freedom to contract includes the ability of the parties to allocate the risks and obligations as they please.⁷⁰

This Court need only review the Contract as a whole to determine the rights and obligations of the parties. The following are specific and unambiguous warranties or guaranties that Tapio made: First, Tapio had to inspect and accept the work of others that performed work in and around the area where Tapio was working.⁷¹ By accepting the work, Tapio was agreeing to accept the work with any defects unless it first notified Iron Gate of the defect, and incorporate that work into their own and warranty the work as a whole.⁷² Tapio's acceptance of other's work rendered Tapio liable for any failed performance of its Work. This agreement is found in other areas of the Contract. For example, Tapio contractually waived the right to require Iron Gate to proceed against other contractors first, which is exactly what it is trying to argue on appeal, through section 15 of the Contract: "Contractor does hereby waive and release any right to require owner to proceed against any other party whatsoever."

Second, Tapio guaranteed the performance of its Work even if the construction plans, drawings, etc., were deficient.⁷³ Finally, Tapio warranted the satisfactory performance of its Work.⁷⁴ Tapio's Work failed to perform satisfactorily for a myriad of reasons. Specifically, Tapio's expert testified that rainwater was intruding in various manners into

⁷⁰ *Watson v. Ingram*, 124 Wn.2d 845, 851-852, 881 P.2d 247 (1994).

⁷¹ CP 48, Master Contract, Section 1, paragraph 3.

⁷² *Id.*

⁷³ CP 48, Master Contract, Section 1, last part of ¶ 2.

⁷⁴ CP 55, Master Contract, Section 15, page 8.

units.⁷⁵ Those various manners all included work either performed by Tapio (i.e., all concrete work) or work that Tapio accepted (Kiwi's work). Water coming through the middle of the wall (regardless of how the water initially got through cracks) was a breach of the performance warranty since Iron Gate could not rent those waterlogged units. Under the facts, that cannot constitute satisfactory performance, and therefore, Tapio breached the performance guaranty.

In addition, Tapio cannot now attempt to create an ambiguity in the Contract by attempting to show a distinction between the Scope of Work Tapio was to perform and Tapio's guaranty and performance warranty of its own Work and the work of others in the area of Tapio's work. Tapio misconstrues and tries to conflate two separate provisions of the Contract. One speaks to the Work Tapio was contracted to perform (the Scope of Work), and the second relates to the performance guaranty provided by Tapio. The fact that Tapio provided a broader performance guaranty than the Work it performed does not create ambiguity in the Contract, it only creates broader liability for Tapio.

Iron Gate and Tapio contractually agreed on the warranty provided by Tapio—the Work, including the retaining walls, would perform to Iron Gate's satisfaction for a period of one year following construction. Iron Gate and Tapio contractually allocated that risk to Tapio, and the trial

⁷⁵ Supplemental CP ___, Michael Milakovich's Deposition, pp. 211-212, published at trial.

court erred when it re-wrote the Contract and allowed the tort theories to go to trial.

B. Tapio's assertion that Iron Gate was the general contractor is irrelevant.

Tapio makes the statement that Iron Gate entered the “same basic contract” with other contractors and that therefore the “warranty language” was “not specific to Tapio.”⁷⁶ This statement disregards all contract principles, and long standing Washington case law that holds parties to their contracts.⁷⁷ The Contract was between two parties: Iron Gate and Tapio. No other entity or person was a party to this specific Contract, so the warranty and guaranty provisions could only be specific to one party, and that is Tapio. Tapio's statement is analogous to arguing that one's insurance contract is not specific to him/her since insurance companies use the same form of contract with other persons.

Similarly, Tapio argues Iron Gate was a general contractor and that somehow its claims are barred or its damages mitigated. Tapio's argument is irrelevant. Tapio cites no law to support its theory that Iron Gate, as the purported general contractor, assumed duties and responsibilities that would waive or otherwise impact the Contract. There is absolutely no support under Washington case law providing stricter duties or requirements on general contractors. The liabilities and responsibilities of Iron Gate and Tapio are contained in the contract, not tort law. This is just

⁷⁶ Resp. Br., p. 9.

⁷⁷ *Berschauer/Phillips Constr. Co.*, 124 Wn.2d 816, 826.

another attempt by Tapio to deflect and distract the Court's attention from the contract language.

C. **Shopping Ctr. Management Co., and Port of Seattle are on point.**

Tapio minimally attempted to distinguish the *Shopping Ctr. Management Co. v. Rupp*,⁷⁸ and *Port of Seattle v. Puget Sound Sheet Metal Works*⁷⁹ cases. Tapio “distinguishes” the two cases by calling them “dated,” and that in those cases there was an “obvious” cause to the plaintiff's damages.

First, the cases may be “dated,” but that only signifies the strength of the holdings and that they have been relied upon by contractors and courts for decades. Second, the “obvious” cause of the defect was not the determining factor, but the scope of the guaranty/warranty. Specifically, both cases hold that the language of the warranty and guaranty control and courts should look to those provisions in interpreting the liability of the contractor.

In *Shopping Ctr. Management Co.*, the warranty and guaranty provisions are extraordinarily similar to the one here because the contractor warranted the “satisfactory operation” of the work and the contractor guaranteed that his work would perform under the plans and specifications. The Court in *Shopping Ctr. Management Co.*, found it was

⁷⁸ 54 Wn.2d 624, 343 P.2d 877 (1959).

⁷⁹ 124 Wash. 10, 213 P. 467 (1923).

immaterial⁸⁰ what caused the unsatisfactory performance because the contractor had broadly warranted his work and assumed the risk that his work would performed regardless of the plan or specifications.⁸¹

Similar to the warranties and guaranties in *Port of Seattle* and *Shopping Ctr. Management Co.*, Tapio provided broad warranties and guaranties for which it assumed liability for performing its work irrespective of the cause. Tapio also guaranteed that its work would perform under the plans and specification provided, and therefore Tapio assumed the risk of the plans and specifications being deficient. Tapio cannot avoid liability by blaming others because it assumed that risk in the contract, nor can Tapio attempt to rewrite the parties' contract just because it does not like the outcome.

⁸⁰ "It is always a question for determination as to what was meant by the guaranty agreement, and that if the proper interpretation of that agreement is that the contractor was undertaking to do more than to merely perform the work and furnish the materials in compliance with the plans and specifications, he is bound by the wider guaranty and must maintain and keep in repair the work, no matter whether the imperfect condition arose from his failure to comply with the plans and specifications, or may have arisen by reason of a defect in the very plan of construction itself, independent of any other cause." *Shopping Ctr. Management Co.*, 54 Wn.2d 624, 632.

⁸¹ "We think the guaranty clause of the contract involved in this case is as broad as that in the *Port of Seattle case, supra*, and that appellant thereby undertook to do more than merely repair or replace any defective material, equipment, or workmanship which might appear within one year after the date of final acceptance. The express wording of the guaranty provision is that the contractor shall guarantee the *satisfactory operation* of all materials and equipment installed *under this contract*. The contract includes the plans and specifications. Therefore, appellant must be deemed to have guaranteed that the materials and equipment installed by him would operate satisfactorily under the plans and specifications of the owner." *Shopping Ctr. Management Co.*, 54 Wn.2d 624, 632-633.

D. Tapio is not entitled to its attorneys' fees because the contractual attorney fee provision is drafted to benefit only the parties to the contract, not an insurance company.

Washington follows the American Rule on attorney fees, which is that attorney fees are not recoverable by the *prevailing party* as costs of litigation unless the recovery of such fees is permitted by contract, statute, or some recognized ground in equity.⁸² Here, Tapio petitioned the trial court for its fees under a provision in the Contract “the losing party shall pay all costs and reasonable attorney’s fees actually incurred by the prevailing party....” (emphasis added).

Tapio must show it is entitled to recovery of its fees under the language in the contract because it actually incurred those fees.⁸³ However, Tapio once again tries to read the attorney fee provision in isolation without reading the entire contract.

First, the Contract was bargained for by two experienced companies **for the benefit of those two companies**, not an insurance company. The language used by the parties was unambiguous; any recovery of attorney’s fees must “actually” be “incurred by the prevailing party.” Tapio was the prevailing party at the trial level, but Liberty Mutual was the party that “actually incurred” the fees.

The parties’ intent to only benefit themselves and not an insurance company is evidenced by the subrogation waiver found in Addendum B to

⁸² *McGreevy v. Or. Mut. Ins. Co.*, 128 Wn.2d 26, 35 n.8, 904 P.2d 731 (1995) and *City of Sequim v. Malkasian*, 157 Wn.2d 251, 284, 138 P.3d 943 (2006).

⁸³ *Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 151, 859 P.2d 1210 (1993).

the Contract.⁸⁴ In that provision, Tapio “independently” released Iron Gate of any liability for any claims, liabilities, or damages covered by insurance from Tapio’s carrier. Regardless of whether Tapio’s insurance company stepped into Tapio’s shoes, Iron Gate only agreed to be liable to Tapio directly and not to its insurance carrier.

The cases cited by Tapio are not applicable because those cases dealt with attorney fees being allowed under statutory provisions and not contractual attorney fee provisions. The fee provision at issue is *unique* and clearly states that the party entitled to such fees must “actually incur” those fees. Tapio did not incur any fees and therefore it is not entitled to attorney fees under the strict language of the parties’ contract.

In addition, should Iron Gate prevail on appeal, Iron Gate respectfully requests its attorney fees and costs as provided under RAP 18.1.

IV. CONCLUSION

This case presents a contractual dispute involving a satisfactory performance warranty negotiated and bargained for between two experienced companies. Iron Gate required Tapio to provide an absolute warranty for performing its work. Tapio also agreed to assume the risk that its Work would perform satisfactorily, regardless of fault and any defects in the plans/designs for a period of one year.

⁸⁴ CP 60.

Because Tapio's work failed to satisfactorily perform, as indicated by water intrusion into the storage units, the trial court erred when it denied Iron Gate's Motion for Summary Judgment, Motion in Limine, or Motions for Directed Verdict. The trial court also erred when it awarded Tapio its attorney's fees.

Iron Gate requests this Court reverse and remand with directions to the trial court to grant judgment in Iron Gate's favor as a matter of law and to re-try damages only. Under RAP 18.1, Iron Gate further requests the attorney's fee award for Tapio be vacated and Iron Gate be awarded its fees on appeal and also at the trial court level.

DATED this 10th day of June, 2016.

Respectfully Submitted,

LANDERHOLM, P.S.



PHILLIP HABERTHUR, WSBA No. 38038
BRADLEY W. ANDERSEN, WSBA No. 20640
GEORGE J. SOURIS, WSBA No. 47491
Attorneys for Appellant Iron Gate Partners 5,
L.L.C.

APPENDIX 1

In the event the scope of Work includes installation of materials or equipment furnished by others or work to be performed in areas to be constructed or prepared by others, it shall be the responsibility of Contractor to examine and accept, at the time of delivery or first access, the items so provided and thereupon handle, store and install the items with such skill and care as to insure a satisfactory completion of the Work. Contractor shall, without limitation, examine the Work performed by others to determine whether it is of the quality and completeness necessary to allow Contractor to perform the Work required hereunder to the quality required hereunder (e.g. to inspect the angles of wall connections to determine whether tiling will have the true lines necessary for high quality completion). Use of items constructed by others or commencement of work by Contractor in such areas shall be deemed to constitute acceptance thereof by Contractor. In the event of Contractor's acceptance of underlying work that Contractor knew (or reasonable examination would have revealed) to be defective, Contractor shall pay the cost of any correction or repair of Contractor's Work caused by the erroneous acceptance of the underlying work, plus any increased cost of correction of the underlying Work caused by Contractor's construction of Contractor's Work prior to correction of the underlying work.

APPENDIX 2

pursuant to this Agreement and shall promptly report to Owner errors, inconsistencies or omissions discovered. If Contractor performs any construction activity involving an error, inconsistency or omission in the Agreement Documents that Contractor recognized or should have recognized, without such notice to Owner, the Contractor shall assume full responsibility for such performance and shall bear the full amount of the costs of correction.

APPENDIX 3

Contractor warrants and guarantees to Owner (i) the satisfactory performance of the Work for a period of one (1) year from _____, the date of Completion, and (ii) the work, labor and materials installed in the building indicated above have been done in accordance with the Contract Documents. Contractor agrees to repair or replace any or all Work, together with any other adjacent work, which may be displaced by so doing, to Owner's satisfaction, that (i) fails to perform for one (1) year from the date of Completion or (ii) proves to be nonconforming or defective in its workmanship or materials within a period of two (2) years from the date of Substantial Completion, without any expense whatsoever to Owner, ordinary wear and tear and unusual abuse or neglect excepted.

LANDERHOLM PS

June 10, 2016 - 3:59 PM

Transmittal Letter

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Appellant's Reply Brief

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deyoung@sohalang.com

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dinning@sohalang.com

heather.dumont@landerholm.com

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