

1998

# Interwest Construction, a Utah corporation v. R. Roy Palmer and Val W. Palmer, d.b.a. A.H. Palmer & Sons: Brief of Appellee

Utah Court of Appeals

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George W. Preston; Preston & Chambers; Robert R. Wallace; Plant, Wallace, Christensen & Kanell; Attorneys for Appellees.

Steven D. Crawley; Walstad & Babcock; Attorney for Appellant.

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## Recommended Citation

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BRIEF

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IN THE UTAH COURT OF APPEALS

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A10

DOCKET NO. 980276-CA

INTERWEST CONSTRUCTION, a  
Utah corporation,

Plaintiff and Appellant,

v.

R. ROY PALMER and VAL W.  
PALMER, d.b.a. A.H. PALMER  
& SONS,

Defendants and Appellees.

Case No. 980276-CA

Priority: 15

R. ROY PALMER and VAL W.  
PALMER, d.b.a. A.H. PALMER  
& SONS,

Third Party Plaintiffs,

v.

JOHN RYSGAARD, d.b.a.  
FIBERGLASS STRUCTURES COMPANY,

Third Party Defendants.

FIBERGLASS STRUCTURES AND  
TANK COMPANY,

Third Party Plaintiffs,

v.

THIOKOL CORPORATION,

Third Party Defendant.

APPELLEES' ADDENDUM

APPEAL FROM A JUDGMENT IN THE  
FIRST DISTRICT COURT OF CACHE COUNTY  
THE HONORABLE GORDON J. LOW, DISTRICT JUDGE

FILED  
MAR 29 1999

IN THE UTAH COURT OF APPEALS

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INTERWEST CONSTRUCTION, a	:	
Utah corporation,	:	
	:	
Plaintiff and Appellant,	:	
	:	
v.	:	
	:	
R. ROY PALMER and VAL W.	:	Case No. 980276-CA
PALMER, d.b.a. A.H. PALMER	:	
& SONS,	:	Priority: 15
	:	
Defendants and Appellees.	:	

---

R. ROY PALMER and VAL W.	:	
PALMER, d.b.a. A.H. PALMER	:	
& SONS,	:	
	:	
Third Party Plaintiffs,	:	
	:	
v.	:	
	:	
JOHN RYSGAARD, d.b.a.	:	
FIBERGLASS STRUCTURES COMPANY,	:	
	:	
Third Party Defendants.	:	

---

FIBERGLASS STRUCTURES AND	:	
TANK COMPANY,	:	
	:	
Third Party Plaintiffs,	:	
	:	
v.	:	
	:	
THIOKOL CORPORATION,	:	
	:	
Third Party Defendant.	:	

---

APPELLEES' ADDENDUM

---

APPEAL FROM A JUDGMENT IN THE  
FIRST DISTRICT COURT OF CACHE COUNTY  
THE HONORABLE GORDON J. LOW, DISTRICT JUDGE

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- 
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  3. Interwest Construction v. Palmer, Supreme Court of Utah  
decision . . . . . 11
  4. 04/25/90- Plaintiff's Complaint . . . . . 26

DATED this 25<sup>th</sup> day of March, 1999.

PLANT, WALLACE, CHRISTENSEN & KANELL

  
\_\_\_\_\_  
ROBERT R. WALLACE,  
Attorney for Appellees

**CERTIFICATE OF MAILING**

I hereby certify that a true and correct copy of the  
foregoing document was mailed, postage prepaid, this 25<sup>th</sup> day of  
March, 1999 to the following:

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ROBERT R. WALLACE,  
Attorney for Appellees

Tab 1



# Interwest Construction

2004 North Redwood Road  
Salt Lake City, Utah 84116  
(801) 363-9057

## Subcontract Agreement

Consisting of this form and attachment "A"

Trade Treat Sys/Mech

Job No. 842-1500-S

Job Name Thiokol M-705

THIS AGREEMENT made at Salt Lake City, Utah, this 1st day of December, 19 88  
by and between Interwest Construction Inc., hereinafter referred to as the Contractor, and  
A.H. Palmer & Sons  
P.O. Box 905  
Logan, UT 84321 (801) 752-4814

An independent Contractor in fact, hereinafter referred to as the Subcontractor. We bind ourselves, our heirs, executors, administrators, successors, and assigns jointly and severally firmly by these presents.

WITNESSETH: That for and in consideration of the covenants herein contained, the Contractor and the Subcontractor agree as follows:

### 1. SCOPE OF WORK

That the work to be performed by the Subcontractor under the terms of this agreement consists of the following:

Furnishing of all labor and material, tools, implements, equipment, scaffolding, permits, fees, etc., to do all of the following:

Construction of the Strategic Waste Water Treatment Plant - M-705  
project as per plans and specifications and general conditions prepared  
by Sverdrup Corporation dated 9/15/88 including addenda #1 (11/10/88)  
and addenda #2 (11/11/88) for the following scope of work: Division  
11000-Treatment System; Less section 11040; Division 15000-Mechanical,  
less Section 15700-Fireprotection; Section 2740-Septic Systems; Section  
2550-Site Utilities; Section 10200-Louvers & Vents; Alternate A

Alt: If accepted deduct \$31,328.00 for Tax Exemption  
Davis Bacon Act applies  
A construction schedule will become Attachment "B" of this contract.  
Construction schedule requires a six day work week and a minimum of  
twelve hours per day & priority delivery schedules. The attached  
letter is a part of this contract.

Subcontractor shall start no later than (as directed) and complete his work no later than (as directed)

In strict accordance with the plans, specifications, and addenda as prepared by Sverdrup Corp/Morton Thiokol

M-705 Strategic Waste Water Treatment Plant Architect and/or Engineer, for the construction of

For Morton Thiokol, Inc. Owner, for which construction, the Contractor has the prime contract with the Owner; together with all addenda or authorized changes issued prior to the date of execution of this agreement.

The Contractor and the Subcontractor agree to be bound by the terms of the prime contract agreement, construction regulations, general and special conditions, plans and specifications, and all other contract documents, if any there be, insofar as applicable to this subcontract agreement, and to that portion of the work herein described to be performed by the Subcontractor.

In the event of any doubt arising between the Contractor and the Subcontractor with respect to the plans and specifications the decision of the Architect and/or Engineer shall be conclusive and binding. Should there be no supervising architect over the work, then the matter in question shall be determined as provided in Section 8 of this agreement.

### 2. PAYMENTS

The Contractor agrees to pay to the Subcontractor for the satisfactory completion of the herein described work the sum of  
One Million Five Hundred Fifty Five thousand Nine Hundred Dollars

90 (\$ 1,555,900.00)

in monthly payments of 90 % of the work performed in any preceding month, in accordance with estimates prepared by the Subcontractor and as approved by the Contractor and Owner, or Owners Representative, such payments to be made as payments are received by the Contractor from the Owner covering the monthly estimates of the Contractor, including the approved portion of the Subcontractor's monthly estimate. Approval and payment of Subcontractor's monthly estimate is specifically agreed to not constitute or imply acceptance by the Contractor or Owner of any portion of the Subcontractor's work.

Final payment shall be due when the work described in this subcontract is fully completed and performed in accordance with the contract documents and is satisfactory to the architect.

Before issuance of the final payment the subcontractor, if required, shall submit evidence satisfactory to the contractor that all payrolls, bills for material and equipment, and all known indebtedness connected with the subcontractor's work has been satisfied.

This article 2. PAYMENTS is continued on attachment

IN WITNESS WHEREOF, the Contractor and Subcontractor signify their understanding and agreement with the terms hereof by affixing their signatures hereunto.

INTERWEST CONSTRUCTION CO., INC.  
(Contractor)

DEC 22 1988

A.H. PALMER & SONS

(Subcontractor)

By Max Smith

By Val A. Palmer

Witness Connie Pedersen

Witness \_\_\_\_\_

INTERWEST CONSTRUCTION

# SUBCONTRACT AGREEMENT

Interwest Construction

ATTACHMENT ' A "

## 2. PAYMENTS (cont d)

In the event the Subcontractor does not submit to the Contractor such monthly estimates prior to the date of submission of the Contractor's monthly estimate then the Contractor shall include in his monthly estimate to the Owner for work performed during the preceding month such amount as he shall deem proper for the work of the Subcontractor for the preceding month and the Subcontractor agrees to accept such approved portion thereof as his regular monthly payment as described above

Subcontractor agrees to complete monthly release and supplier affidavit forms supplied under separate cover prior to receiving payments under this agreement

Failure to comply with any of the conditions of this agreement constitutes cause for withholding payments until such time as this condition is corrected to the satisfaction of the Contractor

The Subcontractor agrees to make good without cost to the Owner or Contractor any and all defects due to faulty workmanship and or materials which may appear within the period so established in the contract documents and if no such period be stipulated in the contract documents then such guarantee shall be for a period of one year from date of completion of the project The Subcontractor further agrees to execute any special guarantees as provided by terms of the Contract documents prior to final payment

In the event it appears to the Contractor that the labor material and other bills incurred in the performance of the work are not being currently paid the Contractor may take such steps as it deems necessary to assure absolutely that the money paid with any progress payment will be utilized to the full extent necessary to pay labor material and all other bills incurred in the performance of the work of Subcontractor The Contractor may deduct from any amounts due or to become due to the Subcontractor any sum or sums owing by the Subcontractor to the Contractor and in the event of any breach by the Subcontractor of any provision or obligation of this Subcontractor or in the event of the assertion by other parties of any claim or lien against the Contractor or Contractor's Surety or the premises arising out of the Subcontractor's performance of this Contract the Contractor shall have the right but is not required to retain out of any payments due or to become due to the Subcontractor an amount sufficient to completely protect the Contractor from any and all loss damage or expense therefrom until the situation has been remedied or adjusted by the Subcontractor to the satisfaction of the Contractor These provisions shall be applicable even though the Subcontractor has posted a full payment and performance bond

## 3. PROSECUTION OF WORK, DELAYS, ETC

The Subcontractor shall prosecute the work undertaken in a prompt and diligent manner whenever such work or any part of it becomes available or at such other time or times as the Contractor may direct and so as to promote the general progress of the entire construction and shall not by delay or otherwise interfere with or hinder the work of the Contractor or any other Subcontractor and in the event that the Subcontractor neglects and/or fails to supply the necessary supervision labor and or materials tools implements equipment etc in the opinion of the Contractor and/or in the event the Subcontractor is unable to perform because of strikes picketing or boycotting of any kind which result in Subcontractor's employee's supplier's or Subcontractor's being unable or unwilling to enter on the job and complete the work or in the event that the Subcontractor or his men refuse to work after having been requested by the Contractor to proceed with the work then the Contractor shall notify the Subcontractor in writing setting forth the deficiency and or delinquency and forty eight hours after date of such written notice the Contractor shall have the right if he so desires to take over the work of the Subcontractor in full and exclude the Subcontractor from any further participation in the work covered by this agreement or at his option the Contractor may take over such portion of the Subcontractor's work as the Contractor shall deem to be in the best interest of the Contractor and permit the Subcontractor to continue with the remaining portions of the work Whichever method the Contractor might elect to pursue the Subcontractor agrees to release to the Contractor for his use only without recourse any materials tools implements equipment etc on the site belonging to or in the possession of the Subcontractor for the benefit of the Contractor in completing the work covered in this agreement and the Contractor agrees to complete the work to the best of his ability and in the most economical manner available to him at the time Any costs incurred by the Contractor in doing any such portion of the work covered by this agreement shall be charged against any monies due or to become due under the terms of this agreement and in the event the total amount due or to become due under the terms of this agreement shall be insufficient to cover the costs incurred by the Contractor in completing the work then the Subcontractor and his sureties if any shall be bound and liable to the Contractor for the difference

Should the proper workmanlike and accurate performance of any work under this contract depend wholly or partially upon the proper workmanlike or accurate performance of any work or materials furnished by the Contractor or other subcontractors on the project the Subcontractor agrees to use all means necessary to discover any such defects and report same in writing to the Contractor before proceeding with his work which is so dependent and shall allow to the Contractor a reasonable time in which to remedy such defects and in the event he does not so report to the Contractor in writing then it shall be assumed that the Subcontractor has fully accepted the work of others as being satisfactory and he shall be fully responsible thereafter for the satisfactory performance of the work covered by this agreement regardless of the defective work of others

The Subcontractor shall clean up and remove from the site as directed by the Contractor all rubbish and debris resulting from his work Failure to clean up rubbish and debris shall serve as cause for withholding further payment to Subcontractor until such time as this condition is corrected to the satisfaction of the Contractor Also he shall clean up to the satisfaction of the inspectors all dirt grease marks etc from walls ceilings floors fixtures etc deposited or placed thereon as a result of the execution of this subcontract If the Subcontractor refuses or fails to perform this cleaning as directed by the Contractor the Contractor shall have the right and power to proceed with the said cleaning and the Subcontractor will on demand repay to the Contractor the actual cost of said labor plus a reasonable percentage of such cost to cover supervision insurance overhead etc

The Subcontractor agrees to reimburse the Contractor for any and all liquidated damages that may be assessed against and collected from the Contractor by the Owner which are attributable to or caused by the Subcontractor's failure to furnish the materials and perform the work required by this Subcontract within the time fixed in the manner provided for herein regardless of the cause from which the delay occurred and in addition thereto agrees to pay to the Contractor such other or additional damages as the Contractor may sustain by reason of such delay by the Subcontractor The payment of such damages shall not release the Subcontractor from his obligation to otherwise fully perform this Subcontract

Whenever it may be useful or necessary to the Contractor to do so the Contractor shall be permitted to occupy and/or use any portion of the work which has been either partially or fully completed by the Subcontractor before final inspection and acceptance thereof by the Owner but such use and/or occupation shall not relieve the Subcontractor of his guarantee of said work and materials nor of his obligation to make good at his own expense any defect in materials and workmanship which may occur or develop prior to Contractor's release from responsibility to the Owner Provided however the Subcontractor shall not be responsible for the maintenance of such portion of the work as may be used and/or occupied by the Contractor nor for any damage thereto that is due to or caused by the sole negligence of the Contractor during such period of use

Subcontractor shall be responsible for his own work property and/or materials until completion and final acceptance of the Contract by the Owner and shall bear the risk of any loss or damage until such acceptance In the event of loss or damage he shall proceed promptly to make repairs or replacement of the damaged work property and or materials at his own expense as directed by the Contractor Subcontractor waives all rights Subcontractor might have against Owner and Contractor for loss or damage to Subcontractor's work property or materials

It is agreed that the Subcontractor at the option of the Contractor may be considered as disabled from so complying whenever a petition in Bankruptcy or the appointment of a Receiver is filed against him

The Subcontractor assumes toward the Contractor all the obligations and responsibilities that the Contractor assumes toward the Owner The Subcontractor shall indemnify the Contractor and the Owner against and save them harmless from any and all loss damage expenses costs and attorney's fees incurred or suffered on account of any breach of the provisions or covenants of this contract

Subcontractor shall pay reasonable and proportionate cost for hoisting services provided by Contractor

## 4. SURETY BOND

The Subcontractor agrees to furnish to the Contractor at the Contractor's request and expense a surety bond guaranteeing the faithful performance of this agreement and the payment of all labor and material bills in connection with the execution of the work covered by this agreement The bond is to be written by a surety company designated or approved by the Contractor and in a form entirely satisfactory to the Contractor

## 5. PERMITS, LICENSE FEES, TAXES, ETC

The Subcontractor shall at his own cost and expense apply for and obtain all necessary fees permits and licenses and shall at no extra cost to the Contractor conform strictly to the laws building codes and ordinances in force in the locality where the work under the project is being done insofar as applicable to work covered by this agreement

Subcontractor is an independent contractor in fact and also within the scope of the United States Internal Revenue Code the Federal Social Security Act together with present and future amendments thereto and any and all unemployment insurance laws both Federal and of any state or territory and is therefore solely responsible to the Federal State or territorial Governments for all payroll taxes deductions withholdings and contributions under such laws The compensation payable to Subcontractor as above provided includes all sales and use taxes and franchise excise and other taxes and governmental impositions of all kinds and is not subject to any addition for any such taxes or impositions now or hereafter levied



## 6. INSURANCE

The Subcontractor agrees to provide and maintain workmen's compensation insurance and to comply in all respects with the employment of labor required by any constituted authority having legal jurisdiction over the area in which the work is performed.

The Subcontractor shall maintain such third party public liability and property damage insurance including general products and automobile liability as will protect it from claims for damages because of bodily injury including death or damages because of injury to or loss destruction or loss of use of property which may arise from operations under this agreement whether such operations be by it or its subcontractors or anyone directly or indirectly employed by either of them. Limits for third party public liability including products and automobile liability shall be not less than \$200,000 each occurrence for bodily injury, \$200,000 each occurrence for property damage, and \$200,000 aggregate as respects property damage. If the prime contract requires higher limits than those listed above then such requirements shall govern and the higher limits shall be provided (SEE INS. ATTACHMENT)

The Subcontractor agrees to furnish a completed certificate of insurance issued to Interwest Construction Co., Inc.

(5) The Subcontractor shall indemnify the Contractor and the Owner against and save them harmless from any and all loss damage costs expenses and attorney's fees suffered or incurred on account of any breach of the aforesaid obligations and covenants and any other provision or covenant of this subcontract.

(6) Subcontractor shall indemnify save harmless and defend Owner and the Contractor from and against any and all loss damage in jury liability and claims thereof for injuries to or death of persons and all loss of or damage to property resulting directly or indirectly from Subcontractor's performance of this contract regardless of the negligence of Owner or Contractor or their agents or employees except where such loss damage injury liability or claims are the result of active negligence on the part of Owner or Contractor or its agents or employees and is not caused or contributed to by an omission to perform some duty also imposed on Subcontractor its agents or employees.

All insurance required hereunder shall be maintained in full force and effect in a company or companies satisfactory to Contractor shall be maintained at Subcontractor's expense until performance in full hereof (certificates of such insurance being supplied by Subcontractor to Contractor) and such insurance shall be subject to requirement that Contractor must be notified by ten (10) days written notice before cancellation of any such policy. In event of threatened cancellation for nonpayment of premium Contractor may pay same for Subcontractor and deduct the said payment from amounts then or subsequently owing to Subcontractor hereunder.

## 7. CHANGES, ADDITIONS AND DEDUCTIONS

The Contractor may add to or deduct from the amount of work covered by this agreement and any changes so made in the amount of work involved or any other parts of this agreement shall be by a written amendment hereto setting forth in detail the changes involved and the value thereof which shall be mutually agreed upon between the Contractor and the Subcontractor. The Subcontractor agrees to proceed with the work as changed when so ordered in writing by the Contractor so as not to delay the progress of the work and pending any determination of the value thereof.

Subcontractor shall be entitled to receive no extra compensation for extra work or materials or changes of any kind regardless of whether the same was ordered by Contractor or any of its representatives unless a change order therefor has been issued in writing by Contractor. If extra work was ordered by Contractor and Subcontractor performed same but did not receive a written order therefor Subcontractor shall be deemed to have waived any claim for extra compensation therefor regardless of any written or verbal protests or claims by Subcontractor. Subcontractor shall be responsible for any costs incurred by Contractor for changes of any kind made by Subcontractor that increase the cost of the work for either the Contractor or other Subcontractors when the Subcontractor proceeds with such changes without a written order therefor.

Notwithstanding any other provision if the work for which Subcontractor claims extra compensation is determined by the Owner or Architect not to entitle Contractor to a change order or extra compensation then Contractor shall not be liable to Subcontractor for any extra compensation for such work. (As used in this Subcontract the term Owner includes any representative of Owner and Architect includes the Engineer if any.)

## 8. DISPUTES

In the event of any dispute between the Contractor and Subcontractor covering the scope of the work the dispute shall be settled in the manner provided by the contract documents. If none be provided or if there arises any dispute concerning matters in connection with this agreement and without the scope of the work then such disputes shall be settled by a ruling of a board of arbitration consisting of three members one selected by the Contractor one by the Subcontractor and the third member shall be selected by the first two members. The Contractor and Subcontractor shall bear the expense of their selected members respectively but the expenses of the third member shall be borne by the party hereto requesting the arbitration in writing. The Contractor and Subcontractor agree to be bound by the findings of any such boards of arbitration finally and without recourse to any court of law.

## 9. TERMINATION OF CONTRACT

In the event the prime contract between the Owner and the Contractor should be terminated prior to its completion then the Contractor and Subcontractor agree that an equitable settlement for work performed under this agreement prior to such termination will be made as provided by the contract documents if such provision be made or if none such exist by mutual agreement or failing either of these methods by arbitration as provided in Section 8.

## 10. EQUAL EMPLOYMENT OPPORTUNITY

During the performance of this subcontract the Subcontractor agrees to not discriminate against any employee because of race color creed or national origin. As outlined in the Equal Opportunity Clause of the Regulations of Executive Order 10925 of March 6, 1961 as amended by Executive Order 11114 of June 22, 1963. The executive orders and the respective regulations are made a part of this subcontract by reference.

Subcontractor shall also fully comply with wage hour and Equal Opportunity regulations and shall take vigorous affirmative action including the submittal of a written affirmative action program to employ minority employees whenever so required—and is encouraged to do so in the absence of such requirements.

## 11. TERMS OF LABOR AGREEMENTS

It is hereby understood and agreed that for the work covered by this subcontract the Subcontractor is bound and will comply with the terms and conditions of the labor agreements to which the general contractor is a party insofar as said labor agreements lawfully require subcontractors to be so bound.

## 12. ADDITIONAL PROVISIONS

The Subcontractor agrees not to sublet transfer or assign this agreement or any part thereof without written consent of the Contractor.

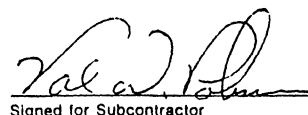
As built drawings when required shall be accurately maintained by Subcontractor for his portion of the work and turned over to Contractor in an acceptable manner before final payment is made to Subcontractor.

The Subcontractor agrees to provide his employees with safe appliances and equipment to provide them with a safe place to work to perform the work under this contract in a safe manner with high regard for the safety of his employees and others and to comply with health and safety provisions and requirements of local state and federal agencies including the Williams Steiger Occupational Safety and Health Act and to hold the Contractor harmless for any costs deficiencies fines or damages incurred because of his negligence to comply with these regulations acts and procedures.

## Subcontract Agreement

Attachment "A"

 12.23.88  
Signed for Interwest Construction Date

 12/14/88  
Signed for Subcontractor Date

Tab 2

Cite as  
292 Utah Adv. Rep. 27

IN THE SUPREME COURT  
OF THE STATE OF UTAH

INTERWEST CONSTRUCTION, a Utah  
corporation,  
Plaintiff and Respondent,

v.

R. Roy PALMER and Val W. Palmer, dba  
A.H. Palmer & Sons,  
Defendants and Respondents.

R. Roy Palmer and Val W. Palmer, dba  
A.H. Palmer & Sons,  
Third-Party Plaintiffs and Respondents,

v.

John Rysgaard, dba Fiberglass Structures  
Company and Fiberglass Structures  
Company, Inc.,  
Third-Party Defendants and  
Respondents.

Fiberglass Structures and Tank Company,  
fka Fiberglass Structures Company of St.  
Paul, Inc.,  
Third-Party Plaintiffs and Respondents,

v.

Thiokol Corporation,  
Third-Party Defendant and Petitioner.

No. 940616

FILED: June 14, 1996

First District, Cache County  
The Honorable Gordon R. Low

ATTORNEYS:

Steven D. Crawley, Robert C. Keller, Salt  
Lake City, for Interwest Construction  
George W. Preston, Logan, and Robert T.  
Wallace, Salt Lake City, for A.H. Palmer &  
Sons  
John E. Daubney, St. Paul, Minn., for Rysgaard  
and Fiberglass Structures  
Anthony B. Quinn, Mary Anne Q. Wood,  
Richard G. Wilkins, Salt Lake City, for  
Thiokol  
Mark F. James, Salt Lake City, for amicus  
Utah Manufacturers Association

On Certiorari to the Utah Court of Appeals

This opinion is subject to revision before  
publication in the Pacific Reporter.

ZIMMERMAN, Chief Justice:

Following the trial court's entry of judgment  
on a contract dispute in favor of Interwest  
Construction ("Interwest") and A.H. Palmer and  
Sons ("Palmer"), Thiokol Corporation  
("Thiokol") appealed to this court, and we

poured the appeal to the court of appeals. We  
then granted certiorari to review the court of  
appeals' decision affirming the trial court  
judgment. *See Interwest Constr. v. Palmer*, 886  
P.2d 92 (Ct. App. 1994), *cert. granted sub  
nom. Fiberglass v. Thiokol*, 892 P.2d 13 (Utah  
1995). Our present review is limited to  
considering whether the court of appeals erred in  
holding (i) that our decision in *Beck v. Farmers  
Insurance Exchange*, 701 P.2d 795 (Utah 1985),  
precludes tort actions for negligence and strict  
liability arising out of the breach of contractually  
defined obligations; and (ii) that Thiokol waived  
its rights to enforce its contract with Interwest.

Thiokol does not appeal the trial court's  
findings of fact. The trial court initially detailed  
its findings by memorandum decision and then  
by formal findings of fact and conclusions of  
law. Accordingly, we recite the facts in a light  
most favorable to the trial court's findings. *State  
v. A House & 1.37 Acres*, 886 P.2d 534, 535  
(Utah 1994).<sup>1</sup>

In the fall of 1988, Thiokol and Interwest  
entered into a contract under which Interwest  
agreed to build a wastewater treatment facility  
for Thiokol. Interwest subsequently  
subcontracted with Palmer for labor and  
materials in connection with the construction of  
the facility. Palmer, in turn, subcontracted with  
Fiberglass Structures and Tank Company, Inc.  
("Fiberglass Structures"), for the purchase of  
three fiberglass wastewater storage tanks for the  
facility. Palmer's purchase order required  
Fiberglass Structures to follow Thiokol's plans  
and specifications unless it obtained prior  
approval to deviate from them.

Thiokol's plans and specifications for the  
treatment facility designated the fiberglass tanks  
as T32, T33, and T34 and called for the tanks to  
be built in accordance with "applicable  
requirements" of NBS/PS 15-69, a national  
voluntary industry standard governing the  
construction of fiberglass tanks. The tanks were  
designed to collect wastewater from four smaller  
tanks located inside the treatment building by  
means of a gravity-feed system. Because the  
tanks inside the building were smaller than the  
three external tanks, the gravity-feed system  
allowed the external tanks to become only  
two-thirds full at maximum. Thiokol approved  
specifications for the tanks indicating that their  
walls would be 1/4 inch thick.

Fiberglass Structures shipped prefabricated  
fiberglass panels to the treatment facility site.  
The panels were bolted together along vertical  
seams to create each of the three tanks, and the  
tanks were bolted to a concrete base outside the  
treatment building. The top of each tank was  
bolted to the sides, and fill pipes were connected  
between the three external and the four internal  
tanks. The three external tanks were completed  
and installed on April 30, 1989. During a trial  
test that same day, tank T34 burst along one of  
the vertical seams connecting two of its  
fiberglass panels. Nevertheless, on May 2,  
1989, Thiokol inspected the treatment facility

and notified Interwest that the facility was substantially complete with the exception of a few punch-list items, which did not include the ruptured tank or necessary repairs to the other two tanks. The same day, Palmer gave Thiokol a one-year warranty on all then-installed work.

Thiokol hired an independent consulting engineer to review the cause of tank T34's failure, and the consultant recommended that Thiokol discard all three tanks. The consultant was concerned about the strength of the tanks' vertical panels, among other things, and recommended increasing the thickness of the panels from 1/4 inch, as per the original design, to 3/4 inch. However, Thiokol's project engineer directed the consultant to focus on fixing the tanks' seams. Thereafter, Thiokol negotiated separately and directly with Fiberglass Structures for the repair of tanks T32 and T33 and replacement of tank T34; Thiokol's involvement was such that the trial court concluded that Thiokol and Fiberglass Structures "jointly constructed the tanks." Specifications for the modified tanks clearly indicated that they would have 1/4-inch-thick walls and a safety factor of 6.

In early June of 1989, Thiokol tested and accepted the repaired tanks on the basis of its determination that the tanks met its specifications. On June 13th, Fiberglass Structures gave Thiokol an extended three-year warranty at Thiokol's insistence, which warranted the structural integrity of the tanks but expressly excluded damage resulting from modifications to the tanks. Interwest and Palmer were minimally, if at all, involved in these negotiations.

In June of 1989, Thiokol began operating the treatment facility. Sometime that month, without the knowledge of Interwest, Palmer, or Fiberglass Structures, Thiokol changed the tanks' filling system from the original gravity-feed design to an overhead, high-pressure pump feed.

On August 24, 1989, tank T33 ruptured, spilling its wastewater contents. The trial court found that the pump feed system allowed the tank to be overfilled and that tank T33 failed because it was overfilled by a Thiokol employee. Given the pumping capacity, there was an insufficient opening at the top of the tank to allow for the escape of excess wastewater, thus causing an uplift pressure which the tank was not designed to withstand. The overfilling and consequent uplift pressure caused the tank to lift up from its concrete base and to split from the bottom up along the middle of one of the fiberglass panels, not along a seam as was the case with tank T34's earlier failure.

At the time of the second failure, Thiokol withheld \$200,000 which it owed to Interwest on the original contract. That amount included \$93,653.70 which Interwest owed to Palmer. The instant action began when Interwest sued Palmer for breach of warranty, negligence, indemnity, and breach of contract. Palmer then

filed a third-party complaint against Fiberglass Structures, which in turn filed a third-party complaint against Thiokol. Interwest later added Thiokol as a defendant and sought recovery for breach of contract and unjust enrichment. Thiokol eventually counterclaimed against Interwest, Palmer, and Fiberglass Structures for breach of contract, breach of express and implied warranties, negligence, and strict liability.

After a two-week bench trial, the trial court concluded in relevant part that (i) it would not address Thiokol's tort claims because the case was "entirely controlled by contract"; (ii) the NBS/PS 15-69 standard was not incorporated into the contract so as to specify a particular wall thickness or safety factor for the fiberglass panels and, therefore, Thiokol could not hold its suppliers liable for failing to provide tanks with a specific wall thickness and safety factor; (iii) neither Interwest, Palmer, nor Fiberglass Structures failed to comply with the contract in any way which caused or resulted in the August 24th failure of tank T33; (iv) Thiokol failed to prove the cause of tank T33's failure and the most likely cause was Thiokol's overfilling the tank; and (v) Thiokol's overfilling the tanks barred its recovery under any of its suppliers' warranties. Accordingly, the trial court ordered Thiokol to pay Interwest \$200,000, ordered Interwest to pay Palmer \$93,653.70, and dismissed all other claims. The court of appeals affirmed, and Thiokol's petition to this court followed.

On certiorari to this court, Thiokol contends that the court of appeals erred in affirming the dismissal of Thiokol's tort claims. In addition, Thiokol claims the court of appeals erred in holding that Thiokol waived its right to assert that the modified tanks should have complied with the NBS/PS 15-69 standard. Thiokol claims that each of these issues presents only questions of law which this court should review nondeferentially. *See State v. Pena*, 869 P.2d 932, 935-36 (Utah 1994).

We first address the dismissal of Thiokol's tort claims. In its post-trial memorandum decision, the trial court refused to address Thiokol's negligence and strict liability claims because it concluded that the case was "entirely controlled by contract." The court of appeals affirmed, reasoning that because "the contract expressly provided that [Interwest and Palmer] were under a duty to design, construct, and deliver a product free from defects and suitable for the purposes for which it was to be used," their "responsibility in tort is . . . exactly co-extensive with their contractual obligations," thus precluding Thiokol's tort claims. *Interwest Constr.*, 886 P.2d at 101. Thiokol maintains that the court of appeals misconstrued our earlier decision in *Beck* as establishing the proposition that "if parties arrange rights, duties, and obligations under a contract, any cause of action for breach of those contractually defined obligations, rights, or duties lies in contract, not

in tort." *Id.* (citing *Beck*, 701 P.2d at 799-800).

Although we ultimately reach the result that Thiokol's tort claims fail, we agree with Thiokol that the court of appeals misapplied our holding in *Beck*. In *Beck*, we addressed whether an insurer's breach of the covenant of good faith and fair dealing allowed its insured to sue the insurer in tort. We held that "in a first-party relationship between an insurer and its insured, the duties and obligations of the parties are contractual rather than fiduciary." *Beck*, 701 P.2d at 800. Because we found no independent fiduciary duty in the first-party insurance relationship, but only a contractual duty to pay claims, we further held, "Without more, a breach of [contractual] implied or express duties can give rise only to a cause of action in contract, not one in tort." *Id.*

Nonetheless, we specifically noted in *Beck* that "in some cases the acts constituting a breach of contract may also result in breaches of duty that are independent of the contract and may give rise to causes of action in tort." *Id.* at 800 n.3 (giving examples). However, in *Beck*, we refused, for a number of policy reasons, *see id.* at 798-801, to recognize a tort action in the context of a first-party insurance relationship.

In the instant case, the court of appeals assumed on the basis of *Beck* that language in Thiokol's contract calling for a product "free from defects" supplanted any independent tort duties the suppliers might have had to deliver nondefective products or services. *See Interwest Constr.*, 886 P.2d at 101. But the limitation we adopted in *Beck* is not broadly applicable to all contracts in all circumstances; rather, it referred to a specific relationship between contracting parties. Each category of relationships must be analyzed to determine, as a matter of law and policy, whether in that setting a party to a contract owes any tort-type duties to the other beyond the duties spelled out in the contract. *See, e.g., Beach v. University of Utah*, 726 P.2d 413, 417-20 (Utah 1986) (applying analytical model for determining whether tort duties exist); *see also* W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* §92, at 655 (5th ed. 1984) (recommending that courts consider (i) the nature of the defendant's activity, (ii) the relationship between the parties, and (iii) the type of injury or harm threatened to determine whether tort obligations are owed in addition to contract promises).

Thiokol cites *DCR Inc. v. Peak Alarm Co.*, 663 P.2d 433 (Utah 1983), as an example of an instance where we recognized that a tort duty may exist even when the relationship between the parties is founded upon a contract. In *DCR Inc.*, we allowed a clothing store owner to pursue a tort claim against a company which agreed to install and maintain a burglar alarm when the company knew but failed to warn the store owner that the alarm could be easily deactivated by criminals. *Id.* at 434. We recognized that under those factual circumstances, one who undertakes to provide

services for another owes a tort duty to the other to perform such services with reasonable care. *Id.* at 435-37; *see* Restatement (Second) of Torts §323 (1965).<sup>2</sup> We explained that "the defendant's tort liability is not based upon breach of contract, but rather upon violation of the legal duty independently imposed as a result of what the defendant undertook to do with relation to the plaintiff's interests." *Id.* at 437 (quoting Carl S. Hawkins, *Retaining Traditional Tort Liability in the Nonmedical Professions*, 1981 B.Y.U. L. Rev. 33, 36).

We agree that a buyer of products or services may, in some circumstances, assert tort claims along with breach of contract claims against a supplier. That recognition is nothing more than an acknowledgment that virtually all courts have permitted certain actions—for example, products liability—to include claims sounding in both tort and contract. *See Keeton et al., supra*, §92, at 660-61.

We therefore disagree that the tort duties of Thiokol's suppliers are necessarily "exactly co-extensive with their contractual obligations," as the court of appeals held. *Interwest Constr.*, 886 P.2d at 101. Here, Thiokol alleged that its suppliers failed to use reasonable care to prevent foreseeable harm to others (negligence) or manufactured and sold the tanks in a defective condition that made them unreasonably dangerous to others (strict liability). Our decision in *Beck* does not control whether these tort claims can coexist with Thiokol's contract claims. That determination requires a deeper analysis. But for the purposes of this appeal, that analysis is unnecessary. We will take a shorter route and simply assume, without deciding, that some tort and contract claims can coexist in the instant case.

In light of this assumption, we also hold that the "free from defects" contractual provision cited by the court of appeals is insufficient as a matter of law to exempt Thiokol's suppliers from strict tort or negligence liability. On grounds of public policy, parties to a contract may not generally exempt a seller of a product from strict tort liability for physical harm to a user or consumer unless the exemption term "is fairly bargained for and is consistent with the policy underlying that [strict tort] liability." Restatement (Second) of Contracts §195(3) (1981). While parties to a contract may generally exempt themselves from negligence liability, the language they use must "clearly and unequivocally" express an intent to limit tort liability in the contract itself. *DCR Inc.*, 663 P.2d at 438; *see also* Restatement (Second) of Contracts §195 cmt. b (1981). Without such an expression of intent, "the presumption is against any such intention, and it is not achieved by inference or implication from general language such as was employed here." *DCR Inc.*, 663 P.2d at 437 (quoting *Union Pac. R.R. v. El Paso Natural Gas Co.*, 408 P.2d 910, 914 (Utah 1965)).

Accordingly, we hardly see how a contractual promise to provide a product "free from defects" amounts to an exemption from tort liability, especially when we have refused to enforce very detailed and thorough exculpatory clauses that presented a much closer case for exemption. See *Union Pac. R.R.*, 408 P.2d at 912-14. We therefore conclude that Thiokol's strict liability and negligence claims were not precluded by the existence of a contract which contained a promise that Interwest and its subcontractors would supply products "free from defects." We thus disapprove of the reasoning employed by the court of appeals to affirm the trial court's decision.

We now address Thiokol's negligence and strict liability claims on the merits. "To recover for negligence, a plaintiff must show that the defendant owed the plaintiff a duty, the defendant breached the duty, the breach was a proximate cause of the plaintiff's injuries, and there was in fact injury." *Jackson v. Righter*, 891 P.2d 1387, 1392 (Utah 1995); see also *Hunsaker v. State*, 870 P.2d 893, 897 (Utah 1993); *Reeves v. Gentile*, 813 P.2d 111, 116 (Utah 1991); *Williams v. Melby*, 699 P.2d 723, 726 (Utah 1985). To recover on a strict liability theory against a seller engaged in selling products of the kind at issue, a plaintiff must prove (i) that the product was unreasonably dangerous due to a defect or defective condition, (ii) that the defect existed at the time the product was sold, and (iii) that the defective condition caused the plaintiff's injuries. *Lamb v. B&B Amusements Corp.*, 869 P.2d 926, 929 (Utah 1993); see also *Mulherin v. Ingersoll-Rand Co.*, 628 P.2d 1301, 1302 (Utah 1981); *Ernest W. Hahn, Inc. v. Armco Steel Co.*, 601 P.2d 152, 158 (Utah 1979); Restatement (Second) of Torts §402A (1965); Keeton et al., *supra*, §103.

Assuming, without deciding, that Thiokol's suppliers owed it tort duties which they breached, it is nonetheless axiomatic that to successfully prosecute actions for negligence and strict liability, the complaining party must prove that another party's breach of duty proximately caused the first party's injury. See *Jackson*, 891 P.2d at 1392 (negligence); *Mulherin*, 628 P.2d at 1304 (strict liability); see also Restatement (Second) of Torts §281 (1965). Proof of proximate cause is also required in breach of warranty actions, which may sound in either contract or tort. *Mitchell v. Pearson Enters.*, 697 P.2d 240, 247 (Utah 1985); *Mulherin*, 628 P.2d at 1304; *Hahn*, 601 P.2d at 159. "Proximate cause is 'that cause which, in natural and continuous sequence[] (unbroken by an efficient intervening cause), produces the injury, and without which the result would not have occurred. It is the efficient cause—the one that necessarily sets in operation the factors that accomplish the injury.'" *Harline v. Barker*, 912 P.2d 433, 439 (Utah 1996) (alteration in original) (quoting *Mitchell*, 697 P.2d at 245-46 (quoting *State v. Lawson*, 688 P.2d 479, 482 n.3 (Utah 1984))).

Applying these principles to the instant case and assuming that Thiokol's suppliers owed tort duties which they breached, we hold that Thiokol's tort claims fail for the same reason that its warranty claim failed: it was unable to prove that any defect in the design or manufacture of tank T33 proximately caused the August 24th failure. The trial court specifically noted contrary testimony on causation: namely, that Fiberglass Structures failed to properly design, engineer, manufacture, or test the tanks and that these failures contributed to the failure of tank T33. However, the trial court ruled against Thiokol on its breach of warranty claim because it found that Thiokol caused the August 24th failure by overfilling tank T33. We read this as a factual determination that Thiokol's misuse of tank T33 exceeded the fault, if any, of its suppliers. Otherwise, the trial court would have apportioned damages on Thiokol's breach of warranty claim. See *Interwest Constr.*, 886 P.2d at 98-100 (affirming award of no damages on Thiokol's breach of warranty claim).

Accordingly, this finding also defeats Thiokol's strict liability and negligence claims, because they are premised on the same conduct and resulted in the same alleged damages as the breach of warranty claim. *Jacobsen Constr. Co. v. Structo-Lite Eng'g, Inc.*, 619 P.2d 306, 312 (Utah 1980). We thus disapprove of the reasoning employed by the court of appeals to affirm the trial court's ruling but affirm the result reached by both courts.

We now turn to Thiokol's claim that the court of appeals erred in holding that Thiokol waived its rights to enforce the terms of its original contract with Interwest with respect to the repaired tanks. Thiokol insists that its original contract with Interwest incorporated the requirements of NBS/PS 15-69, a national voluntary standard for fiberglass tanks and fittings. Thiokol additionally claims that the standard, and therefore the contract, called for a wall thickness greater than 1/4 inch and a safety factor of 10 to 1, while the modified tanks had walls of 1/4 inch and a safety factor of 6 to 1.<sup>3</sup>

We first note that the trial court concluded that the "NBS/PS 15-69 standards were not incorporated into the contract by Thiokol with sufficient clarity in the contract for the designer and manufacturer to be aware of their application; specifically with respect to wall thickness and safety factors."

The court of appeals, in turn, initially affirmed the trial court's finding that there was no breach of contract because Thiokol's suppliers "built and supplied the tanks in accordance with the terms of the contract." *Interwest Constr.*, 886 P.2d at 97. The court of appeals then began its waiver analysis. The court first noted, without analysis, that the NBS/PS 15-69 standard imposed minimum wall thickness dimensions and a safety factor of 10 to 1 and that the tanks did not meet these alleged requirements. *Id.* at 97 & nn.6-7. Then the

court of appeals concluded that even if the contract incorporated the NBS standard, Thiokol had waived its right to insist that the tanks conform to the wall thickness and safety factor the standard allegedly required. *Id.* at 98. The court reasoned that because Thiokol approved Fiberglass Structures' proposed design for remedying the defective tanks, supervised their reconstruction, "and accepted the tanks although aware that they were not constructed in accordance with NBS/PS 15-69," Thiokol waived its right to claim that the modified tanks were deficient because they failed to meet the design or construction specifications allegedly incorporated into the original contract. *Id.*

Thiokol argues that the court of appeals' waiver analysis cannot survive legal scrutiny because (i) the NBS/PS 15-69 standard was a material term of the contract which cannot be waived; and (ii) an intentional waiver did not occur because Thiokol never knew the tanks did not meet the NBS/PS 15-69 specifications until after the August 24th failure; and (iii) by allowing Fiberglass Structures to repair and replace the three tanks after the first failure on April 30th, Thiokol was merely permitting that supplier to cure its deficient performance, and such cure cannot, as a matter of law, abrogate Thiokol's rights to demand full performance under the original contract. Thiokol notes that if left uncorrected, the court of appeals' waiver analysis threatens to encourage litigation by deterring contracting parties from attempting to cure defective contract performance.

We reject the premise advanced by Thiokol and assumed by the court of appeals that the contract incorporated minimum wall thickness dimensions and a 10 to 1 safety factor by virtue of the reference to the NBS/PS 15-69 standard. Thiokol concedes that the trial court expressly found that the contract did *not* incorporate such requirements but claims that the court of appeals found that it did. Thiokol contends that the court of appeals could do so because whether the original contract incorporated the NBS/PS 15-69 standard presents a question of law which an appellate court can correct without giving deference to the trial court's findings and conclusions.

However, both Thiokol and the court of appeals have misconstrued the issue in this case. We do not read the trial court's finding as rejecting the incorporation of the NBS/PS 15-69 standard into the contract, but as a finding that the standard did not mandate tank walls thicker than 1/4 inch and a safety factor of 10 to 1 so as to make these required terms of the contract. Our reading is supported by the fact that the trial court did consider whether tank T33 met NBS/PS 15-69's unambiguous requirement that "all layers shall be overlapped a minimum of 1 inch" but found that Thiokol had not proven the existence of insufficient overlap. *See supra* note 3.

As we set forth below, under our reading, the trial court's finding that the contract's reference

to the NBS/PS 15-69 standard did not mandate wall thickness or safety factor requirements is a factual finding which Thiokol has not properly challenged. Thiokol has therefore failed to meet its burden on appeal to "marshal the evidence in support of the findings and then demonstrate that despite this evidence, the trial court's findings are so lacking in support as to be against the clear weight of the evidence, thus making them clearly erroneous." *Hall v. Process Instruments & Control, Inc.*, 890 P.2d 1024, 1028 (Utah 1995) (quoting *A House & 1.37 Acres*, 886 P.2d at 538 n.4) (additional citation omitted). "Absent such a showing, we 'assume[] that the record supports the findings of the trial court and proceed to a review of the accuracy of the lower court's conclusions of law and the application of that law in the case.'" *Id.* (alteration in original) (quoting *A House & 1.37 Acres*, 886 P.2d at 538 n.4).

We first clarify the standard of review for interpretation of a contract. Determining whether a contract is ambiguous presents a threshold question of law, which we review for correctness. *Willard Pease Oil & Gas Co. v. Pioneer Oil & Gas Co.*, 899 P.2d 766, 770 (Utah 1995); *Winegar v. Froerer Corp.*, 813 P.2d 104, 108 (Utah 1991); *Fitzgerald v. Corbett*, 793 P.2d 356, 358 (Utah 1990). If a contract is unambiguous, a trial court may interpret the contract as a matter of law, and we review the court's interpretation for correctness. *Willard Pease*, 899 P.2d at 770. "A contract provision is ambiguous if it is capable of more than one reasonable interpretation because of 'uncertain meanings of terms, missing terms, or other facial deficiencies.'" *Winegar*, 813 P.2d at 108 (quoting *Faulkner v. Farnsworth*, 665 P.2d 1292, 1293 (Utah 1983)). Once a contract is found to be ambiguous, a court may consider extrinsic evidence to determine its meaning. *Id.* Determining the meaning of a contract by extrinsic evidence generally presents questions of fact for the trier of fact, whose findings we review deferentially. *Fitzgerald*, 793 P.2d at 358; *see also Plateau Mining Co. v. Utah Div. of State Lands & Forestry*, 802 P.2d 720, 725 (Utah 1990); John D. Calamari & Joseph M. Perillo, *Contracts* §3-14 (3d ed. 1987).

Applying the foregoing rules, we first look to the four corners of the contract itself to determine whether it is ambiguous. We conclude that while the contract unambiguously referred to the NBS/PS 15-69 standard, the term requiring the tanks to conform to the "applicable requirements of NBS/PS 15-69" made the precise meaning of the performance intended by the parties ambiguous. "Applicable" is defined as "[f]it, suitable, pertinent, related to, or appropriate; capable of being applied." *Black's Law Dictionary* 98 (6th ed. 1990). The word "applicable" necessarily implies that (i) all the requirements of NBS/PS 15-69 apply; (ii) some requirements apply while others do not; or (iii) none of the requirements apply. We must therefore review the NBS standard to determine

whether any of its provisions unambiguously mandate tank walls thicker than 1/4 inch and a safety factor of 10 to 1.

Our review of the NBS standard itself reveals that the standard does not unambiguously mandate a particular wall thickness or safety factor for the tanks. The standard spans eighteen pages and covers materials, laminate properties, round and rectangular ducting, reinforced polyester piping, reinforced polyester tanks, inspection and test procedures, labeling, and so forth. As regards wall thickness, section 3.3.6 of the standard states, "[M]inimum wall thickness shall be as specified in the tables . . . , but in no case shall be less than . . . 3/16 inch in pipes and tanks regardless of operating conditions." Turning to table 7, which specifies minimum wall thicknesses for vertical cylindrical tanks like those at issue here, we find that the table does not include dimensions for tanks greater than 12 feet in diameter, and tanks T32, T33, and T34 were each 20 feet in diameter. Table 7 also notes that its figures are "[b]ased on a safety factor of 10 to 1 . . . and a liquid specific gravity of 1.2." The NBS standard does not include a formula for calculating wall thickness for tanks of different sizes than those included in table 7, for different safety factors, or for liquids with different specific gravities.

Moreover, as regards safety factors, the NBS standard does not state anywhere that a 10 to 1 safety factor is "the recognized industry" standard, contrary to the unsupported assertion of the court of appeals, *Interwest Constr.*, 886 P.2d at 97 n.6, or that this safety factor is required in all fiberglass tanks. Other tables in the standard for tanks, pipes, ducts, and flanges are based on different safety factors, and we have found no formula or recommendation regarding selection of a mandatory safety factor. Further, we do not read table 7 as specifically requiring a safety factor of 10 to 1, but as merely stating the assumptions upon which its wall thickness specifications for standard-sized tanks rest.

In short, the word "applicable" in the contract, coupled with the lack of specificity within the NBS standard, renders the contract ambiguous with respect to the thickness of the tank walls and a specific safety factor without resort to extrinsic evidence. The trial court apparently also found the contract provision ambiguous, as evidenced by its consideration of extrinsic evidence to clarify the contract's meaning. Whether the standard mandated a minimum wall thickness and a safety factor of 10 to 1 was hotly contested at trial. After hearing the evidence, the trial court found as a matter of fact that the contract, as drafted by Thiokol, did not impose the minimum wall thickness and safety factor requirements that Thiokol claims were mandated by the NBS/PS 15-69 standard.

Thiokol failed to marshal the evidence in support of the trial court's factual finding before

the court of appeals, and so that court should have presumed that the trial court's finding was correct. *Hall*, 890 P.2d at 1028. An appellate court does not "set aside the trial court's factual findings unless they are against the clear weight of the evidence or [the appellate court] otherwise reach[es] a definite and firm conviction that a mistake has been made." *Sweeney Land Co. v. Kimball*, 786 P.2d 760, 761 (Utah 1990) (quoting *Western Kane County Special Serv. Dist. No. 1 v. Jackson Cattle Co.*, 744 P.2d 1376, 1377 (Utah 1987)). "This standard of review applies equally to the Court of Appeals." *Id.*; see also *Saunders v. Sharp*, 806 P.2d 198, 199 (Utah 1991). In short, the appeals court should have deferred to the trial court's factual finding regarding the meaning of the contract in light of its facial ambiguity and should have presumed the correctness of the finding, given Thiokol's failure to properly challenge it on appeal.

In light of the foregoing, the court of appeals' waiver analysis was irrelevant and superfluous because it proceeded from an incorrect factual assumption. In contrast to the court of appeals, the trial court found that the NBS/PS 15-69 standard did not mandate a minimum wall thickness greater than 1/4 inch or a safety factor of 10 to 1. A contracting party cannot be said to waive a term that was never part of the contract. Because the NBS/PS 15-69 standard did not mandate a particular wall thickness or safety factor, Thiokol could not waive these "terms." However, under the same reasoning, Thiokol cannot now claim that its suppliers failed to adhere to these "terms" and therefore breached their contracts.

Accordingly, we are left with the trial court's factual finding that "the tanks were built pursuant to the design specifications mandated by Thiokol in the contract," and the court of appeals' affirmance, based on that finding, of the trial court's conclusion that there was no breach of contract. *Interwest Constr.*, 886 P.2d at 97. Therefore, we disapprove of that portion of the court of appeals opinion which held that Thiokol waived its right to enforce the terms of its original contract with Interwest but affirm that court's conclusion that there was no breach of contract.

In sum, we hold that Thiokol's contract with Interwest did not preclude Thiokol's claims for negligence and strict liability but that those claims fail as a matter of law because Thiokol caused the August 24th failure of tank T33. We also hold that waiver is inapplicable to Thiokol's breach of contract claim, because the contract provision the court of appeals found Thiokol to have waived did not mandate a minimum wall thickness greater than 1/4 inch or a 10 to 1 safety factor as Thiokol claims. However, we affirm that court's ultimate conclusion that Thiokol's suppliers did not breach the contract.

Justice Howe, Justice Durham, and Judge Harding concur in Chief Justice Zimmerman's opinion.



Associate Chief Justice Stewart concurs in the result.

Having disqualified himself, Justice Russon does not participate herein; District Judge Ray M. Harding sat.

1. These facts are largely drawn from the Utah Court of Appeals' opinion in this case. For a more complete recitation of the facts, see *Interwest Construction v. Palmer*, 886 P.2d 92, 94-95 (Ct. App. 1994), cert. granted sub nom. *Fiberglass v. Thiokol*, 892 P.2d 13 (Utah 1995).

2. Section 323 of the Restatement provides:

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if

(a) his failure to exercise such care increases the risk of harm, or

(b) the harm is suffered because of the other's reliance upon the undertaking.

Restatement (Second) of Torts §323 (1965). We also note that manufacturers and suppliers of products may be subject to other tort duties even though their products are sold via contract. See *id.* §§388-90 (pertaining to suppliers); *id.* §§395-98 (pertaining to manufacturers); *id.* §402A (pertaining to strict liability for defective products).

3. Thiokol also claims that the woven roving in the tanks' structural laminate layer overlapped by 1/4 inch rather than the one-inch overlap that NBS/PS 15-69 calls for and that the tensile strength of the tanks was insufficient. However, the trial court specifically rejected this version of the facts, finding that Thiokol presented inconclusive evidence to prove either of these points. Thiokol failed to challenge the trial court's factual findings before the court of appeals. *Interwest Constr.*, 886 P.2d at 96 ("Thiokol does not challenge the trial court's factual findings."). We therefore refuse to address them in this opinion. *Butterfield v. Okubo*, 831 P.2d 97, 101 n.2 (Utah 1992). To the extent that the court of appeals recited the trial court's findings incorrectly, see *Interwest Constr.*, 886 P.2d at 97 n.7, we vacate that portion of its opinion.

Tab 3

*This opinion is subject to revision before final  
publication in the Pacific Reporter.*

IN THE SUPREME COURT OF THE STATE OF UTAH

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Interwest Construction, a Utah                      No. 940616  
corporation,  
Plaintiff and Respondent,

v.

R. Roy Palmer and Val W. Palmer,  
dba A.H. Palmer & Sons,  
Defendants and Respondents.

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R. Roy Palmer and Val W. Palmer,  
dba A.H. Palmer & Sons,  
Third-Party Plaintiffs  
and Respondents,

v.

John Rysgaard, dba Fiberglass  
Structures Company and Fiberglass  
Structures Company, Inc.,  
Third-Party Defendants  
and Respondents.

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Fiberglass Structures and Tank  
Company, fka Fiberglass Structures  
Company of St. Paul, Inc.,  
Third-Party Plaintiffs  
and Respondents,

v.

Thiokol Corporation,  
Third-Party Defendant  
and Petitioner.

F I L E D

June 14, 1996

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First District, Cache County  
The Honorable Gordon R. Low

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Mark F. James, Salt Lake City, for amicus Utah  
Manufacturers Association

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On Certiorari to the Utah Court of Appeals

ZIMMERMAN, Chief Justice:

Following the trial court's entry of judgment on a contract dispute in favor of Interwest Construction ("Interwest") and A.H. Palmer and Sons ("Palmer"), Thiokol Corporation ("Thiokol") appealed to this court, and we poured the appeal to the court of appeals. We then granted certiorari to review the court of appeals' decision affirming the trial court judgment. See Interwest Constr. v. Palmer, 886 P.2d 92 (Ct. App. 1994), cert. granted sub nom. Fiberglass v. Thiokol, 892 P.2d 13 (Utah 1995). Our present review is limited to considering whether the court of appeals erred in holding (i) that our decision in Beck v. Farmers Insurance Exchange, 701 P.2d 795 (Utah 1985), precludes tort actions for negligence and strict liability arising out of the breach of contractually defined obligations; and (ii) that Thiokol waived its rights to enforce its contract with Interwest.

Thiokol does not appeal the trial court's findings of fact. The trial court initially detailed its findings by memorandum decision and then by formal findings of fact and conclusions of law. Accordingly, we recite the facts in a light most favorable to the trial court's findings. State v. A House & 1.37 Acres, 886 P.2d 534, 535 (Utah 1994).<sup>1</sup>

In the fall of 1988, Thiokol and Interwest entered into a contract under which Interwest agreed to build a wastewater treatment facility for Thiokol. Interwest subsequently

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<sup>1</sup> These facts are largely drawn from the Utah Court of Appeals' opinion in this case. For a more complete recitation of the facts, see Interwest Construction v. Palmer, 886 P.2d 92, 94-95 (Ct. App. 1994), cert. granted sub nom. Fiberglass v. Thiokol, 892 P.2d 13 (Utah 1995).

subcontracted with Palmer for labor and materials in connection with the construction of the facility. Palmer, in turn, subcontracted with Fiberglass Structures and Tank Company, Inc. ("Fiberglass Structures"), for the purchase of three fiberglass wastewater storage tanks for the facility. Palmer's purchase order required Fiberglass Structures to follow Thiokol's plans and specifications unless it obtained prior approval to deviate from them.

Thiokol's plans and specifications for the treatment facility designated the fiberglass tanks as T32, T33, and T34 and called for the tanks to be built in accordance with "applicable requirements" of NBS/PS 15-69, a national voluntary industry standard governing the construction of fiberglass tanks. The tanks were designed to collect wastewater from four smaller tanks located inside the treatment building by means of a gravity-feed system. Because the tanks inside the building were smaller than the three external tanks, the gravity-feed system allowed the external tanks to become only two-thirds full at maximum. Thiokol approved specifications for the tanks indicating that their walls would be 1/4 inch thick.

Fiberglass Structures shipped prefabricated fiberglass panels to the treatment facility site. The panels were bolted together along vertical seams to create each of the three tanks, and the tanks were bolted to a concrete base outside the treatment building. The top of each tank was bolted to the sides, and fill pipes were connected between the three external and the four internal tanks. The three external tanks were completed and installed on April 30, 1989. During a trial test that same day, tank T34 burst along one of the vertical seams connecting two of its fiberglass panels. Nevertheless, on May 2, 1989, Thiokol inspected the treatment facility and notified Interwest that the facility was substantially complete with the exception of a few punch-list items, which did not include the ruptured tank or necessary repairs to the other two tanks. The same day, Palmer gave Thiokol a one-year warranty on all then-installed work.

Thiokol hired an independent consulting engineer to review the cause of tank T34's failure, and the consultant recommended that Thiokol discard all three tanks. The consultant was concerned about the strength of the tanks' vertical panels, among other things, and recommended increasing the thickness of the panels from 1/4 inch, as per the original design, to 3/4 inch. However, Thiokol's project engineer directed the consultant to focus on fixing the tanks' seams. Thereafter, Thiokol negotiated separately and directly with Fiberglass Structures for the repair of tanks T32 and T33 and replacement of

tank T34; Thiokol's involvement was such that the trial court concluded that Thiokol and Fiberglass Structures "jointly constructed the tanks." Specifications for the modified tanks clearly indicated that they would have 1/4-inch-thick walls and a safety factor of 6.

In early June of 1989, Thiokol tested and accepted the repaired tanks on the basis of its determination that the tanks met its specifications. On June 13th, Fiberglass Structures gave Thiokol an extended three-year warranty at Thiokol's insistence, which warranted the structural integrity of the tanks but expressly excluded damage resulting from modifications to the tanks. Interwest and Palmer were minimally, if at all, involved in these negotiations.

In June of 1989, Thiokol began operating the treatment facility. Sometime that month, without the knowledge of Interwest, Palmer, or Fiberglass Structures, Thiokol changed the tanks' filling system from the original gravity-feed design to an overhead, high-pressure pump feed.

On August 24, 1989, tank T33 ruptured, spilling its wastewater contents. The trial court found that the pump feed system allowed the tank to be overfilled and that tank T33 failed because it was overfilled by a Thiokol employee. Given the pumping capacity, there was an insufficient opening at the top of the tank to allow for the escape of excess wastewater, thus causing an uplift pressure which the tank was not designed to withstand. The overfilling and consequent uplift pressure caused the tank to lift up from its concrete base and to split from the bottom up along the middle of one of the fiberglass panels, not along a seam as was the case with tank T34's earlier failure.

At the time of the second failure, Thiokol withheld \$200,000 which it owed to Interwest on the original contract. That amount included \$93,653.70 which Interwest owed to Palmer. The instant action began when Interwest sued Palmer for breach of warranty, negligence, indemnity, and breach of contract. Palmer then filed a third-party complaint against Fiberglass Structures, which in turn filed a third-party complaint against Thiokol. Interwest later added Thiokol as a defendant and sought recovery for breach of contract and unjust enrichment. Thiokol eventually counterclaimed against Interwest, Palmer, and Fiberglass Structures for breach of contract, breach of express and implied warranties, negligence, and strict liability.

After a two-week bench trial, the trial court concluded in relevant part that (1) it would not address Thiokol's tort claims because the case was "entirely controlled by contract";

(ii) the NBS/PS 15-69 standard was not incorporated into the contract so as to specify a particular wall thickness or safety factor for the fiberglass panels and, therefore, Thiokol could not hold its suppliers liable for failing to provide tanks with a specific wall thickness and safety factor; (iii) neither Interwest, Palmer, nor Fiberglass Structures failed to comply with the contract in any way which caused or resulted in the August 24th failure of tank T33; (iv) Thiokol failed to prove the cause of tank T33's failure and the most likely cause was Thiokol's overfilling the tank; and (v) Thiokol's overfilling the tanks barred its recovery under any of its suppliers' warranties. Accordingly, the trial court ordered Thiokol to pay Interwest \$200,000, ordered Interwest to pay Palmer \$93,653.70, and dismissed all other claims. The court of appeals affirmed, and Thiokol's petition to this court followed.

On certiorari to this court, Thiokol contends that the court of appeals erred in affirming the dismissal of Thiokol's tort claims. In addition, Thiokol claims the court of appeals erred in holding that Thiokol waived its right to assert that the modified tanks should have complied with the NBS/PS 15-69 standard. Thiokol claims that each of these issues presents only questions of law which this court should review nondeferentially. See State v. Pena, 869 P.2d 932, 935-36 (Utah 1994).

We first address the dismissal of Thiokol's tort claims. In its post-trial memorandum decision, the trial court refused to address Thiokol's negligence and strict liability claims because it concluded that the case was "entirely controlled by contract." The court of appeals affirmed, reasoning that because "the contract expressly provided that [Interwest and Palmer] were under a duty to design, construct, and deliver a product free from defects and suitable for the purposes for which it was to be used," their "responsibility in tort is . . . exactly co-extensive with their contractual obligations," thus precluding Thiokol's tort claims. Interwest Constr., 886 P.2d at 101. Thiokol maintains that the court of appeals misconstrued our earlier decision in Beck as establishing the proposition that "if parties arrange rights, duties, and obligations under a contract, any cause of action for breach of those contractually defined obligations, rights, or duties lies in contract, not in tort." Id. (citing Beck, 701 P.2d at 799-800).

Although we ultimately reach the result that Thiokol's tort claims fail, we agree with Thiokol that the court of appeals misapplied our holding in Beck. In Beck, we addressed whether an insurer's breach of the covenant of good faith and fair dealing allowed its insured to sue the insurer in tort. We held that "in

a first-party relationship between an insurer and its insured, the duties and obligations of the parties are contractual rather than fiduciary." Beck, 701 P.2d at 800. Because we found no independent fiduciary duty in the first-party insurance relationship, but only a contractual duty to pay claims, we further held, "Without more, a breach of [contractual] implied or express duties can give rise only to a cause of action in contract, not one in tort." Id.

Nonetheless, we specifically noted in Beck that "in some cases the acts constituting a breach of contract may also result in breaches of duty that are independent of the contract and may give rise to causes of action in tort." Id. at 800 n.3 (giving examples). However, in Beck, we refused, for a number of policy reasons, see id. at 798-801, to recognize a tort action in the context of a first-party insurance relationship.

In the instant case, the court of appeals assumed on the basis of Beck that language in Thiokol's contract calling for a product "free from defects" supplanted any independent tort duties the suppliers might have had to deliver nondefective products or services. See Interwest Constr., 886 P.2d at 101. But the limitation we adopted in Beck is not broadly applicable to all contracts in all circumstances; rather, it referred to a specific relationship between contracting parties. Each category of relationships must be analyzed to determine, as a matter of law and policy, whether in that setting a party to a contract owes any tort-type duties to the other beyond the duties spelled out in the contract. See, e.g., Beach v. University of Utah, 726 P.2d 413, 417-20 (Utah 1986) (applying analytical model for determining whether tort duties exist); see also W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 92, at 655 (5th ed. 1984) (recommending that courts consider (i) the nature of the defendant's activity, (ii) the relationship between the parties, and (iii) the type of injury or harm threatened to determine whether tort obligations are owed in addition to contract promises).

Thiokol cites DCR Inc. v. Peak Alarm Co., 663 P.2d 433 (Utah 1983), as an example of an instance where we recognized that a tort duty may exist even when the relationship between the parties is founded upon a contract. In DCR Inc., we allowed a clothing store owner to pursue a tort claim against a company which agreed to install and maintain a burglar alarm when the company knew but failed to warn the store owner that the alarm could be easily deactivated by criminals. Id. at 434. We recognized that under those factual circumstances, one who undertakes to provide services for another owes a tort duty to the other to perform such services with reasonable care. Id. at



435-37; see Restatement (Second) of Torts § 323 (1965).<sup>2</sup> We explained that "the defendant's tort liability is not based upon breach of contract, but rather upon violation of the legal duty independently imposed as a result of what the defendant undertook to do with relation to the plaintiff's interests." Id. at 437 (quoting Carl S. Hawkins, Retaining Traditional Tort Liability in the Nonmedical Professions, 1981 B.Y.U. L. Rev. 33, 36).

We agree that a buyer of products or services may, in some circumstances, assert tort claims along with breach of contract claims against a supplier. That recognition is nothing more than an acknowledgment that virtually all courts have permitted certain actions--for example, products liability--to include claims sounding in both tort and contract. See Keeton et al., supra, § 92, at 660-61.

We therefore disagree that the tort duties of Thiokol's suppliers are necessarily "exactly co-extensive with their contractual obligations," as the court of appeals held. Interwest Constr., 886 P.2d at 101. Here, Thiokol alleged that its suppliers failed to use reasonable care to prevent foreseeable harm to others (negligence) or manufactured and sold the tanks in a defective condition that made them unreasonably dangerous to others (strict liability). Our decision in Beck does not control whether these tort claims can coexist with Thiokol's contract claims. That determination requires a deeper analysis. But for the purposes of this appeal, that analysis is

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<sup>2</sup> Section 323 of the Restatement provides:

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if

(a) his failure to exercise such care increases the risk of harm, or

(b) the harm is suffered because of the other's reliance upon the undertaking.

Restatement (Second) of Torts § 323 (1965). We also note that manufacturers and suppliers of products may be subject to other tort duties even though their products are sold via contract. See id. §§ 388-90 (pertaining to suppliers); id. §§ 395-98 (pertaining to manufacturers); id. § 402A (pertaining to strict liability for defective products).

unnecessary. We will take a shorter route and simply assume, without deciding, that some tort and contract claims can coexist in the instant case.

In light of this assumption, we also hold that the "free from defects" contractual provision cited by the court of appeals is insufficient as a matter of law to exempt Thiokol's suppliers from strict tort or negligence liability. On grounds of public policy, parties to a contract may not generally exempt a seller of a product from strict tort liability for physical harm to a user or consumer unless the exemption term "is fairly bargained for and is consistent with the policy underlying that [strict tort] liability." Restatement (Second) of Contracts § 195(3) (1981). While parties to a contract may generally exempt themselves from negligence liability, the language they use must "'clearly and unequivocally' express an intent to limit tort liability" in the contract itself. DCR Inc., 663 P.2d at 438; see also Restatement (Second) of Contracts § 195 cmt. b (1981). Without such an expression of intent, "the presumption is against any such intention, and it is not achieved by inference or implication from general language such as was employed here." DCR Inc., 663 P.2d at 437 (quoting Union Pac. R.R. v. El Paso Natural Gas Co., 408 P.2d 910, 914 (Utah 1965)).

Accordingly, we hardly see how a contractual promise to provide a product "free from defects" amounts to an exemption from tort liability, especially when we have refused to enforce very detailed and thorough exculpatory clauses that presented a much closer case for exemption. See Union Pac. R.R., 408 P.2d at 912-14. We therefore conclude that Thiokol's strict liability and negligence claims were not precluded by the existence of a contract which contained a promise that Interwest and its subcontractors would supply products "free from defects." We thus disapprove of the reasoning employed by the court of appeals to affirm the trial court's decision.

We now address Thiokol's negligence and strict liability claims on the merits. "To recover for negligence, a plaintiff must show that the defendant owed the plaintiff a duty, the defendant breached the duty, the breach was a proximate cause of the plaintiff's injuries, and there was in fact injury." Jackson v. Richter, 891 P.2d 1387, 1392 (Utah 1995); see also Hunsaker v. State, 870 P.2d 893, 897 (Utah 1993); Reeves v. Gentile, 813 P.2d 111, 116 (Utah 1991); Williams v. Melby, 699 P.2d 723, 726 (Utah 1985). To recover on a strict liability theory against a seller engaged in selling products of the kind at issue, a plaintiff must prove (i) that the product was unreasonably dangerous due to a defect or defective condition, (ii) that the defect existed at the time the product was sold,

and (iii) that the defective condition caused the plaintiff's injuries. Lamb v. B&B Amusements Corp., 869 P.2d 926, 929 (Utah 1993); see also Mulherin v. Ingersoll-Rand Co., 628 P.2d 1301, 1302 (Utah 1981); Ernest W. Hahn, Inc. v. Armco Steel Co., 601 P.2d 152, 158 (Utah 1979); Restatement (Second) of Torts § 402A (1965); Keeton et al., supra, § 103.

Assuming, without deciding, that Thiokol's suppliers owed it tort duties which they breached, it is nonetheless axiomatic that to successfully prosecute actions for negligence and strict liability, the complaining party must prove that another party's breach of duty proximately caused the first party's injury. See Jackson, 891 P.2d at 1392 (negligence); Mulherin, 628 P.2d at 1304 (strict liability); see also Restatement (Second) of Torts § 281 (1965). Proof of proximate cause is also required in breach of warranty actions, which may sound in either contract or tort. Mitchell v. Pearson Enters., 697 P.2d 240, 247 (Utah 1985); Mulherin, 628 P.2d at 1304; Hahn, 601 P.2d at 159. "Proximate cause is "that cause which, in natural and continuous sequence[] (unbroken by an efficient intervening cause), produces the injury, and without which the result would not have occurred. It is the efficient cause--the one that necessarily sets in operation the factors that accomplish the injury."" Harline v. Barker, 912 P.2d 433, 439 (Utah 1996) (alteration in original) (quoting Mitchell, 697 P.2d at 245-46 (quoting State v. Lawson, 688 P.2d 479, 482 n.3 (Utah 1984))).

Applying these principles to the instant case and assuming that Thiokol's suppliers owed tort duties which they breached, we hold that Thiokol's tort claims fail for the same reason that its warranty claim failed: it was unable to prove that any defect in the design or manufacture of tank T33 proximately caused the August 24th failure. The trial court specifically noted contrary testimony on causation: namely, that Fiberglass Structures failed to properly design, engineer, manufacture, or test the tanks and that these failures contributed to the failure of tank T33. However, the trial court ruled against Thiokol on its breach of warranty claim because it found that Thiokol caused the August 24th failure by overfilling tank T33. We read this as a factual determination that Thiokol's misuse of tank T33 exceeded the fault, if any, of its suppliers. Otherwise, the trial court would have apportioned damages on Thiokol's breach of warranty claim. See Interwest Constr., 886 P.2d at 98-100 (affirming award of no damages on Thiokol's breach of warranty claim).

Accordingly, this finding also defeats Thiokol's strict liability and negligence claims, because they are premised on the

same conduct and resulted in the same alleged damages as the breach of warranty claim. Jacobsen Constr. Co. v. Structo-Lite Eng'g, Inc., 619 P.2d 306, 312 (Utah 1980). We thus disapprove of the reasoning employed by the court of appeals to affirm the trial court's ruling but affirm the result reached by both courts.

We now turn to Thiokol's claim that the court of appeals erred in holding that Thiokol waived its rights to enforce the terms of its original contract with Interwest with respect to the repaired tanks. Thiokol insists that its original contract with Interwest incorporated the requirements of NBS/PS 15-69, a national voluntary standard for fiberglass tanks and fittings. Thiokol additionally claims that the standard, and therefore the contract, called for a wall thickness greater than 1/4 inch and a safety factor of 10 to 1, while the modified tanks had walls of 1/4 inch and a safety factor of 6 to 1.<sup>3</sup>

We first note that the trial court concluded that the "NBS/PS 15-69 standards were not incorporated into the contract by Thiokol with sufficient clarity in the contract for the designer and manufacturer to be aware of their application; specifically with respect to wall thickness and safety factors."

The court of appeals, in turn, initially affirmed the trial court's finding that there was no breach of contract because Thiokol's suppliers "built and supplied the tanks in accordance with the terms of the contract." Interwest Constr., 886 P.2d at 97. The court of appeals then began its waiver analysis. The court first noted, without analysis, that the NBS/PS 15-69 standard imposed minimum wall thickness dimensions and a safety factor of 10 to 1 and that the tanks did not meet these alleged requirements. Id. at 97 & nn.6-7. Then the court

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<sup>3</sup> Thiokol also claims that the woven roving in the tanks' structural laminate layer overlapped by 1/4 inch rather than the one-inch overlap that NBS/PS 15-69 calls for and that the tensile strength of the tanks was insufficient. However, the trial court specifically rejected this version of the facts, finding that Thiokol presented inconclusive evidence to prove either of these points. Thiokol failed to challenge the trial court's factual findings before the court of appeals. Interwest Constr., 886 P.2d at 96 ("Thiokol does not challenge the trial court's factual findings."). We therefore refuse to address them in this opinion. Butterfield v. Okubo, 831 P.2d 97, 101 n.2 (Utah 1992). To the extent that the court of appeals recited the trial court's findings incorrectly, see Interwest Constr., 886 P.2d at 97 n.7, we vacate that portion of its opinion.

of appeals concluded that even if the contract incorporated the NBS standard, Thiokol had waived its right to insist that the tanks conform to the wall thickness and safety factor the standard allegedly required. Id. at 98. The court reasoned that because Thiokol approved Fiberglass Structures' proposed design for remedying the defective tanks, supervised their reconstruction, "and accepted the tanks although aware that they were not constructed in accordance with NBS/PS 15-69," Thiokol waived its right to claim that the modified tanks were deficient because they failed to meet the design or construction specifications allegedly incorporated into the original contract. Id.

Thiokol argues that the court of appeals' waiver analysis cannot survive legal scrutiny because (i) the NBS/PS 15-69 standard was a material term of the contract which cannot be waived; and (ii) an intentional waiver did not occur because Thiokol never knew the tanks did not meet the NBS/PS 15-69 specifications until after the August 24th failure; and (iii) by allowing Fiberglass Structures to repair and replace the three tanks after the first failure on April 30th, Thiokol was merely permitting that supplier to cure its deficient performance, and such cure cannot, as a matter of law, abrogate Thiokol's rights to demand full performance under the original contract. Thiokol notes that if left uncorrected, the court of appeals' waiver analysis threatens to encourage litigation by deterring contracting parties from attempting to cure defective contract performance.

We reject the premise advanced by Thiokol and assumed by the court of appeals that the contract incorporated minimum wall thickness dimensions and a 10 to 1 safety factor by virtue of the reference to the NBS/PS 15-69 standard. Thiokol concedes that the trial court expressly found that the contract did not incorporate such requirements but claims that the court of appeals found that it did. Thiokol contends that the court of appeals could do so because whether the original contract incorporated the NBS/PS 15-69 standard presents a question of law which an appellate court can correct without giving deference to the trial court's findings and conclusions.

However, both Thiokol and the court of appeals have misconstrued the issue in this case. We do not read the trial court's finding as rejecting the incorporation of the NBS/PS 15-69 standard into the contract, but as a finding that the standard did not mandate tank walls thicker than 1/4 inch and a safety factor of 10 to 1 so as to make these required terms of the contract. Our reading is supported by the fact that the trial court did consider whether tank T33 met NBS/PS 15-69's

unambiguous requirement that "all layers shall be overlapped a minimum of 1 inch" but found that Thiokol had not proven the existence of insufficient overlap. See supra note 3.

As we set forth below, under our reading, the trial court's finding that the contract's reference to the NBS/PS 15-69 standard did not mandate wall thickness or safety factor requirements is a factual finding which Thiokol has not properly challenged. Thiokol has therefore failed to meet its burden on appeal to "marshal the evidence in support of the findings and then demonstrate that despite this evidence, the trial court's findings are so lacking in support as to be against the clear weight of the evidence, thus making them clearly erroneous." Hall v. Process Instruments & Control, Inc., 890 P.2d 1024, 1028 (Utah 1995) (quoting A House & 1.37 Acres, 886 P.2d at 538 n.4) (additional citation omitted). "Absent such a showing, we 'assume[] that the record supports the findings of the trial court and proceed to a review of the accuracy of the lower court's conclusions of law and the application of that law in the case.'" Id. (alteration in original) (quoting A House & 1.37 Acres, 886 P.2d at 538 n.4).

We first clarify the standard of review for interpretation of a contract. Determining whether a contract is ambiguous presents a threshold question of law, which we review for correctness. Willard Pease Oil & Gas Co. v. Pioneer Oil & Gas Co., 899 P.2d 766, 770 (Utah 1995); Winegar v. Froerer Corp., 813 P.2d 104, 108 (Utah 1991); Fitzgerald v. Corbett, 793 P.2d 356, 358 (Utah 1990). If a contract is unambiguous, a trial court may interpret the contract as a matter of law, and we review the court's interpretation for correctness. Willard Pease, 899 P.2d at 770. "A contract provision is ambiguous if it is capable of more than one reasonable interpretation because of 'uncertain meanings of terms, missing terms, or other facial deficiencies.'" Winegar, 813 P.2d at 108 (quoting Faulkner v. Farnsworth, 665 P.2d 1292, 1293 (Utah 1983)). Once a contract is found to be ambiguous, a court may consider extrinsic evidence to determine its meaning. Id. Determining the meaning of a contract by extrinsic evidence generally presents questions of fact for the trier of fact, whose findings we review deferentially. Fitzgerald, 793 P.2d at 358; see also Plateau Mining Co. v. Utah Div. of State Lands & Forestry, 802 P.2d 720, 725 (Utah 1990); John D. Calamari & Joseph M. Perillo, Contracts § 3-14 (3d ed. 1987).

Applying the foregoing rules, we first look to the four corners of the contract itself to determine whether it is ambiguous. We conclude that while the contract unambiguously referred to the NBS/PS 15-69 standard, the term requiring the

tanks to conform to the "applicable requirements of NBS/PS 15-69" made the precise meaning of the performance intended by the parties ambiguous. "Applicable" is defined as "[f]it, suitable, pertinent, related to, or appropriate; capable of being applied." Black's Law Dictionary 98 (6th ed. 1990). The word "applicable" necessarily implies that (i) all the requirements of NBS/PS 15-69 apply; (ii) some requirements apply while others do not; or (iii) none of the requirements apply. We must therefore review the NBS standard to determine whether any of its provisions unambiguously mandate tank walls thicker than 1/4 inch and a safety factor of 10 to 1.

Our review of the NBS standard itself reveals that the standard does not unambiguously mandate a particular wall thickness or safety factor for the tanks. The standard spans eighteen pages and covers materials, laminate properties, round and rectangular ducting, reinforced polyester piping, reinforced polyester tanks, inspection and test procedures, labeling, and so forth. As regards wall thickness, section 3.3.6 of the standard states, "[M]inimum wall thickness shall be as specified in the tables . . . , but in no case shall be less than . . . 3/16 inch in pipes and tanks regardless of operating conditions." Turning to table 7, which specifies minimum wall thicknesses for vertical cylindrical tanks like those at issue here, we find that the table does not include dimensions for tanks greater than 12 feet in diameter, and tanks T32, T33, and T34 were each 20 feet in diameter. Table 7 also notes that its figures are "[b]ased on a safety factor of 10 to 1 . . . and a liquid specific gravity of 1.2." The NBS standard does not include a formula for calculating wall thickness for tanks of different sizes than those included in table 7, for different safety factors, or for liquids with different specific gravities.

Moreover, as regards safety factors, the NBS standard does not state anywhere that a 10 to 1 safety factor is "the recognized industry" standard, contrary to the unsupported assertion of the court of appeals, Interwest Constr., 886 P.2d at 97 n.6, or that this safety factor is required in all fiberglass tanks. Other tables in the standard for tanks, pipes, ducts, and flanges are based on different safety factors, and we have found no formula or recommendation regarding selection of a mandatory safety factor. Further, we do not read table 7 as specifically requiring a safety factor of 10 to 1, but as merely stating the assumptions upon which its wall thickness specifications for standard-sized tanks rest.

In short, the word "applicable" in the contract, coupled with the lack of specificity within the NBS standard, renders the contract ambiguous with respect to the thickness of

the tank walls and a specific safety factor without resort to extrinsic evidence. The trial court apparently also found the contract provision ambiguous, as evidenced by its consideration of extrinsic evidence to clarify the contract's meaning. Whether the standard mandated a minimum wall thickness and a safety factor of 10 to 1 was hotly contested at trial. After hearing the evidence, the trial court found as a matter of fact that the contract, as drafted by Thiokol, did not impose the minimum wall thickness and safety factor requirements that Thiokol claims were mandated by the NBS/PS 15-69 standard.

Thiokol failed to marshal the evidence in support of the trial court's factual finding before the court of appeals, and so that court should have presumed that the trial court's finding was correct. Hall, 890 P.2d at 1028. An appellate court does not "set aside the trial court's factual findings unless they are against the clear weight of the evidence or [the appellate court] otherwise reach[es] a definite and firm conviction that a mistake has been made.'" Sweeney Land Co. v. Kimball, 786 P.2d 760, 761 (Utah 1990) (quoting Western Kane County Special Serv. Dist. No. 1 v. Jackson Cattle Co., 744 P.2d 1376, 1377 (Utah 1987)). "This standard of review applies equally to the Court of Appeals." Id.; see also Saunders v. Sharp, 806 P.2d 198, 199 (Utah 1991). In short, the appeals court should have deferred to the trial court's factual finding regarding the meaning of the contract in light of its facial ambiguity and should have presumed the correctness of the finding, given Thiokol's failure to properly challenge it on appeal.

In light of the foregoing, the court of appeals' waiver analysis was irrelevant and superfluous because it proceeded from an incorrect factual assumption. In contrast to the court of appeals, the trial court found that the NBS/PS 15-69 standard did not mandate a minimum wall thickness greater than 1/4 inch or a safety factor of 10 to 1. A contracting party cannot be said to waive a term that was never part of the contract. Because the NBS/PS 15-69 standard did not mandate a particular wall thickness or safety factor, Thiokol could not waive these "terms." However, under the same reasoning, Thiokol cannot now claim that its suppliers failed to adhere to these "terms" and therefore breached their contracts.

Accordingly, we are left with the trial court's factual finding that "the tanks were built pursuant to the design specifications mandated by Thiokol in the contract," and the court of appeals' affirmance, based on that finding, of the trial court's conclusion that there was no breach of contract. Interwest Constr., 886 P.2d at 97. Therefore, we disapprove of



that portion of the court of appeals opinion which held that Thiokol waived its right to enforce the terms of its original contract with Interwest but affirm that court's conclusion that there was no breach of contract.

In sum, we hold that Thiokol's contract with Interwest did not preclude Thiokol's claims for negligence and strict liability but that those claims fail as a matter of law because Thiokol caused the August 24th failure of tank T33. We also hold that waiver is inapplicable to Thiokol's breach of contract claim, because the contract provision the court of appeals found Thiokol to have waived did not mandate a minimum wall thickness greater than 1/4 inch or a 10 to 1 safety factor as Thiokol claims. However, we affirm that court's ultimate conclusion that Thiokol's suppliers did not breach the contract.

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Justice Howe, Justice Durham, and Judge Harding concur in Chief Justice Zimmerman's opinion.

Associate Chief Justice Stewart concurs in the result.

Having disqualified himself, Justice Russon does not participate herein; District Judge Ray M. Harding sat.

Tab 4

Exhibit D  
file Copy

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IN THE FIRST JUDICIAL DISTRICT COURT OF CACHE COUNTY  
STATE OF UTAH

INTERWEST CONSTRUCTION,  
a Utah corporation,

Plaintiff,

vs.

R. ROY PALMER and VAL W.  
PALMER, d.b.a. A. H. PALMER  
& SONS,

Defendants.

COMPLAINT

Civil No.:

9321

Plaintiff complains of the Defendant and for cause of  
action alleges as follows:

GENERAL ALLEGATIONS

1. Plaintiff is a Utah corporation which maintains  
its principal place of business in Salt Lake County, State  
of Utah.

2. Defendants are residents of Cache County, State of  
Utah.

3. Plaintiff entered into an agreement with Morton  
Thiokol Inc. ("Thiokol") under which Plaintiff agreed to  
construct a waste water treatment facility (the "Treatment  
Plant") for Thiokol.

1           4. On or about December 1, 1988, Defendants entered  
2 into a Subcontract Agreement with Plaintiff by which  
3 Defendants agreed to perform labor and provide materials for  
4 the construction of the Treatment Plant. A copy of the  
5 Subcontract Agreement is attached hereto as Exhibit "A" and  
6 incorporated herein.

7           5. Pursuant to the Subcontract Agreement Defendants  
8 supplied, among other things, three fiberglass waste water  
9 storage tanks that were installed in the Treatment Plant.

10          6. On or about August 24, 1989 one of the tanks  
11 supplied by Defendants failed and released approximately  
12 32,000 gallons of water causing damage to the Treatment  
13 Plant.

14          7. At the time the tank failed and at the time of the  
15 filing of this Complaint, Thiokol was and is indebted to  
16 Plaintiff an amount exceeding \$229,000.00 pursuant to the  
17 construction agreement mentioned above of which \$93,000.00  
18 was owed to Defendants leaving a balance due Plaintiff of  
19 \$136,000.00.

20          8. Thiokol has refused to pay the balance due to  
21 Plaintiff because of the damages Thiokol alleges that it  
22 suffered as a result of the failure of the tank.

23                   FIRST CAUSE OF ACTION

24          9. Plaintiff incorporates the preceding paragraphs of  
25 this Complaint as if fully set forth herein.

1           10. Pursuant to the Subcontract Agreement Defendants  
2 are obligated to:

3           make good without cost to [Thiokol] and  
4 [Plaintiff] any and all defects due to faulty  
5 workmanship and or materials which may appear  
6 within . . . one year from date of completion of  
7 the [Treatment Plant].

8           11. Defendants have failed and refused to comply with  
9 the terms of the express warranty of their work set forth in  
10 the Subcontract Agreement which has resulted in the  
11 withholding of the payment by Thiokol.

12           12. Plaintiff is entitled to judgment against  
13 Defendants, jointly and severally, in the amount of  
14 \$136,000.00, together interest thereon at the highest legal  
15 rate from August 24, 1989 until paid in full and Plaintiff's  
16 costs incurred herein, including reasonable attorneys' fees.

17                               SECOND CAUSE OF ACTION

18           13. Plaintiff incorporates the preceding paragraphs of  
19 this Complaint as if fully set forth herein.

20           14. Pursuant to the Subcontract Agreement Defendants  
21 are obligated to indemnify and hold Plaintiff harmless from  
22 any costs, losses or claims that may in any way arise out of  
23 the Defendants' performance under the Subcontract Agreement.

24           15. Defendants have failed and refused to indemnify  
25 and hold Plaintiff harmless of loss in accordance with the  
26 terms of the Subcontract Agreement which has resulted in the  
27 withholding of the payment by Thiokol.  
28

1 16. Plaintiff is entitled to judgment against  
2 Defendants, jointly and severally, in the amount of  
3 \$136,000.00, together interest thereon at the highest legal  
4 rate from August 24, 1989 until paid in full and Plaintiff's  
5 costs incurred herein, including reasonable attorneys' fees.

6 THIRD CAUSE OF ACTION

7 17. Plaintiff incorporates the preceding paragraphs of  
8 this Complaint as if fully set forth herein.

9 18. Defendants made impliedly warranted that the tank  
10 was fit for the particular purpose for which it was  
11 intended.

12 19. Defendants breached the implied warranty of  
13 fitness for a particular purpose by supplying a faulty tank  
14 and by failing and refusing to replace the faulty tank after  
15 proper notice of the failure was given to Defendants.

16 20. Plaintiff is entitled to judgment against  
17 Defendants, jointly and severally, in the amount of  
18 \$136,000.00, together interest thereon at the highest legal  
19 rate from August 24, 1989 until paid in full and Plaintiff's  
20 costs incurred herein, including reasonable attorneys' fees.

21 FOURTH CAUSE OF ACTION

22 21. Plaintiff incorporates the preceding paragraphs of  
23 this Complaint as if fully set forth herein.

24 22. Defendants had a duty to Plaintiff to select a  
25 competent manufacturer of fiberglass tanks to supply tanks  
26 for the Treatment Plant.

1           23. Defendants had a duty to Plaintiff to adequately  
2 inspect the materials from which the tank was constructed.

3           24. Defendants had a duty to Plaintiff to adequately  
4 supervise the construction of the tank.

5           25. Defendants negligently performed their duties to  
6 Plaintiff and said negligence was a proximate cause of  
7 Plaintiffs' damages as alleged herein.

8           26. As a result of Defendants' negligence Plaintiff  
9 has suffered damages and Plaintiff is entitled to judgment  
10 against Defendants, jointly and severally, in the amount of  
11 \$136,000.00, together interest thereon at the highest legal  
12 rate from August 24, 1989 until paid in full and Plaintiff's  
13 costs incurred herein.

14           WHEREFORE, Plaintiff prays judgment against Defendants,  
15 jointly and severally, as follows:

16           1. In the amount of \$136,000.00, together interest  
17 thereon at the highest legal rate from August 24, 1989 until  
18 paid in full and Plaintiff's costs incurred herein,  
19 including reasonable attorneys' fees pursuant to the First  
20 Cause of Action;

21           2. In the amount of \$136,000.00, together interest  
22 thereon at the highest legal rate from August 24, 1989 until  
23 paid in full and Plaintiff's costs incurred herein,  
24 including reasonable attorneys' fees pursuant to the Second  
25 Cause of Action;

1           3. In the amount of \$136,000.00, together interest  
2 thereon at the highest legal rate from August 24, 1989 until  
3 paid in full and Plaintiff's costs incurred herein,  
4 including reasonable attorneys' fees pursuant to the Third  
5 Cause of Action;

6           4. In the amount of \$136,000.00, together interest  
7 thereon at the highest legal rate from August 24, 1989 until  
8 paid in full and Plaintiff's costs incurred herein pursuant  
9 to the Fourth Cause of Action;

10           5. For such other and further relief as the Court  
11 deems proper.

12           DATED this 25<sup>th</sup> day of April, 1990.

13                           WALSTAD & BABCOCK

14  
15                           By: Robert F. Babcock  
16                           Robert F. Babcock  
                              Attorneys for Plaintiff

17           Plaintiff's Address:  
18           2004 North Redwood Road  
             Salt Lake City, Utah

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