

Court of Appeals No. 47749-1-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

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

Appellant,

v.

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

Respondents.

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. ASSIGNMENTS OF ERROR	3
A. The trial court erred when it denied Iron Gate’s Motion for Summary Judgment because there were no issues of fact affecting Tapio’s responsibilities under the one-year satisfactory performance warranty.	3
B. The trial court erred when it denied Iron Gate’s Motions for a Directed Verdict because the undisputed evidence showed that Tapio breached the satisfactory performance.....	3
C. The trial court erred when it denied Iron Gate’s First Motion in Limine and allowed Tapio to present evidence of other entities’ fault, especially where Iron Gate sued in contract and not in tort.....	3
D. The trial court erred when it granted attorney’s fees to Tapio because it incurred no fees as required by the parties’ contract.....	4
III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....	4
IV. STATEMENT OF THE CASE	5
A. Iron Gate owns and operates retail dry storage units.....	5
B. Iron Gate builds new storage facility in Vancouver.	5
C. Iron Gate contracts with Tapio to provide water proof foundation and retaining walls.	5
1. <i>Master Contract’s Scope of Work.</i>	5
2. <i>The Master Contract’s Satisfactory Performance Guarantee.</i> ...	6
D. Shortly after construction ended, Iron Gate experienced water intrusion.	7
E. Iron Gate Notifies Tapio of its Dissatisfaction.	8
F. Iron Gate sues for Breach of Warranty.	9
1. <i>Tapio’s water intrusion expert, Michael Milakovich, testified that water was intruding through Tapio’s concrete work.</i>	9
G. Trial Court denies Iron Gate’s Motion for Summary Judgment, Motions in Limine, and Directed Verdict, and Grants Fees to Tapio...	10
V. ARGUMENTS.....	11

A.	Standard of Review.....	11
1.	<i>Summary Judgment is reviewed de novo.</i>	11
2.	<i>Directed Verdicts are also reviewed De Novo.</i>	12
3.	<i>Motions in Limine that are based on issues of law are reviewed De Novo.</i>	12
4.	<i>Whether a party is entitled to fees is reviewed de novo while the amount of those fees is reviewed under an abuse of discretion standard.</i>	13
B.	Appellate Court May Review Denial of Motion for Summary Judgment after Jury Trial.....	13
C.	Tapio Breached the Express Warranty of Satisfactory Performance as a Matter of Law.	13
D.	The Trial Court Erred in Denying Iron Gate’s Motion for Summary Judgment and Motions for Directed Verdict.	22
E.	The Trial Court Erred When it Denied Iron Gate’s First Motion in Limine.	23
F.	The Trial Court Erred in Awarding Tapio Attorney’s fees and Costs.....	24
G.	Iron Gate is Entitled to its Fees and Costs Before the Trial Court and On Appeal.	27
VI.	CONCLUSION	28

TABLE OF AUTHORITIES

	<u>Page</u>
Cases	
<i>224 Westlake, LLC v. Engstrom Props., LLC</i> , 169 Wn. App. 700, 281 P.3d 693 (2012).....	13
<i>Bailie Commc 'ns, Ltd. v. Trend Bus. Sys., Inc.</i> , 61 Wn. App. 151, 810 P.2d 12 (1991).....	27
<i>Crandall Eng'g Co. v. Winslow M. R. & S. Co.</i> , 188 Wash. 1, 61 P.2d 136 (1936).....	15
<i>Dravo Corp. v. Municipality of Metro. Seattle</i> , 79 Wn.2d 214, 484 P.2d 399 (1971).....	14
<i>ESCA Corp. v. KPMG Peat Marwick</i> , 86 Wn. App. 628, 939 P.2d 1228 (1997).....	12
<i>G.W. Equip. v. Mt. McKinley Fence</i> , 97 Wn. App. 191, 982 P.2d 114 (1999).....	27
<i>Grant County Contractors v. E.V. Lane Corp.</i> , 77 Wn.2d 110, 459 P.2d 947 (1969).....	14
<i>Harris v. Drake</i> , 152 Wn.2d 480, 99 P.3d 872 (2004).....	12
<i>Hearst Communications, Inc. v. Seattle Times Company</i> , 154 Wn.2d 493, 115 P.3d 262 (2005).....	14
<i>Highline Sch. Dist. No. 401 v. Port of Seattle</i> , 87 Wn.2d 6, 548 P.2d 1085 (1976).....	11
<i>Howell v. Blood Bank</i> , 117 Wn.2d 619, 818 P.2d 1056 (1991).....	11
<i>Hurley-Mason Co. v. Stebbins</i> , 79 Wash. 366, 140 P. 381 (1914).....	14, 15
<i>In re Guardianship of Decker</i> , 188 Wn. App. 429, 353 P.3d 669 (2015).....	13
<i>Johnson v. Allstate Ins. Co.</i> , 126 Wn. App. 510, 108 P.3d 1273 (2005).....	15
<i>Lietz v. Hansen Law Offices</i> , 166 Wn. App. 571, 585, 271 P.3d 899 (2012).....	14
<i>McGovern v. Smith</i> , 59 Wn. App. 721, 801 P.2d 250 (1990).....	13
<i>Park Ave. Condo. v. Buchan Devs.</i> , 117 Wn. App. 369, 71 P.3d 692 (2003).....	15
<i>Port of Seattle v. Puget Sound Sheet Metal Works</i> , 124 Wash. 10, 213 P. 467 (1923).....	passim

<i>Seven Gables Corp. v. MGM/UA Entertainment Co.</i> , 106 Wn.2d 1, 721 P.2d 1 (1986).....	12
<i>Shopping Ctr. Management Co. v. Rupp</i> , 54 Wn.2d 624, 343 P.2d 877 (1959).....	passim
<i>State v. Goodrich</i> , 47 Wn. App. 114, 733 P.2d 1000 (1987).....	26, 27
<i>State v. Neal</i> , 144 Wn.2d 600, 30 P.3d 1255 (2001).....	12
<i>State v. Powell</i> , 126 Wash. 2d 244, 893 P.2d 615 (1995).....	12
<i>Swanson v. Liquid Air Corp.</i> , 118 Wn.2d 512, 826 P.2d 664 (1992).....	15
<i>Teufel v. Wiener</i> , 68 Wn.2d 31, 411 P.2d 151 (1966).....	20, 21
<i>Thola v. Henschell</i> , 140 Wn. App. 70, 164 P.3d 524 (2007).....	12
<i>Yakima Fruit & Cold Storage Co., v. Central Heating & Plumbing, Co.</i> , 81 Wn.2d 528, 503 P.2d 108 (1973).....	12
<i>Young v. Key Pharmaceuticals, Inc.</i> , 112 Wn.2d 216, 770 P.2d 182 (1989).....	11
<i>Young v. Young</i> , 164 Wn.2d 477, 191 P.3d 1258 (2008).....	27

Statutes

RCW 4.84.330	24, 25, 27
RCW 9.94A.140.....	26

Other Authorities

<i>Webster's 3rd New International Dictionary</i> , 1145 (3d ed. 1971)	26
--	----

Rules

CR 56	11
RAP 18.1	28

I. INTRODUCTION

This case asks whether a strict performance guarantee warranty—wherein a contractor promises satisfactory performance regardless of cause—should be interpreted as a question of fact by a jury or construed as a matter of law by a judge.

Appellant Iron Gate Partners 5, LLC (“Iron Gate”) owns and operates retail self-storage facilities throughout Washington and Oregon, including the 481 storage unit complex (the “facility”) at issue here. Iron Gate hired Respondent Tapio Construction, Inc. (“Tapio”) to design, furnish, install, and warranty the facility’s foundation and retaining walls.¹ Tapio was also exclusively responsible to select and install a liquid membrane to completely waterproof the concrete foundation and retaining walls.

Because leaks would defeat the very purpose for dry storage units, Iron Gate negotiated stringent and performance-based warranties to require Tapio to absolutely guarantee against any water intrusion. In particular, Tapio contractually warranted that, for a period of at least one year following construction, the facility would provide “satisfactory performance.”

¹ R.T. Wharton Associates, Inc., was dismissed from the case before trial.

But within a few months of completion, Iron Gate discovered water in over 35 of its units. This meant these units could not be rented. Because it occurred within one year, and Tapio refused to honor its performance warranty, Iron Gate sued for breach of contract.

Discovery revealed that both sides' experts agreed that the water intruding into the storage units was leaking through the retaining wall that Tapio had constructed. Therefore, and due to the iron-clad and strict nature of the performance warranty, Iron Gate moved for summary judgment.² Iron Gate believed it only needed to prove that it was not satisfied with the results of Tapio's construction to prevail under the contract. In other word, Iron Gate sought to enforce what it believed was a watertight guarantee.

The trial court disagreed and denied Iron Gate's Motion for Summary Judgment as matter of law. For the same reasons, the trial court denied: (1) Iron Gate's Motion in Limine, and allowed Tapio to present evidence of other entities' fault; and, (2) Iron Gate's motions for a directed verdict.

The trial court should have construed the parties' contract to hold Tapio strictly liable under the performance warranty.

² Iron Gate does not challenge the verdict regarding defective construction on appeal.

Finally, the trial court erred in awarding attorney's fees to Tapio because the Master Contract's attorney's fees provision only allows fees when incurred by a party. Tapio incurred no fees as its defense was provided by its insurer.

Iron Gate, therefore, requests this Court to reverse and remand to the trial court with instructions to enter judgment for Iron Gate on liability and to re-try the issue of damages. Iron Gate also requests this Court reverse the award of fees to Tapio and direct entry of an order granting fees to Iron Gate as the prevailing party.

II. ASSIGNMENTS OF ERROR

- A.** The trial court erred when it denied Iron Gate's Motion for Summary Judgment because there were no issues of fact affecting Tapio's responsibilities under the one-year satisfactory performance warranty.
- B.** The trial court erred when it denied Iron Gate's Motions for a Directed Verdict because the undisputed evidence showed that Tapio breached the satisfactory performance.
- C.** The trial court erred when it denied Iron Gate's First Motion in Limine and allowed Tapio to present evidence of other entities' fault, especially where Iron Gate sued in contract and not in tort.

- D. The trial court erred when it granted attorney's fees to Tapio because it incurred no fees as required by the parties' contract.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The contract language of a warranty or guarantee governs the rights and obligations of the parties. Here, Tapio warranted its work would perform satisfactorily for at least one year. However, Iron Gate experienced water intrusion within the one-year-warranty period. Did Tapio breach the one-year satisfactory performance warranty?
2. Tapio expressly warranted the performance of work, regardless of fault or cause. Should the court have granted Iron Gate's Motion for Summary Judgement and Motions for Directed Verdict when the undisputed evidence proved water leaked through Tapio's improvements?
3. Did the trial court err when it permitted the jury to consider evidence of the fault of others when Tapio provided a one-year satisfactory performance warranty?
4. Did the trial court err when it allowed the jury to construe the terms of the warranty?
5. In Washington, attorney's fees may be awarded when authorized by a private agreement. In such cases, the parties' contract controls. Here, the prevailing party may only recover those fees and costs actually incurred. Since Tapio incurred no fees and costs, did the trial court err in awarding Tapio its fees and costs?

IV. STATEMENT OF THE CASE

A. Iron Gate owns and operates retail dry storage units.

The owners of Iron Gate, together and separately, own and operate retail storage units in Washington and Oregon.³ Waterproof units are vital to its business.

B. Iron Gate builds new storage facility in Vancouver.

In 2006, the owners of Iron Gate decided to build and operate a 481-unit self-storage facility comprised of three building in Vancouver, Washington (the facility).⁴

C. Iron Gate contracts with Tapio to provide water proof foundation and retaining walls.

Iron Gate entered into a Master Contract (the “Contract”) with Tapio⁵ to construct the foundation, concrete retaining walls, and related components for Buildings A and B.⁶

1. Master Contract’s Scope of Work.⁷

Under the Contract, Tapio was to provide site preparation; furnish and install the underground utilities package; and provide the concrete

³ RP, p. 261:1 to 262:6, Vol. 2, April 15, 2014.

⁴ CP 42-43.

⁵ CP 42-43.

⁶ CP 43. The layout of the facility is uniquely designed because Buildings A and B are long and narrow, two-story buildings constructed parallel to each other, with an earthen berm in-between. On top of the berm, a driveway aisle with approach ramps at both ends was constructed that allows for vehicle access to the second-story units of these buildings. The berm also provides for a naturally controlled temperature inside the first-story units that backup to the retaining walls. Access to the first-story units is provided on the ground level on the other side of each building.

⁷ CP 43-60 and Ex 12.

work, including construction of the buildings' foundation package, retaining walls, and floors.⁸ Under Addendum A, the scope of work included construction of retaining walls (which would be for Buildings A and B), footing excavation and compaction, labor and materials to form concrete footings and walls, furnishing and installing rebar package, concrete pumping, concrete, and back fill for retaining walls.⁹

The scope of work also called for waterproofing of Buildings A and B.¹⁰ To make the buildings waterproof, the scope of work required Tapio to furnish and apply a liquid membrane waterproofing to the exterior surfaces of the sub-grade portions of the retaining walls.¹¹ In exchange for this work, Iron Gate paid Tapio \$850,370.00.¹²

2. *The Master Contract's Satisfactory Performance Guarantee.*

Key to Iron Gate's Contract with Tapio was Tapio's unconditional promise that no water would intrude the storage units. The Contract, therefore, included this very strict performance guarantee by Tapio:

[Tapio] warrants and guarantees to [Iron Gate] (i) the satisfactory performance of the Work for a period of one (1) year from _____,¹³ the date of Completion ... [Tapio] agrees to repair or replace any or all Work,

⁸ CP 43 and 57.

⁹ CP 43 and 57.

¹⁰ CP 43 and 57.

¹¹ CP 43 and 57.

¹² CP 58.

¹³ The date of completion was left blank in the Contract, but there's no dispute construction was completed by July 30, 2007. CP 43.

together with any other adjacent work, which may be displaced by so doing, to [Iron Gate]'s satisfaction, that (i) fails to perform for one (1) year from the date of Completion....¹⁴

In other words, Tapio had to agree to be liable for any performance failure, regardless of the cause.¹⁵ Regarding this issue, the Contract stated:

In the event the scope of Work includes . . . work to be performed in areas to be constructed or prepared by others, it shall be the responsibility of [Tapio] to examine and accept, at the time of delivery or first access, the items so provided and thereupon handle, store and install the items with such skill and care as to insure a satisfactory completion of the Work. [Tapio] shall, without limitation, examine the Work, performed by others to determine whether it is of the quality and completeness necessary to allow [Tapio] to perform the Work required hereunder to the quality required hereunder. . . .¹⁶

Thus, Tapio warranted that all of its work, and the work of others, would satisfy Iron Gate. Because of the nature of storage units, Iron Gate wanted, and contracted to have, Tapio produce a watertight facility. In return for being awarded the contract, Tapio agreed to assume this risk.

D. Shortly after construction ended, Iron Gate experienced water intrusion.

Within a few months after the facility was constructed, and after the rains began to fall in 2007, Iron Gate discovered water in many of the

¹⁴ CP 54 and 55.

¹⁵ CP 48, 54, and 55.

¹⁶ CP 48.

first-story units.¹⁷ Tenants also complained about water entering and flooding their units, some of which caused property damage.¹⁸

Iron Gate's Patrick Lennon observed at least 37 units with evidence of water intrusion.¹⁹ Mr. Lennon described that he first visited the units in November 2007, and there were puddles of water in the hallways.²⁰ Mr. Lennon also recounted that he observed water coming through the walls in four various ways: (1) through vertical cracks in the concrete, including through cracks that would start in the middle of the wall, (2) through tie back holes including observing water dribbling out of such a hole, (3) through the bottom seam between the wall and floor, and (4) over the top of the wall (between the pan deck and the top of the wall).²¹

E. Iron Gate Notifies Tapio of its Dissatisfaction.

One of Iron Gate's owner, Glen Aronson, testified that he personally observed water coming through the concrete (i.e., Tapio's work). Therefore, in early 2008—less than seven months after the facility was constructed, Mr. Aronson notified Tapio of the problems and Iron

¹⁷ CP 44. David Ross, one of the live-in managers for Iron Gate's Mill Plain location, testified that he observed "pooling" of water in the hallways and floors of units, and that water was coming through the concrete. Mr. Ross and Mrs. Ross testified that they first observed water in units after the first big rainstorm of the fall of 2007. Mr. Ross elaborated that water pooling would occur "every time there was a heavy rain."

¹⁸ CP 44.

¹⁹ RP p. 2386:13 to 2386:16, Vol. 10C, April 28, 2014.

²⁰ RP p. 2386:18 to 2388:20, Vol. 10C, April 28, 2014.

²¹ RP ps. 2387:12 to 2388:12, Vol. 10C, April 28, 2014.

Gate's dissatisfaction.²² When Tapio refused to honor its warranty, Iron Gate sued for breach of contract.

F. Iron Gate sues for Breach of Warranty.

1. *Tapio's water intrusion expert, Michael Milakovich, testified that water was intruding through Tapio's concrete work.*

Tapio's water intrusion expert, Michael Milakovich, confirmed that Iron Gate was experiencing water intrusion, and that the source of the water was from rain water that would migrate from the outside through various building components and into the interior of the building.²³

Mr. Milakovich also testified about the visual evidence of water coming directly through the walls and into the storage units.²⁴ Surface water (i.e., rain) would soak into the ground and then migrate through the foundation and retaining walls (constructed by Tapio), and into the interiors of the storage units.²⁵

Mr. Milakovich also testified that the surface water would soak into the ground and then enter the facility through the weather-exposed cracks in the apron and through the sealant joints. The surface water would then work its way into the interior of the units through such places as the base of the retaining wall, the top of the foundation or through

²² CP 44-45.

²³ CP 203 and RP p. 773:1 to 773:6, Vol. VII, April 30, 2014.

²⁴ CP 203-204 and RP p. 775:1 to 775:10 and 775:21 to 779:4, Vol. VII, April 30, 2014.

²⁵ CP 203-204 and RP p. 777:1 to 777:10, Vol. VII, April 30, 2014.

cracks in the wall.²⁶ In fact, Mr. Milakovich observed cracks in the concrete, which were likely full thickness cracks, and that he was able to push water directly through such a crack in the concrete.²⁷

G. Trial Court denies Iron Gate's Motion for Summary Judgment, Motions in Limine, and Directed Verdict, and Grants Fees to Tapio.

Iron Gate moved for Summary Judgment to enforce the contract's warranty provisions. The trial court denied the motion on March 25, 2014 and the case proceeded to jury trial on April 14, 2014.²⁸

Before trial, Iron Gate moved in limine to exclude evidence regarding the fault of others for any purpose, other than to show failure to mitigate.²⁹ The trial court denied this Motion and permitted Tapio to present evidence and argue to the jury that others were at fault for the water intrusion.³⁰

At the close of its case in chief, and again at the conclusion of trial, Iron Gate moved for a directed verdict under CR 50(a).³¹ The trial court denied the motions and the jury returned a verdict for Tapio on May 5, 2014.³²

²⁶ CP 203-204 and RP p. 777:1 to 777:23, Vol. VII, April 30, 2014.

²⁷ RP ps. 778:8 to 778:22, Vol. VII, April 30, 2014.

²⁸ CP 631-638 and RP, ps. 36:12 to 36:14 and 47:7 to 47:21, Vol. I, March 14, 2014.

²⁹ RP ps. 52:1 to 65:25, Vol. II, April 4, 2014.

³⁰ RP ps. 68:16 to 69:18, Vol. II, April 4, 2014.

³¹ RP ps. 2803:1 to 2808:5, Vol. 10B, April 29, 2014.

³² RP ps. 2809:23 to 2810:15, Vol. 10B, April 29, 2014, and ps. 1377:1 to 1386:22, Vol. XII, May 5, 2014.

Tapio then moved for, and was granted, attorney's fees pursuant to the Contract.³³ Iron Gate timely appealed.

V. ARGUMENTS

A. Standard of Review.

1. *Summary Judgment is reviewed de novo.*

An appellate court reviews a “summary judgment order de novo, engaging in the same inquiry as the trial court.”³⁴ Civil Rule 56(c) requires that summary judgment be granted when the pleadings, and other evidence presented, show there is no genuine issue on any material fact and that the moving party is entitled to judgment as a matter of law. The moving party bears the initial burden of showing the absence of an issue of material fact.³⁵ The burden then shifts to the non-moving party who “must be able to point to some facts which may or will entitle him to judgment, or will refute the proof of the moving party in some material portion.”³⁶

Summary judgment is proper if the records on file with the trial court show “there is no genuine issue of material fact” and the “moving party is entitled to judgment as a matter of law.”³⁷ The court considers all facts submitted and all reasonable inferences from them in the light most

³³ CP 700-711, 1076-1092, 1105-1142, 1376-1382, and 1383-1385 and RP ps. 1390:1 to 1429:17, Vol. XIII, April 24, 2015.

³⁴ *Highline Sch. Dist. No. 401 v. Port of Seattle*, 87 Wn.2d 6, 15, 548 P.2d 1085 (1976).

³⁵ *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989).

³⁶ *Howell v. Blood Bank*, 117 Wn.2d 619, 624-25, 818 P.2d 1056 (1991).

³⁷ CR 56(c).

favorable to the nonmoving party.³⁸ However, the nonmoving party *may not* rely “on speculation or argumentative assertions that unresolved factual issues remain, or in having its affidavits considered at face value.”³⁹

2. *Directed Verdicts are also reviewed De Novo.*

An appellate court reviews a motion for directed verdict de novo.⁴⁰ A “directed verdict is appropriate only if the court can say, as a matter of law, that there is no substantial evidence or reasonable inference to sustain a verdict for a nonmoving party.”⁴¹ An appellate court may review the denial of a directed verdict after the jury renders its verdict.⁴²

3. *Motions in Limine that are based on issues of law are reviewed De Novo.*

Rulings on motions in limine are generally reviewed for abuse of discretion unless, as here, the court allows the jury to decide legal issues that should be resolved by a judge and not the jury.⁴³ A trial court abuses its discretion when it rules unreasonably or on untenable grounds.⁴⁴

³⁸ *Yakima Fruit & Cold Storage Co., v. Central Heating & Plumbing, Co.*, 81 Wn.2d 528, 530, 503 P.2d 108 (1973).

³⁹ *Seven Gables Corp. v. MGM/UA Entertainment Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986).

⁴⁰ *ESCA Corp. v. KPMG Peat Marwick*, 86 Wn. App. 628, 639 n.14, 939 P.2d 1228 (1997), *aff'd*, 135 Wn.2d 820, 959 P.2d 651 (1998) (“In reviewing a trial court’s decision to deny a motion for directed verdict, we apply the same standard as the trial court.”).

⁴¹ *Thola v. Henschell*, 140 Wn. App. 70, 81, 164 P.3d 524 (2007), citing *Harris v. Drake*, 152 Wn.2d 480, 493, 99 P.3d 872 (2004).

⁴² *Thola*, 140 Wn. App. 70, 81.

⁴³ *State v. Neal*, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001).

⁴⁴ *State v. Powell*, 126 Wash. 2d 244, 258, 893 P.2d 615 (1995).

However, allowing a jury to decide how a warranty should be construed, as opposed to how it should be interpreted, is an abuse of discretion.

4. *Whether a party is entitled to fees is reviewed de novo while the amount of those fees is reviewed under an abuse of discretion standard.*

An appellate court applies “a two-step review to attorney fee calculations. First, [the appellate court] review[s] de novo the legal basis for awarding attorney fees, and then [it] review[s] a discretionary award of attorney fees for an abuse of discretion.”⁴⁵

B. Appellate Court May Review Denial of Motion for Summary Judgment after Jury Trial.

Appellate courts will review denial of a motion for summary judgment after a trial if the denial was premised on a question of law.⁴⁶ In such a circumstance, the appellate court will review the issue “in light of the full record” and not just the record as it existed when the motion for summary judgment was denied.⁴⁷

C. Tapio Breached the Express Warranty of Satisfactory Performance as a Matter of Law.

Section 15 of the Contract contains two warranties: “satisfactory performance” and “workmanship.” Iron Gate only appeals the trial court’s denial of the satisfactory performance warranty claim because the

⁴⁵ *In re Guardianship of Decker*, 188 Wn. App. 429, 439, 353 P.3d 669 (2015) (internal citations omitted).

⁴⁶ *McGovern v. Smith*, 59 Wn. App. 721, 735 n.3, 801 P.2d 250 (1990) and *224 Westlake, LLC v. Engstrom Props., LLC*, 169 Wn. App. 700, 715-16, 281 P.3d 693 (2012).

⁴⁷ *224 Westlake*, 169 Wn. App. 700, 715.

undisputed evidence shows that Tapio's work did not perform satisfactorily within one year of completion.

Under Washington's "objective manifestation" theory of contract formation, courts look primarily at the parties' words as expressed in the agreement.⁴⁸ Under this theory, a court (and not a jury) "attempts to determine the parties' intent by focusing on the objective manifestations of the agreement, rather than on the unexpressed, subjective intent of the parties[.]" imputing "an intention corresponding to the reasonable meaning of the words used."⁴⁹ When the intention of the parties is clear from the language of the contract, a court has nothing to construe and must be governed solely by the language.⁵⁰

The Contract contained broad warranties and assumptions of risk. In Washington, contracting parties can allocate risk as they see fit.⁵¹ Also, a warranty is an express or implied statement of something which a party undertakes will be part of a contract, and, though part of the contract, collateral to the express object of it.⁵² A breach of an express warranty

⁴⁸ *Lietz v. Hansen Law Offices, P.S.C.*, 166 Wn. App. 571, 585, 271 P.3d 899 (2012).

⁴⁹ *Hearst Communications, Inc. v. Seattle Times Company*, 154 Wn.2d 493, 503, 115 P.3d 262 (2005).

⁵⁰ *Grant County Contractors v. E.V. Lane Corp.*, 77 Wn.2d 110, 121, 459 P.2d 947 (1969).

⁵¹ *Dravo Corp. v. Municipality of Metro. Seattle*, 79 Wn.2d 214, 218, 484 P.2d 399 (1971).

⁵² *Hurley-Mason Co. v. Stebbins*, 79 Wash. 366, 374, 140 P. 381 (1914).

gives rise to a cause of action.⁵³ And while the question of whether a breach occurred is normally an issue of fact, a court's construction of a contract is a question of law and beyond the purview of the jury.⁵⁴ Thus, if the undisputed facts show that a breach of a warranty occurred, the question of liability should not be submitted to a jury.⁵⁵

The Contract, here, expressly included a satisfactory performance guarantee. This meant Tapio promised the results of its work and not just its workmanship.⁵⁶ By the terms of the Contract, Iron Gate was entitled to be satisfied, for at least one year, with the performance of Tapio's work and not just with the workmanship.

The "work" need not be defective per se as that implicates a different part of the warranty. Rather, Iron Gate was only required to show that the final product did not "perform" to Iron Gate's satisfaction. The flooding of brand new dry storage units means that the final project did not perform as envisioned by the parties, but particularly Iron Gate.

The term "Work" means the product of the Scope of Work in Addendum A to the Contract. The Work as set out in Addendum A

⁵³ *Hurley-Mason Co.*, 79 Wash. 366, 375 and *Crandall Eng'g Co. v. Winslow M. R. & S. Co.*, 188 Wash. 1, 9, 61 P.2d 136 (1936).

⁵⁴ *Johnson v. Allstate Ins. Co.*, 126 Wn. App. 510, 515, 108 P.3d 1273 (2005) and *Swanson v. Liquid Air Corp.*, 118 Wn.2d 512, 826 P.2d 664 (1992).

⁵⁵ See generally *Park Ave. Condo. v. Buchan Devs.*, 117 Wn. App. 369, 71 P.3d 692 (2003).

⁵⁶ [Tapio] warrants and guarantees to [Iron Gate] (i) the satisfactory performance of the Work for a period of one (1) year from _____, the date of Completion. ...

includes the concrete footings, the retaining walls, and the concrete which forms the second floor deck.⁵⁷ It also includes the concrete paving which forms the surface of the drive aisle.⁵⁸ Tapio had to waterproof the retaining wall from the footing to the ground line.

Under the Contract, Tapio was the ultimate guarantor that the facility would be constructed water-tight; the trial court should have rejected Tapio's attempts to blame others for the water intrusion. The Contract expressly required Tapio to warrant that the Work, regardless of the tasks of its subcontractors or the fault of others, would ultimately perform satisfactorily. In other words, regardless of the fault of others, or even the unforeseen acts of God, Tapio promised that the facility would perform to Iron Gate's satisfaction.

Iron Gate primarily relied upon two cases from the Washington Supreme Court to support its position: *Shopping Ctr. Management Co. v. Rupp*,⁵⁹ and *Port of Seattle v. Puget Sound Sheet Metal Works*.⁶⁰ Both cases hold that the language of the warranty and guarantee controls and courts should look to those provisions in interpreting liability of the contractor. Further, both cases hold the contractor responsible for breach of the warranty and guarantee even if they complied with the plans and

⁵⁷ CP 57 and Ex 12 (Master Contract, p. 10, Items 1.3 and 1.5).

⁵⁸ CP 57 and Ex 12.

⁵⁹ 54 Wn.2d 624, 343 P.2d 877 (1959).

⁶⁰ 124 Wash. 10, 213 P. 467 (1923).

specifications and those plans and specifications are later shown to be inadequate. As such, Tapio cannot successfully argue that it did not breach the satisfactory performance warranty because it relied upon inadequate plans and specifications.

In *Shopping Ctr. Management Co.*, three plaintiff corporations, described by the court as “a layman or owner” commenced the construction of a shopping center on land they owned. The plaintiffs contracted with defendant Rupp, a plumbing and heating contractor. Rupp guaranteed that two automatic submersible sewage pumps installed by him as part of a larger project involved in constructing a shopping center would operate satisfactorily. The guarantee clause at issue there, which is remarkably similar to the one at issue in this case, read as follows:

The Contractor shall guarantee the satisfactory operation of all materials and equipment installed under this Contract, and shall repair or replace, to the satisfaction of the Owner or Architect, any defective material, equipment or workmanship which may show itself within one (1) year after date of final acceptance.⁶¹

Rupp agreed to install the complete storm drainage system, a large septic tank, and the drain field on the premises for \$25,830.00.⁶² Two automatic submersible sewage pumps he installed failed to function properly. There was a serious dispute as to what the cause of the pumps’

⁶¹ *Shopping Ctr. Management Co.*, 54 Wn.2d 624, 630.

⁶² Rupp was described as a “prime contractor” and as a “mechanical contractor.” 54 Wn.2d at 629-30. Rupp clearly was not a general contractor.

failure was and whether Rupp could escape liability on the guarantee he made by implicating others (e.g., the manufacturer of the pumps, the electrician who participated in the installation, another plumbing contractor who affected repairs, and the architect who specified the location).⁶³ In holding Rupp responsible under the guarantee clause, the Court reasoned:

We think the guaranty clause of the contract involved in this case is as broad as that in the *Port of Seattle*⁶⁴ case, *supra*, and that appellant thereby undertook to do more than literally repair or replace any defective material, equipment, or workmanship which might appear within one (1) year after the date of final acceptance. The express wording of the guaranty provision is that the contractor shall guarantee the *satisfactory operation* of all materials and equipment installed *under this contract* [emphasis in original]. The contract includes the plans and specifications. Therefore, appellant must be deemed to have guaranteed that the materials and equipment installed by him would operate satisfactorily under the plans and specifications of the owner.

Thus, it is immaterial in this case whether the pumps failed to operate satisfactorily because of the plans and specifications or because of defective materials, equipment, or workmanship. In either event, appellant must be held, under the language of this guaranty, to have assumed the risk of the events which subsequently transpired⁶⁵

⁶³ *Shopping Ctr. Management Co.*, 54 Wn.2d 624.

⁶⁴ *Port of Seattle*, 124 Wash. 10.

⁶⁵ *Shopping Ctr. Management Co.*, 54 Wn.2d 624, 632-633.

In *Port of Seattle*, the builder constructed a roof on the owner's building under a contract based upon certain plans and specifications. The builder provided this guaranty:

Guaranty. Each proposal must be accompanied by a form of guaranty which must cover a period of not less than ten years, during which time the repairs must be made free of charge to the Port Commission. If the roofing is not placed by the manufacturer of the materials, the guaranty must be made jointly by the contractor and the manufacturer.

The builder completed the roof, and the Port inspected and approved the builder's work. However, after a few months of usage, the asphalt in the roofing material melted and dripped down on the floor below. The Port sued the builder for breaching the performance guarantee. The trial court entered judgment for the Port. The Supreme Court affirmed ruling that the guarantee language was clear that the builder was to maintain and repair the roof. The Court also reasoned that the builder guaranteed, no matter what might have caused the imperfect condition of the roof, to remedy the imperfect condition and to keep it in perfect condition. The Court disagreed with the builder that the obligation to repair was limited only to the contingency of a leaking roof.

The Court reasoned:

[T]he clear and natural import of the language used, when applied to the subject matter of the contract, ... was that the structure or work, as an entirety, which was the joint product of the plan or design, the labor bestowed, and the

materials furnished...all three combined...would remain in good condition. No reason is perceived why contractors will not guaranty against all defects, whatever their origin, - - whether they arise from insufficiency of the materials supplied, from unskillfulness of workmen, or from unfitness of the plan or design, whether devised by the one or the other of the parties to the contract, or by some other person. In case of a contract with such warranty, it will be presumed that the consideration for the guaranty was included in the price agreed to be paid for the work to be done.⁶⁶

The scope and breadth of a guarantee clause was also reviewed by the Washington Supreme Court in *Teufel v. Wiener*.⁶⁷ The language of the guarantee in *Teufel* was narrower than the guarantee used in *Port of Seattle*. The *Teufel* guarantee read as follows:

Neither the final certificate nor payment nor any provision of the Contract Documents shall relieve the Contractor of responsibility for *faulty materials or workmanship* and, unless otherwise specified, he shall remedy any defects due thereto and pay for any damage to other work resulting therefrom, which shall appear within a period of one (1) year from the date of substantial completion.... [emphasis added]

The guarantee in *Teufel* is obviously different than the guarantee in the case at bar and considerably more limited. Specifically, the *Teufel* guarantee was not a “performance” guarantee. As the court in *Teufel* pointed out, the guarantee clause there was “limited to faulty materials or

⁶⁶ *Port of Seattle*, 124 Wash. 10, 15-16.

⁶⁷ 68 Wn.2d 31, 411 P.2d 151 (1966).

workmanship.”⁶⁸ The operative language in the guarantee clause at issue here is satisfactory performance, a much broader guarantee. The *Teufel* court then distinguished *Port of Seattle* and *Shopping Center*:

It is at least the standard guarantee provision of the specifications here involved that distinguishes the instant case from *Shopping Ctr...* and *Port of Seattle...*, upon which defendants rely. In *Shopping Ctr.* and *Port of Seattle*, the guarantee provisions of the contracts were broader than the standard guarantee of the instant case; in those cases the prime contractor actually guaranteed the satisfactory operation of all materials installed. The *Port of Seattle* case amply points out the difference between the two types of guarantys.⁶⁹

Similar to *Port of Seattle* and *Shopping Center*, the Contract here contained an express “performance” warranty guarantee that provided “Contractor warrants and guarantees to Owner...the satisfactory performance of the Work for a period of one (1) year from...the date of Completion.”⁷⁰ Tapio also agreed to repair or replace all of the work together with any other adjacent work to the owner’s satisfaction if it failed to perform for one (1) year for any reason.⁷¹

Further, Section 15 also contains an express waiver by Tapio that would have required Iron Gate to proceed against any other party. The waiver provides “Contractor does hereby waive and release any right to

⁶⁸ *Teufel*, 68 Wn.2d 31, 35.

⁶⁹ *Teufel*, 68 Wn.2d 31, 36.

⁷⁰ CP 54-55 and Ex 12 (Master Contract, ps. 7-8, Section 15).

⁷¹ CP 55 and Ex 12 (Master Contract, p. 8, Section 15).

require Owner to proceed against any other party whatsoever, to proceed against or exhaust any security held by Owner or pursue any other remedy in Owner's power whatsoever."⁷²

The satisfactory performance guarantee clause in the Contract is no different and no less broad than the ones found in *Shopping Ctr. Management Co.*, and in *Port of Seattle*. Tapio guaranteed the satisfactory performance of its Work and agreed to repair or replace all of the Work that failed to perform for any reason whatsoever.

D. The Trial Court Erred in Denying Iron Gate's Motion for Summary Judgment and Motions for Directed Verdict.

The water intrusion occurred through Tapio's Work, in direct breach of the satisfactory performance warranty. Tapio's own expert, Michael Milakovich, testified that water was intruding into the units:

A. I have not seen water coming through the walls. I have seen the result. There are some drip indications. There is water vapor indications coming through the wall.

So it is possible....⁷³
* * *

Q. I take it we can agree that my client is experiencing water intrusion through the building components and into the interior of a number of storage units at this facility?

A. Yes, sir, I have observed them.

⁷² CP 55 and Ex 12 (Master Contract, p. 8, Section 15).

⁷³ SCP ___, Second Declaration of Richard G. Matson in Support of Plaintiff's Motion for Summary Judgment, page 5 (page 33, lines 14-18 of Mr. Milakovich's deposition).

Q. And I think we agreed earlier the original source of the water is from the rainwater that somehow migrates through various building components into the interior of the building correct?

A. Yes.⁷⁴

There is no dispute that the Work was not satisfactorily performing as water intruded into what was supposed to be dry storage units. The trial court erred in denying Iron Gate's Motion for Summary Judgment. This Court should reverse the trial court's denial of summary judgment and remand to the trial court for entry of a judgment in Iron Gate's favor on the breach of warranty and for trial on damages only.

Similarly, the trial court erred in denying Iron Gate's Motions for Directed Verdict because as a matter of law, there is no substantial evidence or reasonable inference to sustain a verdict for Tapio on the breach of warranty of satisfactory performance.

E. The Trial Court Erred When it Denied Iron Gate's First Motion in Limine.

Iron Gate's First Motion in Limine moved to exclude all evidence of the fault of others for any purpose except to show failure to mitigate. Iron Gate's motion was based on the grounds (1) the fault of others was not relevant to breach of the satisfactory performance warranty (i.e., if the

⁷⁴ SCP ___, Second Declaration of Richard G. Matson in Support of Plaintiff's Motion for Summary Judgment, page 9 (page 68, lines 5-14 of Mr. Milakovich's deposition).

Work did not perform satisfactorily, it made no difference that someone else's work was defective or unsatisfactory); and, (2) tort principles of comparative fault did not apply. The trial court denied Iron Gate's Motion, and Tapio was allowed to present evidence of other entities' fault.⁷⁵

Iron Gate's First Motion in Limine should have been granted and the trial court erred in allowing Tapio to present evidence regarding the fault of others and also to argue comparative fault. By allowing the jury to hear evidence regarding the fault of other subcontractors or Iron Gate's comparative fault, the jury was presented with confusing, improper, and irrelevant evidence that did not impact the satisfactory performance warranty.

F. The Trial Court Erred in Awarding Tapio Attorney's fees and Costs.

The trial court erred in awarding Tapio its attorney's fees and costs as it did not incur any fees. Liberty Mutual, Tapio's insurer, incurred these expenses. Liberty Mutual cannot recover these expenses because it is not a party to the Contract between Iron Gate and Tapio. Also, Liberty Mutual is not the prevailing party within the meaning of RCW 4.84.330.

The controlling provision in the Contract regarding attorney's fees and costs reads:

⁷⁵ RP ps. 52:1 to 65:25 and 68:16 to 69:18, Vol. II, April 4, 2014.

In the event of litigation between the parties hereto, declaratory or otherwise, for or on account of the breach of or to enforce or interpret any of the covenants, agreements, terms or conditions of the Contract Documents, and notwithstanding any other provisions therein, the losing party shall pay all costs and reasonable attorney's fees *actually incurred by the prevailing party*, including those on appeal, the amount of which shall be fixed by the court and shall be made part of any judgment rendered. (Emphasis added).

Tapio claimed attorney's fees and costs under RCW 4.84.330 which reads:

In any action on a contract or lease entered into after September 21, 1977, where such contract or lease specifically provides that attorney's fees and costs, which are incurred to enforce the provisions of such contract or lease, shall be awarded to one of the parties, the prevailing party, whether he or she is the party specified in the contract or lease or not, shall be entitled to reasonable attorney's fees in addition to costs and necessary disbursements.... *As used in this section 'prevailing party' means the party in whose favor final judgment is rendered.*" (Emphasis added).

Tapio did not "actually" incur the attorney's fees and costs claimed, Liberty Mutual did. The express language of the Contract limits the recovery of attorney's fees to the prevailing party that "actually" incurred those fees. As such, Tapio cannot recover fees and costs based on the contract because it did not incur the expenses.

Similarly, the language of the statute follows the language of the contract. Tapio can only recover expenses which it incurred to enforce the

contract. Since it incurred no such expenses, the trial court erred in awarding it reasonable fees and costs.

The Washington Court of Appeals considered nearly identical language in the case of *State v. Goodrich*.⁷⁶ In *Goodrich*, the trial court awarded restitution for future medical expenses not yet incurred by an assault victim. The Court of Appeals concluded that that portion of the award was in error. The trial court had awarded restitution for future medical expenses based on the language of RCW 9.94A.140(1) which provides:

Restitution ordered by a court pursuant to a criminal conviction shall be based on easily ascertainable damages for injury to or loss of property, *actual expenses incurred* for treatment for injury to persons, and lost wages resulting from injury. (Emphasis added).⁷⁷

The language in the opinion is instructive:

The trial court erred if it awarded restitution for future medical expenses not yet incurred by the victim.

‘Incurred’ means to become liable or subject to. *Webster’s 3rd New International Dictionary*, 1145 (3d ed. 1971). Proof of payment is unnecessary before restitution is ordered, but the victim must have an obligation to pay for the medical treatment necessitated by her injury. If there is sufficient evidence to demonstrate that, the victim is obligated to pay for the medical services which will be performed, and there is adequate proof of the amount of the

⁷⁶ 47 Wn. App. 114, 733 P.2d 1000 (1987).

⁷⁷ *Goodrich*, 47 Wn. App. at 116.

obligation, an award of restitution for the medical services is proper.⁷⁸

Because Tapio did not actually “incur” any attorney’s fees and costs, it had no legal right to recover them. Tapio was unjustly enriched by the trial court’s award.⁷⁹ While Liberty Mutual incurred expenses, it could not recover them from Iron Gate either. Liberty Mutual was not a party to the Master Contract from which this right flows. Nor was it the “prevailing party” within the meaning of RCW 4.84.330. A party (Tapio) cannot request attorney’s fees and costs under RCW 4.84.330 for a non-party (Liberty Mutual).⁸⁰

Tapio failed to cite any authority that would authorize the court to award it attorney’s fees and costs which it has not incurred and which were incurred by a third-party to whom Tapio has no liability for repayment. The attorney fee award for Tapio should be vacated.

G. Iron Gate is Entitled to its Fees and Costs Before the Trial Court and On Appeal.

As set forth above, the Contract contains an attorney’s fees provision awarding fees to the prevailing party. Under RCW 4.84.330, a

⁷⁸ *Goodrich*, 47 Wn. App. at 117.

⁷⁹ Unjust enrichment occurs under Washington law when a person has and retains money or benefits which in justice and equity belong to another. *Bailie Commc’ns, Ltd. v. Trend Bus. Sys., Inc.*, 61 Wn. App. 151, 160, 810 P.2d 12 (1991) and *Young v. Young*, 164 Wn.2d 477, 484, 191 P.3d 1258 (2008).

⁸⁰ *G.W. Equip. v. Mt. McKinley Fence*, 97 Wn. App. 191, 200, 982 P.2d 114 (1999) (husband’s prevailing party fee request was denied because it was made on behalf of his wife who was a non-party).

court must award the prevailing party their attorney's fees where the parties have an agreement with an attorney fee provision. Iron Gate requests that this Court remand to the trial court with directions to award attorney's fees to Iron Gate, and also grant Iron Gate its attorney's fees and costs on appeal. Iron Gate requests its fees on appeal pursuant to RAP 18.1(a).

VI. CONCLUSION

The satisfactory performance warranty was negotiated and bargained for between two experienced companies. Because its business depends upon dry storage units, Iron Gate required Tapio to provide an absolute warranty against water intrusion.

Whether Tapio believes, in hindsight, that the provision was lopsided, it is clear that Tapio agreed to assume the risk that its facility would be watertight, regardless of fault.

Because there is no dispute that, within one year of completion, water intruded into the storage units, the trial court erred when it denied Iron Gate's Motion for Summary Judgment, Motion in Limine, or Motions for Directed Verdict. The trial court also erred when it awarded Tapio its attorney's fees.

Iron Gate therefore requests this Court reverse and remand with directions to the trial court to grant judgment in Iron Gate's favor as a matter of law and to re-try the issue of damages only.

Iron Gate further requests the attorney's fee award in favor of Tapio be vacated and Iron Gate be awarded its fees on appeal and also at the trial court level.

DATED this 10th day of February, 2016.

Respectfully Submitted,

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Transmittal Letter

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Appellant's Opening Brief

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