

NO. 48644-0-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

**Nova Contracting, Inc.,
Appellant**

v.

**City of Olympia,
Respondent**

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

This case arises from the Trial Court's summary judgment order dismissing Nova Contracting, Inc.'s (referred to herein as "Nova") claim that the Respondent, City of Olympia, violated the Warranty of Good Faith and Fair Dealing by unreasonably exercising its contractual discretion in the review and evaluation of submittals on a public contract in a manner that completely prevented project performance within the available time. To reach this result, the Trial Court imposed on Nova, the non-moving party, a burden of proof under preponderance of the evidence standard, as if the judge were conducting a mini-trial in his head rather than considering the triability of this case under the proper summary judgment standard. The Trial Court also applied an improper evaluative standard for this proof, importing the abuse of discretion standard from administrative law, rather than deciding this case under proper and applicable contract law standards. The Court expressly acknowledged production of evidence and inferences sufficient to support Nova Contracting's claim, but, finding that evidence unpersuasive under the trial standards it applied, dismissed the case.

The Trial Court then granted judgment to the City of Olympia on the City's counterclaim for liquidated damages, even though the City of Olympia had failed to produce any evidence justifying either the imposition of liquidated damages or the rate of such damages, and had failed to even address Nova's arguments against such damages.

II. SUMMARY OF KEY AND ISSUES AND FACTS IN REPLY

The City of Olympia provides a good summary of the key facts in this case in its Response (at p. 40) as follows:

- 1) Nova was behind schedule;
- 2) Nova was not receiving approvals of its submittals and could not start construction before approvals were obtained;
- 3) The City required certain information to be included in the submittals; and
- 4) Rather than do its utmost to provide that information in the submittals, Nova refused by blaming the City's contract management.

The City of Olympia characterizes these as "uncontested facts." The first three are. The last is hotly contested by Nova, which did its utmost to comply with the impossible requirements of the City and made a claim only when it became clear that compliance was not possible, due to unreasonable expectations and requirements imposed by the City, and that the project could not be completed in the time available.

While the other facts are uncontested, the explanation for them is not. Why was Nova behind schedule? Why was the City not approving submittals? Why didn't the City allow Nova to proceed with construction based on approved, preliminary submittals, instead requiring that Nova obtain pre-approval of all submittals, including those involving project close-out, before

starting work? Why did the City require the information it did and was it proper or reasonable for it to do so?

The answers to each of these questions involves hotly contested issues of material fact and cross-claims for breach that should not have been decided on summary judgment.

III. SUMMARY OF KEY ARGUMENT

The Trial Court's ruling granting the City of Olympia's summary judgment in this case is fundamentally flawed. It is reversible error both as a matter of process and in substantive law.

Although this case came on as a Motion for Summary Judgment, the Court applied a standard of evidence and a burden of proof as if the case were a bench trial, ultimately ruling that Nova, the non-moving party, had failed to prove its case by a preponderance of the evidence, even though Nova had produced evidence justifying its claims. That is, the Trial Court imposed a trial burden on Nova, the non-moving party in a summary judgment motion, and dismissed the claims as if it had tried them and found them wanting under a preponderance of the evidence standard burden of proof.

The Trial Court also applied an erroneous substantive legal standard for the Warranty of Good Faith and Fair Dealing. This implied warranty applies when a party has discretion under a contract term to define or require some obligation or term on the other party. The Warranty is breached if the party with discretion exercises it in a manner that undermines, rather than facilitates,

the performance of the contract and thus denies the other party the benefit of their bargain.

In this case, it is undisputed that the City of Olympia had such discretion under the submittal process in this case. Nova contends, substantiated by testimony of its project personnel and the opinion of its expert witness, that Olympia exercised this discretion in a manner that prevented contract performance, ultimately frustrating that performance completely. This is a paradigmatic breach of the warranty of good faith and fair dealing.

The Trial Court imposed a *mens rea* requirement on Nova. That was improper, and the City of Olympia has failed to even try to defend it. However, this *mens rea* element was the only arguable gap in the evidence produced by Nova to substantiate its claim that Olympia breached the Warranty of Good Faith and Fair Dealing. Therefore, Nova's claim should have proceeded to trial, and Olympia's Motion for Summary Judgment should have been denied.

The City of Olympia instead argues that it had absolute discretion to reject Nova's submittals, even if it did so unreasonably and at the cost of project performance. This assertion is not supported by the terms of the contract or industry standard.

Olympia then argues that the Warranty of Good Faith and Fair Dealing does not apply because Nova is seeking to apply it as a "free-floating" obligation. Nova is not. Rather, Nova is seeking to impose it as a contractual

limitation on the discretion Olympia has under express contract clauses involving and imposing the submittal process.

Finally, having improperly concluded that Nova's claim for breach of the Warranty of Good Faith and Fair Dealing failed to meet its burden of proof, the Court erroneously concluded that this meant that Olympia was entitled to judgment on its counterclaim for liquidated damages even though Olympia had failed to justify those damages or even argue against the arguments raised by Nova against them. The Court entered judgment for Olympia and struck the trial.

In the end, Nova has presented a triable case for its claim and triable defenses to the City's claim for liquidated damages. The Trial Court erred in dismissing it. This Court should reverse and remand this matter for trial.

IV. ARGUMENT

A. Response Improperly Raises Issues and Asserts Facts Not Presented Below.

Two of Respondent's three issues on appeal, and one of Respondent's substantive arguments concerning the warranty of good faith and fair dealing as it applies to this contract, are improper because they were not raised or briefed below, depriving Appellant Nova of the opportunity to develop a record to rebut the factual underpinnings of the argument. The only argument raised in Olympia's summary judgment, consistent with Issue 1 of the Response brief, was whether Olympia had "properly terminated Nova for default." Olympia

did not argue, either in its Motion or its Reply, that any portion of Nova's claim or defenses was improperly or untimely submitted. (Issues 2 and 3 of the Response brief.) Further, in its summary judgment briefing, Olympia did not assert its argument that its right to reject submittals was an "absolute" right, merely asserting that its right was "discretionary."

This injection of new issues and arguments into this appeal is improper, depriving Nova of the opportunity to produce, through declarations, the facts it would have produced to rebut the arguments had they been presented below. RAP 9.12. Fortuitously, there are facts in the record to rebut the assertion that Nova's claims regarding Olympia's abuse of the submittal process were untimely and the argument that Olympia's right to reject submittals was an absolute right. These arguments will be substantively argued below.

However, Nova has been denied the opportunity to submit direct evidence refute the argument that it was untimely in contesting the liquidated damages claim. The record may contain sufficient indirect evidence to refute that argument. (The record shows that liquidated damages, while threatened, were not imposed until the City of Olympia submitted a counterclaim in this litigation, which was properly and timely answered by Nova.) Despite this, Nova is entitled to make its record on this issue, and that requires a reversal and remand to the Trial Court so that this argument (along with the other two noted above) can be presented and argued there before it is ripe for this Court to address.

B. The Motion for Summary Judgment Standard was not Properly Applied.

Both parties essentially agree on the legal standard for summary judgment. However, the Trial Court did not apply the proper standard, and that failure is reversible error.

Summary judgment can be imposed "...where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Marincovich v. Tarabochia*, 114 Wn.2d 271, 274, 787 P.2d 562 (1990). "The court must consider the facts in the light most favorable to the nonmoving party, and the motion should be granted only if, from all of the evidence, reasonable persons could reach but one conclusion." *Marincovich* at 274; CR 56(c). Therefore, summary judgment is appropriate when there is no issue of material fact or law, and when a party is entitled to judgment as a matter of law. *Ruff v. County of King*, 125 Wn.2d 697, 703, 887 P. 2d 886 (1995); see also CR 56(c).

A party can move for summary judgment in one of two ways. *Guile v. Ballard Community Hosp.*, 70 Wn. App. 18, 851 P.2d 689 (1993). First, the party can set out its own version of the facts and show that there is no genuine issue as to the facts as stated. *Hash v. Children's Orthopedic Hosp. And Med. Ctr.*, 110 Wn.2d 912, 916, 757 P.2d 507 (1988). Alternatively, a party moving for summary judgment can meet its burden by pointing out to the trial court that the nonmoving party lacks sufficient evidence to meet its

burden of proof. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225 n.1, 770 P.2d 182 (1989), *citing to Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 91 L.Ed. 2d 265, 106 S. Ct. 2548 (1986). In a *Young* or *Celotex* motion, if the moving party shows that there is no dispute of fact and that the nonmoving party has the burden of proof at trial, the nonmoving party must respond by making a *prima facie* showing of the elements it must prove. *Young*, 112 Wn.2d at 225-26. Thus, the non-moving party has a burden of production, but not a burden of proof, and the Court errs if, as here, it grants summary judgment in the face of produced evidence based on a weighing of the evidence under a burden of proof.

The transcript of the Trial Court's decision makes clear that the Trial Court applied the incorrect standard, imposing a burden of proof on Nova, the non-moving party, rather than merely imposing the proper burden of production. The Trial Court expressly indicated that it applied a "preponderance of the evidence" standard, and found that Nova failed its "showing" under this standard. (RP 28:2-9.) The Trial Court further clarified that what it was requiring that Nova make "a clear showing" rather than a "suggestion" – that is, a proof rather than a production – on the material issues raised in the summary judgment. (RP 29: 16-22.)

This was not merely an instance of the Court misspeaking and saying "burden of proof" when it meant, and applied, a burden of production. The Trial Court expressly recognized that Nova had produced evidence, thereby

meeting a burden of production, but ruled that the production was insufficient because it fell short of a burden of proof, and made “findings” to that effect.

I am finding that the contract was a bargained for exchange between two parties. There was a provision in the contract that said that the engineer had the right to approve submissions. I do not think that under these circumstances it's been proven sufficiently by the plaintiff, by Nova that there was some inappropriate or bad faith utilized by the city engineer. I do recognize that there are allegations that, well, at least one city official said they didn't want to see the same thing happen in this case that had happened previously and that showed bias in this case. I don't find there's a sufficient showing of bias.

(RP 29:3-15.)

The Respondent appears to be arguing that this error was harmless error because, even applying the proper summary judgment burden, Nova's claim either fails as a matter of law on substantive grounds or fails to meet a burden of production. The substantive arguments are addressed below. The Trial Court's own recognition that evidence was produced, but was found wanting under a “preponderance of the evidence” standard and a “burden of proof” shows the reversible error of the second point.

C. The Duty of Good Faith and Fair Dealing.

1. General Statement of Duty

“There is in every contract an implied duty of good faith and fair dealing. This duty obligates the parties to cooperate with each other so that

each may obtain the full benefit of performance." *Badgett v. Security State Bank*, 116 Wn.2d 563 at 570, 807 P.2d 356 (1991); RESTATEMENT (SECOND) OF CONTRACTS § 5 (1981). Where one party retains discretion to determine certain terms of a contract, a party breaches the duty of good faith and fair dealing simply by disregarding the other party's justified expectations under the contract. *Scribner v. Worldcom, Inc.*, 249 F.3d 902, 909 (9th Cir. 2001); see also, *Edmonson v. Popchoi*, 172 Wn.2d 272, 280-281, 256 P.3d 1223 (2011); *Frank Coluccio Const. Co., Inc. v. King County*, 136 Wn. App. 751, 766, 150 P.3d 1147 (2007). Thus, where a party retains discretion to exercise performance of a material contract term, the implied duty of good faith and fair dealing imposes a requirement that such discretion be exercised reasonably. See, *Scribner, supra*, 249 F.3d at 909-11.

Thus, in Washington, this duty applies in contracts where a specific contract term gives one of the parties discretion to "fill out" the contractual obligations of the other party. Thus, the warranty is not "free-floating," but rather must connect to some specific contract term. *Rekhter v. Dep't of Soc. & Health Servs.*, 180 Wn.2d 103 at 113 323 P.3d 1036 (2014) and where that gives one party has discretionary authority under the contract. If these conditions are met, the warranty of good faith and fair dealing requires that the party granted such discretionary power exercise that power in a manner calculated to preserve the reasonable contractual expectancy of the other party.

At a minimum, this requires that the party exercise its power reasonably.

Rekhtor at 112-113.

In this case, the contract gives the owner, the City of Olympia, power to “fill out” the specific performance obligations of the contractor, Nova, by receiving, reviewing, approving or rejecting submittals by Nova in which Nova provides Olympia with detailed information about how it intends to perform the contract. Olympia had discretion to use this process to police Nova’s performance to assure that Nova properly performs the requirements of the contract. However, Olympia attempted to use this process improperly, to greatly expand Nova’s contractual obligations and impose obligations, including design obligations and a “performance guarantee” obligation, not provided for by the contract and not actually possible under the real-world limitations of the project. (CP 273-314; 315-320).

2. *Respondent’s Appeal to Arbitrary and Capricious Standard*

Citing to Federal cases concerning Federal government procurements, the City of Olympia contends that the contractual performance of its engineer should be evaluated under an “arbitrary and capricious” standard imported from administrative law, rather than under ordinary contract law standards, such as the warranty of good faith and fair dealing. There is a reason why the Respondent has not cited any Washington authority for this proposition. It appears that there isn’t any. Unlike Federal court, Washington courts find ordinary contract law sufficient to evaluate all contracts, including public work

contracts, and are content to apply contract law to those contracts undiluted by administrative law principles. The Trial Court erred, under Washington law, in accepting the City of Olympia's invitation to apply a standard appropriate to review of regulatory actions, rather than contractual market participation, by a governmental party.

However, even if it were proper to apply an "arbitrary and capricious" standard to evaluate the performance of contractual obligation by the government in a public work contract context, that standard does not avoid the more fundamental error of the Trial Court, applying an incorrect standard of proof and thus disregarding disputed issues of material fact. A regulatory action is "arbitrary and capricious" if it is made "in disregard of the facts and circumstances." *Sweitzer v. Ind. Ins. Comm.*, 116 Wash. 398 at 401, 199 P. 724 (1921). Thus, it is an inherently fact-laden performance review, making it a question of material fact not properly decided on summary judgment in the face of produced evidence of unreasonable government action.

Further, the evidence on which a fact-finder would evaluate whether the City of Olympia acted arbitrarily and capriciously (if that were the correct standard) is the same evidence on which a fact-finder would evaluate whether the City of Olympia breached the warranty of good faith and fair dealing. For purposes of this appeal, it is irrelevant which standard applies. Whichever standard applies, the evidence produced by Nova should go to the jury for evaluation and findings.

3. *Duty Asserted by Nova is not “Free Floating”*

As noted above, the warranty of good faith and fair dealing does not impose a “free-floating” warranty obligation over and above all contract terms. Rather, it applies to govern how discretion provided to a party under some specific contract term must be exercised. Thus, the party seeking to assert a claim for breach of the warranty of good faith and fair dealing must tie it to some other contract term providing some discretion to the other party.

Nova has done that here. The contract provides:

The Engineer intends to complete the review of all submittals within ten (10) working days of receipt. When incomplete or rejected submittals are returned to the Contractor, the Contractor shall make appropriate revisions and re-submit. Review of re-submittals will be completed within ten (10) working days. The contract time shall not be extended on the basis that the Contractor experienced delays due to rejection of submittals.

Olympia Specials, S-21 of 53.

4. *Olympia’s Discretion was Not Absolute*

As with the argument that Nova’s assertion of the warranty of good faith and fair dealing is “free-floating,” Olympia’s assertion that its right to reject submittals turns on the particular language of the submittal clause.

The Engineer intends to complete the review of all submittals within ten (10) working days of receipt. When incomplete or rejected submittals are returned to the Contractor, the Contractor shall make *appropriate revisions* and re-submit. Review of re-submittals will be completed within ten (10) working days. The contract time shall not be extended on the basis that the Contractor experienced delays due to rejection of submittals.

Olympia Specials, S-21 of 53 (emphasis added).

Thus, the clause itself builds in a reasonableness standard, limiting the right Olympia has to reject submittals and making the issue of whether Olympia properly exercised its right a question of triable fact. On re-submittal, the Contractor is obligated to make “appropriate revisions.” The appropriate revision to a rejected submittal that should have been approved is no revision at all. Thus, by requiring that the Contractor make “appropriate revisions” in the face of rejection, the clause implies that the City will reject submittals for appropriate reasons. The City did not reject Nova’s submittals for appropriate reasons in this case (or, at least, the appropriate reasons for the rejections are disputed issues of material fact).

Further, under ordinary principles of contract interpretation, contract clauses are not to be read in isolation. They are to be read in light of, and harmonized with, other applicable contractual clauses. One such clause is § 1-05.1 of the 2012 Standard Specifications for Road, Bridge and Municipal Construction, which applies to this project and states, in relevant part:

Authority of the Engineer The Engineer shall be satisfied that all the Work is being done in accordance with the requirements of the Contract. The Contract and Specifications give the Engineer authority over the Work. Whenever it is so provided in this Contract, the decision of the Engineer shall be final: provided, however, that if an action is brought within the time allowed in this Contract challenging the Engineer’s decision, that decision shall be subject to the scope of judicial review provided in such cases under Washington case law.

Under this clause, decisions of the Engineer, such as decisions rejecting submittals, denying access to the jobsite, or issuing a stop work order on the

project, are subject to challenge by the Contractor through the claim procedure contained in the Standard Specifications (especially § 1-09.11.) (Nova properly initiated this claim process by submitting the claim (CP 289-314) and by thereafter filing suit (CP 3-35).) If the performance of the engineer, including the engineer's review and rejection of submittals, can be the basis of a contractor's claim, then the right to reject submittals is not absolute. Rather, § 1-06.1 of the Special Conditions to this Contract must be read in light of background principles of contract law, including the implied warranty of good faith and fair dealing, the implied warranty not to hinder or delay, the implied warranty of adequacy and sufficiency of plans and specifications, and the statutory prohibition of "No Damages for Delay" clauses in construction contracts (RCW 4.24.360), as argued by Nova in Response to the Motion for Summary Judgment and here.

Under the implied warranty of good faith and fair dealing, Olympia did not have to merely respond to submittals within ten days, it was obligated to consider and process those submittals in reasonable cooperation with Nova "so that each may obtain the full benefit of performance." Olympia did not do so. There is strong evidence, both in the form of expert opinion (CP 245-272) and factual testimony (CP 315-320) that Olympia's processing of submittals was done in a manner that tended to prevent such performance, and which may have been intended to prevent such performance, thus violating the warranty of good faith and fair dealing.

More, asserting that it has an absolute right to reject proper submittals, and thus completely frustrate the performance and progress of the contract, the City of Olympia is making an argument indistinguishable from the argument made by the City of Spokane and rejected in *Lester N. Johnson Co. v. Spokane*:

First, the City contends that it did not breach any terms of the contract. Instead, it argues that the contract expressly authorized the type of activity which occurred here. We disagree. Recent cases have recognized that there is an implied term in every construction contract that the owner or the person for whom the work is being done will not hinder or delay the contractor.

Lester N. Johnson Co. v. Spokane, 22 Wn. App. 265 at 269, 588 P.2d 1214, (1978) (citations omitted). This interpretation would also cause the submittal process to be an improper “no damage for delay” clause to the extent delays were caused by the improper rejection of proper submittals. The clause, on its face, prohibits extension, not damages. Nova sought damages for the delay (the interminable delay) in approving proper submittals, which ultimately led to a complete failure of the project as a result of the breach by Olympia. While contract extensions were prohibited as a result of delays related to rejection of submittals, delay damages were not. Such delay damages are not waivable in advance, and any clause in a construction contract that purports to waive them is void under RCW 4.24.360. However, Olympia’s argument, that it has an absolute right to reject submittals, or to indefinitely delay approving them, even if that practice makes the project unperformable within the time allowed, then § 1-06.1 of the Special Conditions would be an improper “no damages for

delay” clause and would be void. An alternative interpretation, such as seeing it as providing for a less-than-absolute right to be exercised with reasonable discretion, and thus subject to the warranty of good faith and fair dealing, is to be preferred over the City’s interpretation, which opens up the rabbit-hole of RCW 4.24.360.

D. Special Issues Regarding the Testimony of Plaintiff’s Expert, Pita.

The City of Olympia bases a substantial part of its Response on a misleading and inaccurate reading of the testimony of Nova’s expert, Frank Pita. First, the City of Olympia repeats the Trial Court’s misinterpretation of Frank Pita’s preliminary observation that “It is my understanding that Nova is not claiming that the City acted improperly by reasonably rejecting submittals” as meaning that Nova is granting that Olympia acted reasonably in rejecting submittals, which would be a fatal concession. However, the opposite is true. Nova is contending, and Mr. Pita agrees, that Olympia acted *unreasonably and improperly* in rejecting submittals, and this *unreasonable and improper* rejection of submittals prevented project performance and thus breached the warranty of good faith and fair dealing. The balance of paragraph 18 of Mr. Pita’s Declaration makes this clear, concluding with his opinion:

The City’s failure to approve the submittals and allow Nova to work was unreasonable, and may have been an attempt to prevent Nova’s contract performance. This is a breach of contractual duty by the City that completely prevented Nova from performing the work. Because Nova’s failure to perform the work was the result of the City’s prior breach in refusing to approve the submittals in a proper and acceptable

fashion, the actions of the City, and not those of Nova, are the primary cause of the failure of this project.

(CP 253-254.)

Next, the City of Olympia, citing deposition testimony from Mr. Pita that the City had the power to terminate Nova's contract when it became clear that the project could not be performed within the time required by its permits, argues that this shows that Mr. Pita is blessing the City Olympia's determination that Nova defaulted on the contract and was properly terminated for default. This argument plays, deceptively, on an ambiguity in the meaning of "termination." This contract provides for two alternative bases for termination. First, a contractor can be terminated for default if it fails to perform the work due to its own fault. Second, the contract can be terminated for convenience at the discretion of the Owner without regard to the fault of the contractor. If a project cannot be performed in the time available through no fault of the contractor, it is reasonable for the owner to exercise its power to terminate the contract for convenience.

In context, it is clear that Mr. Pita was referring to such a "termination for convenience," rather than a "termination for default," in his deposition testimony. He merely said, it would be "reasonable" to "terminate" the project because it could not be performed in the time left. Elsewhere, as in his declaration, he made clear that Nova did not default and that a "termination for default" was not proper here. This conclusion, and the analysis that supports it,

is presented at length in Mr. Pita's declaration (CP 245-272).

The City argues that Mr. Pita's opinion supports its conclusion that Nova's submittals were inadequate and were properly rejected throughout this project. Mr. Pita's opinion is nothing of the sort. Rather, Mr. Pita notes that (unsurprisingly) some of Nova's submittals were properly rejected as originally submitted, but then he concludes that the submittals should have been approved on resubmission and that the subsequent rejection of resubmitted submittals was unreasonable and improper. (Pita Declaration paragraphs 13-18, especially paragraph 17, CP 251-254).

The City also notes that Mr. Pita acknowledges that the City has discretion in reviewing and rejecting submittals, appearing to conclude from this that Mr. Pita supports its argument that this discretion is absolute. Mr. Pita does not reach this further conclusion. Rather, he opines that the discretion must be exercised reasonably and that the City breached its contractual duties by unreasonably rejecting submittals. (Pita Declaration, paragraphs 11 and 18; CP 249-250; 253-254.)

Finally, the City of Olympia argues that Mr. Pita's ultimate opinion (that Olympia's ephemeral, iterative, unreasonable, and ultimately fatal review and rejection of Nova's Submittals was the primary cause of the failure of this project and a misuse of the submittal process) (Paragraph 18; CP 253-254) is not supported by other evidence and therefore was properly discounted by the Trial Court. This is not accurate. That opinion is based on the description of

how Olympia mishandled submittals on this project, described at length, with project record attachments, in the Declaration of Dana Madsen (CP 315-436).

E. Timeliness of Nova's Claims and Protests

The City of Olympia has argued that Nova failed to timely pursue and perfect its claims under the contract or to timely challenge the City of Olympia's counterclaims. These are new arguments, beyond the scope of this appeal, not made below, and therefore not properly considered here. However, these arguments are also refuted by the record.

Nova made substantial efforts to comply with the City's improper submittal requirements. The Declaration of Dana Madsen, with attachments, details those efforts. (CP 315-436.) When it became clear that the City's abuse of the submittal process was preventing project performance, Nova submitted a proper and timely claim, and later perfected that claim using the process required by the Standard Specification. (See Declaration of Jordan Opdahl, especially Attachments C and D; CP 273-314.)

With regard to the City's claim for liquidated damages, as an affirmative claim by the City, the City has the obligation to timely submit and perfect the claim under the claim provision. *Mike Johnson, Inc. v. County of Spokane*, 150 Wn.2d 375, 78 P.3rd 161 (2003). The City is improperly trying to shift this burden of presentation onto Nova by imposing a burden of protest. Further, while the City of Olympia repeatedly threatened to make a claim for liquidated damages during project performance, it did not make any such claim

until it served and filed its Answer and Counterclaim (CP 38-44) and did not substantiate or price that claim until the Motion for Summary Judgment and subsequent proceedings.

Nova, by timely Answering the Counterclaim, thus timely opposed the liquidated damages claim, raising a *Mike Johnson* affirmative defense to that claim at “C” in its affirmative defenses. (CP 45-47.)

F. The City of Olympia is Not Entitled to Liquidated Damages.

Liquidated damages are available, but are somewhat disfavored and only allowed under limited circumstances, which must be established by the party seeking them. A liquidated damages provision must meet three requirements: (1) the liquidated sum or rate must be a reasonable approximation of what the nonbreaching party’s damages will actually be; (2) the nonbreaching party’s damages must be difficult or impossible to predict accurately, and (3) the liquidated damages clause, as applied in the case, must not be unconscionable. *N.W. Acc. Corp. v. Hesco Constr.*, 26 Wn. App. 823 at 827-28, 614 P.2d 1302 (1980), citing to *Brower Co. v. Garrison*, 2 Wn. App. 424, 432, 468 P.2d 469 (1970); and *Management, Inc. v. Schassberger*, 39 Wn.2d 321, 326, 235 P.2d 293 (1951). In this case, the liquidated damages clause asserted by Olympia and imposed by the Court fails all these requirements.

In response, Olympia seeks to avoid its burden to establish the propriety of the liquidated damages clause and impose a burden of refutation on Nova. This reversal of burden is improper. Nonetheless, Nova has met it.

The arguments against the liquidated damages clause were made by Nova in its Response brief and were not addressed or rebutted by the City of Olympia, either in its Reply brief or its oral argument. In awarding Olympia liquidated damages, the Trial Court also did not address the arguments in the Response brief, merely stating, “That brings up the issue that's not really been argued in great detail about liquidated damages, but I'll just tell you that I believe the city is entitled to liquidated damages.” (RP 30:11-14.) This statement, while true of the oral argument and of Olympia’s briefing, is not true of Nova’s briefing, suggesting that the Trial Court did not read the written materials (at least with regard to liquidated damages), relying entirely on an oral argument in which Nova’s counsel relied on the unrebutted and unaddressed arguments in his brief. This was error and this matter should be reversed and remanded to the Trial Court for full consideration of the arguments that liquidated damages are not proper in this case.

G. Attorney’s Fees

The Trial Court granted Olympia attorney’s fees under RCW 39.04.240 because the amount of the liquidated damages recovery exceeded the amount previously offered in settlement by the City of Olympia. If the liquidated damages award is upheld, then Olympia will be entitled to fees on appeal.

However, if the liquidated damages award is reversed, either for reconsideration of its own merits or because this matter is remanded to trial on all claims improperly dismissed on summary judgment, then the City is not yet entitled to fees on appeal or in the Trial Court.

Nova also made an offer of settlement under RCW 39.04.240 and may ultimately be entitled to a fee recovery under that statute. However, to be so entitled, Nova must prevail and recover an amount in excess of its offer. That is not a possible outcome on appeal, so Nova is not entitled to fees should it prevail on appeal, but is entitled to recover, and reserves its right to recover, fees, including fees on appeal, if Nova ultimately prevails in this case and recovers more than its settlement offer.

V. CONCLUSION

The Trial Court's erred in dismissing Nova's claims, and granting the City of Olympia's counterclaims, on summary judgment. The Court applied a standard of evidence and a burden of proof as if the case were a bench trial, and could not have reached its decision under a proper standard.

The Trial Court also misapplied a *mens rea* standard for the Warranty of Good Faith and Fair Dealing. This implied warranty applies when a party has discretion under a contract term to impose an obligation on the other party. Such discretion must be exercised in a manner that does not undermine the performance of the contract. In this case, the City of Olympia misused its

discretion and prevented contract performance completely. This presents a triable case for breach of the Warranty of Good Faith and Fair Dealing.

Having erroneously concluded that Nova's claim for breach of the Warranty of Good Faith and Fair Dealing failed to meet its burden of proof, the Court further erred in ruling that Olympia was entitled to judgment on its counterclaim for liquidated damages. Olympia had failed to justify those damages, or even argue against the arguments raised by Nova against them. The Court entered judgment for Olympia and struck the trial.

Nova has presented a triable case for its claim and defenses to the City's claim for liquidated damages. The Trial Court erred in dismissing it. This Court should reverse and remand this matter for trial.

SUBMITTED this 6th day of September, 2016.

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CERTIFICATE OF SERVICE

I certify that on the date signed below, I e-filed the foregoing document with this Court, and served it upon Respondent's attorneys via email and legal messenger.

DECLARED UNDER PENALTY OF PERJURY ACCORDING TO
THE LAWS OF THE STATE OF WASHINGTON.

Dated this 6th day of September, 2016, in Olympia, Washington.



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CUSHMAN LAW OFFICES PS

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