

63429-1

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No. 63429-1

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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JANE REARDON, Appellant,

v.

FARMERS INSURANCE COMPANY OF WASHINGTON, Respondent.

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**APPELLANT'S OPENING BRIEF**

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**I. ASSIGNMENT OF ERROR AND ISSUES PERTAINING TO  
ASSIGNMENT OF ERROR**

**A. Assignment Of Error**

The trial court erred when it granted Defendant Farmers Insurance of Washington's summary judgment and dismissed Plaintiff Jane Reardon's claim under the Washington Consumer Protection Act. (Assignment of Error No. 1)

The trial court erred when it reduced the damages awarded by the jury.  
(Assignment of Error No. 2)

**B. Issues Pertaining To Assignments Of Error**

1. Whether Farmers Insurance met its initial burden of demonstrating that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law relating to Ms. Reardon's claim under the Washington Consumer Protection Act. (Assignment of Error No. 1) The standard of review for this issue is de novo.

2. If Farmers Insurance met its initial burden of proof, whether Ms. Reardon met her burden of proof by raising a question of fact as to the element of causation requiring that her claim under the Washington Consumer Protection Act be submitted to a jury. (Assignment of Error No. 1) The standard of review for this issue is de novo.

3. Whether the trial court had discretion to assume that the jury's award was increased by the amount that Farmers Insurance had previously paid to Reardon based upon a question posed to the jury and an answer provided by the court without further instruction to the jury. (Assignment of Error No. 2) The standard of review for this issue is abuse of discretion.

4. Whether the trial court abused its discretion to combine amounts that Farmers Insurance paid under the policy in good faith and not in breach of contract, with the award of damages by the jury for breach of contract and lack of good faith. (Assignment of Error No. 2) The standard of review for this issue is abuse of discretion.

## II. STATEMENT OF THE CASE

Prior to April 7, 2006, Appellant Jane Reardon, the insured, and her grandson resided at her property located at 11702 NE 165th Place, Bothell, Washington 98011. CP 429. On or about April 7, 2006, while Jane Reardon was on vacation, her residence suffered water damage caused by a flooding toilet. Id. Her daughter, Lisa Reardon, discovered the flooding. CP 432. Lisa Reardon immediately contacted four water damage remediation companies, including COIT, but none were available to immediately come to the house. Id. *See also* CP 28-29 (74:9-76:6). At the time of discovering the flood, Lisa

Reardon did not know who carried her mother's homeowners insurance carrier.  
CP 432.

On or about April 11, 2006, Lisa Reardon contacted Farmers Insurance to make a claim on her mother's behalf, and the claim was assigned to Peter Farnung to adjust. *See* CP 432-433. Farmers Insurance accepted coverage of certain portions of Ms. Reardon's claim and denied coverage for other portions. CP 79 (162:9-16); *see also* CP 90-91 and CP 93.

On April 11, 2006, Peter Farnung insisted that Lisa Reardon cancel her appointment with COIT and work with ServiceMaster instead and that she must do so in order to comply the terms of Ms. Reardon's policy. CP 30-31 (80:18-83:14); *see also* CP 68. As a result of numerous actions taken by Farmers Insurance and their failure to properly handle Ms. Reardon's claim over many following months, Ms. Reardon filed a lawsuit alleging Breach of Contract, Failure to Act in Good Faith (Bad Faith), Consumer Protection Act and Negligence/Breach of Contract. CP 444-446. On October 6, 2008, Farmers Insurance filed a motion for summary judgment seeking dismissal of Ms. Reardon's claims arguing that Ms. Reardon had failed to establish that Farmers Insurance's actions caused Ms. Reardon's damages. CP 404-427. Ms. Reardon opposed the motion and on November 7, 2008 the trial court heard oral argument. CP 7-22; VRP 1-39. The trial court ruled in Ms. Reardon's favor on

most of the issues before it, but granted Farmers Insurance's motion as it related to Ms. Reardon's claim under the Washington Consumer Protection Act, dismissing the entire CPA claim while denying summary judgment on the other claims as a result of there being a question of fact on causation. CP 108-109; *comparing* CP 415 to CP 420.

The parties proceeded to trial by jury on the issues of breach of contract and breach of an insurer's duty of good faith where Ms. Reardon prevailed as to both claims.

On February 9, 2009, the jury foreman sent out an inquiry from the jury asking, "Should the total damage amount we provide in answer to Question 4 include amounts already paid by Farmers?" CP 126. The court responded, "Yes." CP 127. The jury then awarded Jane Reardon \$156,500.00 of which Farmers Insurance was responsible for 60%. CP 402. In the final judgment, the trial court ruled that Farmers was entitled to an offset for amounts previously paid to Plaintiff in the total amount of \$65,018.02 and reduced the amount of Farmers Insurance's obligation by that amount. CP 130-131. There were no jury instructions informing the jury as to whether "including" an amount which had already paid by Farmers Insurance would increase the award in favor of Jane Reardon or decrease the award in favor of Jane Reardon. CP 377-400. The trial court's reduction of the jury award necessarily means that the trial court believed

the jury added the amount to be set off into the jury award for damages. CP 130-131. There was no jury instruction related to set off. CP 377-400. There was no claim or affirmative defense plead by Farmers Insurance for set off. CP 390.

### III. SUMMARY OF THE ARGUMENT

Respondent Farmers Insurance did not meet the standard for summary judgment because it failed to meet its initial burden to show there is no genuine issue of material fact **and** it is entitled to judgment as a matter of law on Ms. Reardon's claim under the Washington Consumer Protection Act. Moreover, Petitioner Jane Reardon established in her submissions to the trial court that a question of fact existed that should have been permitted to go to the jury whether Farmers Insurance's actions caused damages to Ms. Reardon under the Washington Consumer Protection Act. (Assignment of Error No. 1)

The trial court abused its discretion when it reduced the jury's award of damages by an amount of benefits previously paid by Farmers Insurance without instructing the jury that the award to Ms. Reardon would ultimately be reduced by this amount and by instructing the jury upon inquiry to "include" the benefits paid by Farmers Insurance in the total damage award. The trial court created ambiguity that did not previously exist. (Assignment of Error No. 2)

#### IV. ARGUMENT

##### A. Standards Of Review

Review of summary judgment is de novo. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). Summary judgment is proper if the evidence viewed in a light most favorable to the nonmoving party, in this case Ms. Reardon, shows there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *Mohr v. Grant*, 153 Wn.2d 812, 821, 108 P.3d 768 (2005), *citing* CR 56(c). “Summary judgment is plainly inappropriate unless the moving party meets its initial burden to show there is no genuine issue of material fact **and** it is entitled to judgment as a matter of law.” *Seattle Police Officers Guild v. City of Seattle*, 151 Wn.2d 823, 847, 92 P.3d 243 (2004) *citing* CR 56(c) and *Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989) (emphasis in original). “If the moving party does not sustain its initial burden to offer factual evidence showing it is entitled to judgment as a matter of law, summary judgment should not be entered, **irrespective of whether the nonmoving party has submitted affidavits or other materials.**” *Seattle Police Officers Guild*, 151 Wn.2d at 848 (citations, internal quotes, and brackets omitted, emphasis added by court in *Seattle Police Officers Guild*). Construing the evidence in the light most favorable to the nonmoving party, the court asks whether a reasonable jury could find in favor of

that party. *Mohr*, at 821, citing *Herron v. KING Broad. Co.*, 112 Wn.2d 762, 767-68, 776 P.2d 98 (1989). (Assignment of Error No. 1)

A trial court's ruling on a question received from the jury during its deliberations is analogous to a ruling on a special verdict form or jury instruction and, therefore, the same standard of review applies: abuse of discretion. See *Caspers v. Bon Marche, Div. of Allied Stores*, 91 Wn. App. 138, 955 P.2d 822 (1998). (Assignment of Error No. 2)

**B. Farmers Insurance Failed To Meet Its Burden Of Proof Under The Standard For Summary Judgment**

The relief requested in Farmers Insurance's motion for summary judgment related only to the elements of **causation** and **damages** with respect to Ms. Reardon's CPA claim. In their opening motion, Farmers Insurance states:

**I. Relief Requested**

Farmers respectfully requests that the Court enter an Order Granting Farmers' Motion for Summary Judgment as to the following issues:

*Causation and Damages* – Farmers asks that the Court rule as a matter of law that Plaintiff has failed to meet her burden of proof as to these essential elements of each of her causes of action against Farmers. There is simply no proof in the record establishing that any of the costs that Plaintiff has incurred over the past two years were caused by some covered event or the acts or omissions of Farmers.

CP 404-405. The relief requested by Farmers Insurance is mirrored in its substantive argument:

Plaintiff has asserted three causes of action...[u]nder each of these causes of action, Plaintiff bears the burden of proof as to **causation and damages**.

CP 416 (emphasis added).

Plaintiff alleges...that Farmers' conduct somehow **caused** the mold growth in her residence...Plaintiff also claims that her personal property was **damaged** because Farmers was directing the work on Plaintiff's contractors.

CP 419 (emphasis added).

Ultimately, Farmers is left with the unenviable task of proving the negative – that **Plaintiff has failed to present evidence supporting the cause and damage elements**. Nonetheless, Farmers asks the Court to parse the record for some modicum of evidence supporting **the causation elements** of each of the causes of action.

CP 419-420 (emphasis added).

In delivering its order granting Farmers Insurance's motion for summary judgment as to Ms. Reardon's claim under the Washington Consumer Protection Act, the trial court stated that it was granting the motion because Ms. Reardon had not addressed all of the elements necessary to establish a CPA claim. VRP 39. However, Ms. Reardon addressed those elements raised by Farmers Insurance, namely only causation and damages, **and** even if Ms. Reardon failed to address all of the elements of the CPA claim, her evidence raised a question

of fact on the elements of causation and damages necessitating a denial of the motion for summary judgment on the other issues and it should have necessitated denial of motion for summary judgment on the CPA claim as well. VRP 39; *see also* CP 7-22; CP 86-98; CP 80-82.

Furthermore, the trial court misapplied the standard for summary judgment. “Summary judgment is plainly inappropriate unless the moving party meets its initial burden to show there is no genuine issue of material fact **and** it is entitled to judgment as a matter of law.” *Seattle Police Officers Guild v. City of Seattle*, 151 Wn.2d 823, 847, 92 P.3d 243 (2004) citing CR 56(c) and *Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989) (emphasis in original). “If the moving party does not sustain its initial burden to offer factual evidence showing it is entitled to judgment as a matter of law, summary judgment should not be entered, **irrespective of whether the nonmoving party has submitted affidavits or other materials.**” *Seattle Police Officers Guild*, 151 Wn.2d at 848 (citations, internal quotes, and brackets omitted, emphasis added by court in *Seattle Police Officers Guild*).

The initial burden of proof is on Farmers Insurance and although they lamented that they were “left with the unenviable task of proving the negative” that was their burden of proof to provide upon moving for summary judgment and they failed to do so. *See* CP 419. Farmers Insurance did not provide

sufficient evidence that their actions were not the cause of Ms. Reardon's injury, whether in the form of defensive evidence demonstrating some other cause, or evidence establishing that their actions could not have been the cause. *See id.* Instead, Farmers Insurance invites the trial court to review the record presented by Farmers Insurance for Ms. Reardon's evidence of causation. CP 419-420. That invitation does not satisfy, "the moving party['s burden to] meet[] its initial burden to show there is no genuine issue of material fact **and** it is entitled to judgment as a matter of law." *Seattle Police Officers Guild*, 151 Wn.2d at 847. As demonstrated below, Ms. Reardon's response raised a question of fact as to the elements of causation and damages.

Similarly, Farmers Insurance failed to argue or provide evidence as to the additional elements of: unfair or deceptive act or practice, occurring in trade or commerce, and public interest impact. *See Ledcor Industries (USA), Inc. v. Mutual of Enumclaw Ins. Co.*, 150 Wn. App. 1, 12, 206 P.3d 1255 (2009). Rather, Farmers Insurance only cited elements and stated that Reardon has the burden to prove these elements. Farmers Insurance did not argue any of the remaining elements other than proximate cause.

Finally, the trial court's order of Farmers Insurance's motion for summary judgment as to the claim under the Consumer Protection Act when it denied Farmers Insurance's motion for summary judgment as to Ms. Reardon's claim for breach of the duty of good faith contradicted established law. "[B]ad faith constitutes a per se violation of the CPA." *Ledcor Industries (USA), Inc. v. Mutual of Enumclaw Ins. Co.*, 150 Wn. App. 1, 12, 206 P.3d 1255 (2009). The trial court determined that the evidence viewed in the light most favorable to Ms. Reardon could not result in summary judgment on her claim for breach of an insurer's duty of good faith, including causation and damages, and should have reached the same conclusion relating to Ms. Reardon's CPA claim based on the evidence before the trial court.

Because Farmers Insurance failed to meet its burden under the standard for summary judgment, its motion for summary judgment should have been denied and Ms. Reardon's claim under the Washington Consumer Protection Act should be remanded to the trial court for trial.

C. **A Question Of Fact Regarding The Elements Of Causation And Damages Exists Requiring That That Ms. Reardon's CPA Claim Be Submitted To The Jury**

During the litigation of the suit, Ms. Reardon engaged Jay K. Thorne, who performs consulting services for both policyholders and insurance companies on a variety of insurance related matters, as an expert witness. *See* CP 86-98. Mr. Thorne opined,

The custom and practice that I have observed is for insurers to have in place standards and procedures for claims personnel to follow in order to meet or exceed any statutory requirements imposed by the various states in which the insurance company does business. It is also the custom and practice for these standards and procedures to meet or exceed the company's legal and ethical responsibilities to act in good faith and deal fairly with the public. ... It is also custom and practice in the industry for the standards and procedures implemented by the company's claim handlers to meet or exceed the insurance company's own legal and ethical responsibilities to act in good faith and deal fairly with the public.

CP 87-88.

Mr. Thorne's declaratory testimony, as well as Jane and Lisa Reardon's, and Leo Birdsall's supporting testimony, establishes that a question of fact exists whether Farmers Insurance's actions caused injury to Ms. Reardon. *See* CP 86-98, CP 99-107, CP 80-82, and CP 83-85. Ms. Reardon has suffered damage and incurred damages as a result of Farmers conduct in this matter.

Mr. Thorne pointed out that,

Farmers did not act in accordance with minimum industry standards, ...by failing to adopt and implement reasonable standards for the prompt investigation and evaluation of claims arising under Farmers insurance policy number 91260-19-23 ... Farmers made no good faith attempt to adopt and/or implement any reasonable standards in order to comply with WAC 284-30-330 ... The Farmers claim representative[, Peter Farnung] did not know of or identify any specific or written claim standards or procedures that were used in adjusting the Reardon claim ... the initial investigation should include; but not be limited to, 1) how long the water was running undetected into the structure; 2) the potential for water inside of ceiling or wall cavities and under or behind cabinets; 3) the potential for water into ductwork; 4) the potential for water into areas on the lower levels of a structure. **[Mr. Farnung] walked the dwelling with ServiceMaster and used that information for his initial scope of damage. [Mr. Farnung] never inquired how long the water ran, the amount of water that ran through the dwelling, whether any water entered the air ducts, the moisture condition below the master bath cabinet or the wall behind the cabinet, etc. Ms. Reardon inquired about and noted various areas of water damage and Farmers did little or no investigation into those areas until weeks or months after noted by the insured.**

CP 88-89 (emphasis added).

Farmers simply failed to determine the amount of water that entered the dwelling and delayed or ignored the insureds complaints of areas that were still wet. **As a direct result of Farmers failure to provide a reasonable and prompt investigation of the water damage to the Reardon dwelling as a very serious loss, it became a catastrophic water damage loss.**

CP 89 (emphasis added).

Mr. Thorne also testified,

Rather than trying to get Ms. Reardon's home back to a pre-loss condition, Farmers simply failed to provide any true scope for damage repairs. [Mr. Farnung] indicated that there was no water that entered and/or damaged the crawl space, yet he was not aware that the home even had a crawl space until he was told at deposition. **As a direct result of Farmers failure to provide any complete scope of the water damage to the Reardon dwelling, a very serious water damage loss ultimately became a catastrophic water damage loss.**

CP 90 (emphasis added).

As a direct and proximate cause of Mr. Farnung's failing to provide any form of an agreed or reasonable scope for actual damage repairs, Ms. Reardon was left to determine the scope of repairs as she went along to the best of her ability repairing that which the contractors and persons such as Leo Birdsall indicated needed to be repaired. *See* CP 81.

Both Jane and Lisa Reardon provided similar declaratory evidence supporting this fact:

As a direct and proximate cause of Farmer's representative failing to provide any form of an agreed or reasonable scope for actual damage repairs, I assisted my mother in determining the scope of repairs as we went along to the best of my ability repairing that which the contractors and persons such as Leo Birdsall indicated needed to be repaired.

*See* CP 84; *see also similar* CP 81.

Mr. Leo Birdsall's declaratory testimony was extensive as to what needed to be replaced. This was the proof of damage that was proximately caused by Farmers Insurance failing to provide an agreed or reasonable scope for actual damage repairs:

In June, 2006, I was called out to the home to meet with the homeowner's daughter, Lisa Reardon, the homeowner, Jane Reardon and the insurance representative from Farmers Insurance. I was specifically directed to areas of the home including the garage directly below the location of the catastrophic water damage that occurred in April 2006. I relied upon the Farmers Insurance representative to point me to the areas in which he was investigating for water intrusion and/or damage. I did not investigate the location of water damage and relied upon the claims representative for this. In the areas pointed out to me, I could identify areas of the garage ceiling that needed to be replaced rather than repaired as a result of the toilet water event, and areas of the adjacent walls that similarly had water damage to them from the toilet leak. I could also see that these areas had been damaged by mold as well as water.

From my experience, knowledge, training, and expertise, I have found mold to be hidden in the back side of sheetrock, within wall cavities, in insulation, under carpet, under carpet pad, within the subflooring, under the subflooring, and within ductwork. In this case, I was called out to the house several more times within the next 16 months to look at other areas to determine if they too were damaged similarly to the garage ceiling and walls. In the subsequent visits I was asked to provide an opinion on additional areas of the home pointed out to me. I determined that there were several other areas affected by the water damage from the toilet overflow and was able to determine that there were several other areas in the home that similar to the garage needed to be repaired or

replaced as a result of the water damage and resulting mold damage.

Over a period of months, I viewed the subfloor and the water stains on the subfloor, I viewed the walls in the downstairs hallway, the kitchen cabinets and the wall behind the kitchen cabinets. We originally thought that mold remediation would be the least costly and effective protocol for ridding the home of the mold where the water damage had been. While this was somewhat effective, ultimately it was necessary to remove the subfloors as the water damage had been too extensive to repair otherwise. I witnessed the kitchen cabinets and the wall on the back side of the kitchen cabinets and saw water damage and subsequent mold growth which resulted from water damage. The cabinets were falling apart and the wall was not salvageable and the subfloor was puffed up due to the water penetration into the subfloor material. The mold that I witnessed in the home appeared, in my professional opinion, to be a direct result of the catastrophic water loss rather than a long term mold growth from another source.

I also viewed some of the personal property at the home and learned that additional personal property had been packed away wet both before and after my initial visit, or was taken away without knowing whether it had gotten wet. I advised that any personal property that had gotten wet, and then been packed away without first being dried, not be brought back into the home due to mold spores. That personal property must not be allowed back into the home.

I further recommended that the bathrooms and kitchen areas no longer have carpeting and carpet pad. These are areas that mold can occur if there has once been a significant amount of mold in the home. I suggested that the installation of wood be preferable versus carpet because carpet has a tendency to harbor water longer and therefore would be conducive to mold growth. [Since

there had been a significant amount of mold where the water damage had been, it is my opinion that this home should not have carpeting because if future water is[] that any spores that remain in the home do not result in further mold damage.] .

I am aware that the home contained stachybotrys mold. This mold is not benign. Based upon my experience, training, and knowledge, it is a mold that is harmful particularly to those persons with asthma or other breathing issues. Stachybotrys and other molds need water, food and a place to hide therefore in my expert opinion this is another reason why carpet should not be installed. It is a type of mold that is also particularly harmful to any organic material such as sheetrock, wood, some types of insulation, and other material found in Ms. Reardon's home. There is no question that stachybotrys mold had to be removed for the health, safety and well being to the building and occupants therein.

When I was in the home, I smelled a musty wet smell that exists in homes with water damage that have not been fully or properly restored. In this case, the home was not livable until after the mold condition was corrected and samples taken. . Once the mold condition had been corrected and samples taken, one indoor and one outdoor sample to provide proof that the indoor mold has been reduced to a level equal to or less than the mold on the outside of the building then the home is deemed livable.

CP 101-103.

The costs Jane Reardon incurred as a result are damages she suffered because of Farmers Insurance's conduct. *See* CP 80-82; *see also* CP 83-85.

Mr. Thorne further testified,

Farmers noted areas of water damaged sheetrock and tack strips in the master bath and correctly included them in the water damage scope. The items needed to be replaced because of the water damage and not because of mold that was present on them. Later, it was determined that ceiling and wall sheetrock and insulation in the garage were water damaged and still wet **because of the delay in investigation**, yet Farmers refused to treat these areas the same as those found in the master bathroom. The sheetrock and insulation were wet and required replacement even without the presence of mold.

CP 90 (emphasis added).

The costs incurred in replacing the sheetrock, the painting, the replacement of the subflooring, the replacement of insulation, replacement of the kitchen cabinets, cleaning of the ductwork, mold abatement, and attempts at further water remediation and drying out of the home were all costs Ms. Reardon had to incur, and would not have incurred but for Mr. Farnung's failure to adequately investigate. *See* CP 80-82; *see also* CP 83-85 and CP 90-91.

Further, Ms. Reardon suffered damage to her personal property as a direct result of Farmers Insurance's conduct. CP 90-92. It is the contractual duty of Farmers Insurance to inventory Ms. Reardon's personal property and that responsibility cannot be handed off to a third party. *See id.* Ms. Reardon's personal property was removed from her home. Neither Ms. Reardon nor Lisa Reardon knew where the personal property had been taken nor was there any

assistance from Mr. Farnung to prepare an actual inventory other than the beginning of one which was of items of such infinitesimally small value, that it was not relevant. CP 81; CP 84. Moreover, Ms. Reardon was informed that any items that were wet and packed without being dried should not be brought back into her home. CP 102. Ms. Reardon did not know the location where her property was taken nor was there any assistance from the Farmers Insurance representative to prepare an actual inventory. CP 81; CP 84. Neither she nor Lisa Reardon knew where her personal property was located until well into the litigation and there was never a complete or adequate inventory created. *Id.* As a direct and proximate result, Ms. Reardon purchased those items that she needed to live in the manner in which she had previously lived to the best of her ability and therefore she incurred those costs because of Farmers Insurance's conduct. *Id.*

Ms. Reardon's claim under the Washington Consumer Protection Act against Farmers Insurance arises from the conduct of Farmers Insurance and the above cited evidence demonstrates that Farmers Insurance caused damage that Ms. Reardon suffered resulting in the damages she incurred. *See* CP 81, 84; CP 86-94; CP 101-103. Ms. Reardon's evidence raises a question of fact sufficient for denial of Farmers Insurance's motion for summary judgment, and Ms.

Reardon's claim under the Washington Consumer Protection Act should be remanded to the trial court for an award.

**D. Ms. Reardon Requests An Award of Attorney Fees And Costs On Appeal**

Ms. Reardon requests that she be awarded attorney fees and costs for this appeal under RCW 19.86.090, and that the Court of Appeals include language in its decision that should Ms. Reardon succeed on her CPA claim upon remand that the fees and costs associated with this appeal be included in any award of attorney fees and costs under RCW 19.86.090 at such time.

**E. Common Language Should Be Used In Construing The Damages Verdict**

The jury asked the question "Should the total damage amount we provide in answer to Question 4 include amounts already paid by Farmers?" CP 126.

The question from the jury was viewed from two distinct positions. Reardon believes that the jury was asking whether they were to reduce the damages award by the amount already paid by Farmers Insurance because they were given that amount in the jury instructions. CP 394. Farmers Insurance believes that the jury was asking whether to add in the amount that they were given in the jury instruction into the damages award. CP 394. In common language, when a payment is included against an obligation owing, it is a reduction towards the obligation. For example, if on a promissory note, the

obligation is \$100,000, yet \$60,000 in payments had been made, the answer to the question as to how much is owed on the promissory note would be \$40,000 if one “includes” the payments made. If the payments were not included, then the amount owed would be \$100,000, and the Court could then deduct the payments made.

In this case, since the Court said, yes, to the question of whether to include the payments, then it is only proper to conclude that the jury already reduced the amount owed by the payments made. CP 126-127. The plain meaning of the word “include” when it is a payment and when you are including it into a calculation of an obligation owed is to deduct it as already paid.

**F. Deducting Farmers Insurance’s Non-Litigated Payments To Jane Reardon From “Damages” Is Improper**

It is illogical to include the amount previously paid by Farmers Insurance into the damages for lack of good faith damages and breach of contract damages because the amounts paid were not “damages” for breach of contract or lack of good faith. CP 394. In fact, those amounts were the amounts that were paid according to the contract and in good faith. *Id.* They were not included in the actual damages proven at trial because those amounts paid were uncontested and because there was no dispute that they had been properly paid under the policy. *Id.*

Damages measure the amount that the insured was harmed by the insurer's breach of contract or lack of good faith. In order to receive damages, Ms. Reardon was required to demonstrate that Farmers Insurance breached the policy or failed to act in good faith, that those actions of Farmers Insurance proximately caused harm to her, that she sustained damages as a result, and the amount of those damages. CP 388; CP 390. Damages do not include the amount Farmers Insurance properly paid to Ms. Reardon in the handling of her insurance claim because those amounts did not arise as a result of harm caused by Farmers Insurance.

A party injured by a breach of contract, in this case the policy, "is generally entitled to those damages **necessary** to put that party in the same economic position it would have occupied had the breach not occurred." *TMT Bear Creek Shopping Center, Inc. v. Petco Animal Supplies, Inc.*, 140 Wn. App. 191, 210, 165 P.3d 1271 (2007) (internal citation omitted) (emphasis added); *see also Greer v. Nw. Nat'l Ins. Co.*, 109 Wn.2d 191, 202, 743 P.2d 1244 (1987). Thus, damages for breach of the insurance policy do **not** include the amount Ms. Reardon received as proper payment from Farmers Insurance during the handling of her claim because that amount is not necessary to put her in the position she would have been if the breach had not occurred. She received those amounts regardless of Farmers Insurance's breach.

Where an insured has proven that her insurer failed to act in good faith, by proving actual harm, her “damages are limited to the amounts [she] has incurred **as a result** of the bad faith ... as well as general tort damages.” *St. Paul Fire and Marine Ins. Co. v. Onvia, Inc.*, 165 Wn.2d 122, 133, 196 P.3d 664 (2008) quoting *Coventry Assoc. v. American States Ins. Co.*, 136 Wn.2d 269, 285, 961 P.2d 933 (1998) (emphasis added). The tort claim of bad faith does not limit an insured’s damages “to the economic damages within the contemplation of the parties at the time when the contract was made.” *Coventry*, 136 Wn.2d at 284. In other words, the insurer is not liable to the insured for the policy benefits but rather, for “the consequential damages to the insured **as a result of the insurer’s breach** of its contractual and statutory obligations.” *Id.* (emphasis added). Again, Ms. Reardon’s “consequential damages” do not include the amount Farmers Insurance previously paid to her as benefits because they did not arise **as a result of** Farmers Insurance’s breach of its duty of good faith. By instructing the jury to include the amount contained in the jury instructions and further instructing the jury that Farmers had paid \$65,018.02 in benefits the Court erred in mixing benefits with damages. CP 126-127; CP 393-394.

In *Besel v. Viking Ins. Co. of Wisconsin*, 146 Wn.2d 730, 49 P.3d 887 (2002), the court examined whether a covenant judgment may be used as a presumptive measure of harm caused by an insurer's failure to act in good faith. While Ms. Reardon's case does not involve a covenant judgment, the court's comments in *Besel* are instructive because the reasoning is based on the general principle, applicable here, that the measure of damages arises from the harm **caused** by the insurer:

We hold the amount of a covenant judgment is the presumptive **measure of an insured's harm caused by an insurer's tortious bad faith** if the covenant judgment is reasonable under the *Chaussee* criteria. This approach promotes reasonable settlements and discourages fraud and collusion. Furthermore, using the amount of a covenant judgment to measure tort damages in this context makes sense in light of our long standing requirement that such settlements be reasonable. If a reasonable and good faith settlement amount of a covenant judgment does not measure an insured's harm, our requirement that such settlements be reasonable is meaningless.

*Id.* at 738-739 (emphasis added).

Damages include only the amount the insured was harmed as a result of the insurer's actions, and the verdict form in this case reflects that basic principle. CP 402. The jury was told by the trial court to include the amounts previously paid as benefits or on behalf of Jane Reardon into the total damage amount provided by the jury on the special verdict form. CP 126-127. The trial

court's answer to the jury question is neither consistent with the trial court's instruction on damages (CP 393), nor with questions 3 and 4 of the Special Verdict Form. (CP 401-402), nor with the language of the court's instruction to the jury regarding the benefits paid (CP 394).

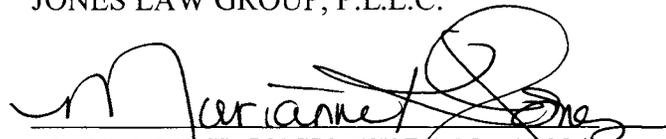
## V. CONCLUSION

The trial court denied Farmers Insurance's motion for summary judgment as to causation yet despite causation being an element of the CPA claim, the trial court granted Farmers Insurance's motion for summary judgment. The trial court did not require Farmers Insurance to meet its burden of proving no fact issues exist as to all of the elements of the CPA claim and merely because Farmers Insurance cited (but did not argue) the elements of the CPA claim, the court required Jane Reardon to argue each of the elements. The facts exist within the record to prove each of the elements, but since the Motion for Summary Judgment only argued the causation element that was the element argued in the opposition to Summary Judgment. Jane Reardon did not have the burden to provide opposing argument to anything other than what Farmers Insurance originally argued in its moving papers. The trial court's order granting summary judgment on the CPA claim should be remanded for further trial court proceedings.

The jury found that Farmers Insurance breached its contract with Jane Reardon and it failed to act in good faith. CP 401. The jury further found that Farmers Insurance's breach caused damages and that its failure to act in good faith proximately caused damages to Jane Reardon. CP 401. "Damages" was specifically defined to the jury. CP 393. Until the inquiry from the jury arose, there was no commingling of terms with benefits paid to Jane Reardon and damages. The court abused its discretion and erred when it answered the jury's inquiry with simply "yes." The trial court should have declined to answer or the trial court should have made clear to the jury and counsel in any instructions that it intended to deduct the amount of benefits previously paid from the amount of the jury award. The final judgment should be remanded for further trial court proceedings.

RESPECTFULLY SUBMITTED this 28<sup>th</sup> day of September 2009.

JONES LAW GROUP, P.L.L.C.

A handwritten signature in black ink, appearing to read "Marianne K. Jones", is written over a horizontal line. The signature is stylized and somewhat cursive.

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COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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JANE REARDON, Appellant,

v.

FARMERS INSURANCE COMPANY OF WASHINGTON, Respondent.

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**DECLARATION OF SERVICE**

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COURT OF APPEALS DIVISION I  
STATE OF WASHINGTON  
2009 SEP 30 AM 10:55

I, Erin M. Vaughn, hereby certify under penalty of perjury under the laws of the State of Washington, that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of 18 years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below, I cause to be served true and correct copies of Appellant's Opening Brief and this Declaration of Service on the following persons and manner indicated.

1. Court of Appeals, Division 1

Place: One Union Square  
600 University Street  
Seattle, WA 98101-1176

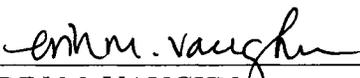
Manner: By mail

2. Mr. Thomas Lether  
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SIGNED at Bellevue, Washington, this 28<sup>th</sup> day of September 2009.

  
ERIN M. VAUGHN