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No. 71424-4-I

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

CHERYL STREMKE, a single person; TYE PANZONE, a married person; JAMI PANZONE, husband and wife; and UNITRIN, INC., d/b/a UNITRIN AUTO AND HOME INSURANCE COMPANY, d/b/a KEMPER, a foreign corporation,

Plaintiffs/Respondents,

v.

FISHER & PAYKEL APPLIANCES, INC., a California corporation,

Defendant/Appellant,

and

LOWE'S HIW, INC., a Washington corporation,

Defendant.

**APPELLANT FISHER & PAYKEL APPLIANCES, INC.'S
OPENING BRIEF**

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I. INTRODUCTION

On the evening of Tuesday, July 1, 2008, fire damaged parts of an Auburn residence owned by Cheryl Stremke. The origin and cause of the fire, and the extent of resulting damage are in dispute.

One day after the fire, Stremke and her insurance company (Unitrin Auto and Home Insurance Company d/b/a Kemper (“Unitrin”)) decided that the fire originated inside a clothes dryer in the laundry room. Although there were other possible (and more plausible) explanations, none were investigated. Unitrin retained parts of the dryer system and transported them to a lab, and destroyed the dryer’s ducting and ventilation system. Unitrin opined that the cause of the fire was an electrical failure inside the dryer. Fisher & Paykel Appliances, Inc. (“F&P”), which manufactured the dryer, did not even learn about the fire until more than a month later. Then, fifty days after the fire, F&P was given first access to the retained dryer parts and confirmed that Unitrin/Stremke’s theory was incorrect. By that time, the remaining dryer system parts had been destroyed and demolition of the home was underway; as a result, F&P was unable to conduct its own causation investigation.

Unitrin paid \$538,071.55 to Stremke (including \$272,000 for real property repairs/upgrades and \$176,000 to replace personal property), and

then teamed up together against F&P. Unitrin/Stremke pursued (1) a product liability subrogation action¹ to recover \$538,071.55 paid to Stremke by Unitrin, (2) additional damages claimed by Stremke that her insurance company declined to pay, and (3) claims for treble damages and attorney fees under Washington's Consumer Protection Act ("CPA") based on a theory that F&P knew the dryer was defective, yet failed to warn Stremke and other customers of the associated fire danger. The premise underlying all of these claims was that there was a defect inside the F&P dryer that caused an electrical failure that, in turn, caused the fire.

During trial, Unitrin/Stremke offered evidence that F&P knew that the heating elements in some dryers had failed, coupled with images of the charred remains of Stremke's dryer. In its defense, F&P presented evidence that failure of the heating elements was not the cause of the fire, including (1) the dryer's "black box" that confirmed Stremke's dryer had not been producing heat for some time, and (2) photos of the thermostat button covered in lint in an extended "tripped" or "fail safe" position (meaning that, long before the fire, electricity had been disconnected automatically as a safety measure), and (3) burn patterns inside the dryer that were inconsistent with Unitrin/Stremke's theory. F&P theorized that

¹ In a subrogation action, an insurer that has paid its policyholder's loss stands in the shoes of its policyholder to pursue an action against allegedly responsible parties. See *Mahler v. Szucs*, 135 Wn.2d 398, 411, 957 P.2d 632 (1998).

the fire started elsewhere and thereafter burned the dryer. However, F&P's ability to explain where and how the fire started was severely hindered by Unitrin/Stremke's destruction of the dryer's ducting and ventilation system, and premature demolition of parts of the home. The trial court's refusal to give the jury a spoliation instruction (under which all inferences about the destroyed evidence were to be made against Unitrin/Stremke) was exploited by Unitrin/Stremke's counsel, who ridiculed F&P for not being able to prove where or how the fire started.

At the end of trial, the jury determined that a defect in F&P's dryer proximately caused Stremke's damages. It awarded \$537,612 on the \$538,071.55 subrogation (product liability) claim and \$537,612 on the CPA claim, but concluded that the entire CPA award (supported by evidence that the trial court characterized as "very, very thin") was duplicative of the subrogation award. Although the trial court properly declined to award treble damages under the CPA, it nonetheless awarded CPA attorney fees in the amount of \$624,354.75. Including damages, attorney fees, and costs, the grand total awarded to Unitrin/Stremke as joint creditors was \$1,165,594.62.

For the reasons discussed below, this Court should reverse and vacate the judgment, dismiss the CPA claim (including the CPA attorney fee award) as a matter of law, and remand for trial on the product liability

claim before a properly-instructed jury with instructions that personal property damages are not recoverable as a matter of law.

II. ASSIGNMENTS OF ERROR

1. The trial court erred by denying pre-trial relief on the spoliation issue (CP 222), refusing to give a spoliation instruction to the jury (RP 1195), and by improperly informing the jury of the law. CP 2364-95.
2. The trial court erred by denying F&P's motions for directed verdict, judgment as a matter of law, and new trial. RP 853; CP 3545-46; CP 3641-42.
3. The trial court erred by refusing to instruct the jury on the proper measure damages. RP 405, 853; CP 4184-4195.
4. The trial court erred by preventing F&P from presenting expert testimony on damages. RP 962.
5. The trial court erred by awarding \$624,354.75 in CPA attorney fees (CP 4184-95) and by entering judgment with Unitrin and Stremke listed as judgment creditors. CP 4213-15.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court denied a defendant due process, necessitating reversal, by refusing to instruct the jury that all inferences from destroyed evidence would have been unfavorable to Unitrin, the party that destroyed the evidence?
2. Whether the trial court erred by refusing to direct a verdict dismissing the CPA claim, given that no evidence was presented that the alleged defect in the product at issue caused any fire?
3. Whether the trial court erred by awarding \$624,354.75 in CPA fees because that sum is patently unreasonable as compared to the amount in controversy and because that sum does not reflect work done solely on the CPA claims that were prosecuted on Stremke's behalf?

4. Whether the trial court erred by refusing to direct a verdict dismissing the personal property damages claim, given that no evidence was presented on the elements set forth in the jury instruction requested by the plaintiffs and that the jury was not allowed to consider any opposing evidence on these damages?
5. Whether the trial court erred by refusing to instruct the jury to measure damages using the “lesser than” rule that applies to partially damaged real property that is capable of repair?

IV. STATEMENT OF THE CASE

A. The Fire, the Investigation, and the Repairs.

On July 2, 2008, fire damaged parts of Stremke’s residence located at 2110 Ginkgo Street SE in Auburn, with resulting damage to some, but not all, of the home’s interior. CP 4766-73; RP 405. One day after the fire, Stremke’s insurance company, Unitrin, hired an investigator who examined the home with her cooperation. RP 352, 434; CP 4. That same day, a determination was made by Unitrin that the fire originated inside the dryer in her laundry room. RP 367, 397. Unitrin released the fire scene and transported the dryer (including its parts and components) more than fifty miles from Auburn to Whidbey Island. RP 352, 396; CP 122. Unitrin did not retain or preserve: the dryer’s ventilation system; the power outlets, electrical wiring, light switches, or any of the other components of the electrical system located in the laundry room; the

partially burned clothing and debris found behind and under the dryer; or the washing machine.² RP 460, 736, 809, 1010-11; CP 4772.

Unitrin's investigator released the house to the owners that same day (July 2, 2008) and repairs commenced in early July. RP 352, 388-89, 396; *see* RP 225-26. Demolition of damaged parts of the home began in mid-August. RP 236-37, 249.³

B. More than One Month After the Fire, F&P (the Dryer Manufacturer) Was First Notified of the Fire.

F&P, the manufacturer of the dryer, did not receive notice of the July 1, 2008 fire until more than one month later on August 5, 2008. This first notice came from Unitrin, inviting F&P to have a representative present for the "next phase of the investigation," namely the "destructive testing of the failed unit." CP 27534; RP 868. Unitrin, which was storing the dryer on Whidbey Island, did not allow F&P to see the dryer until

² Also not retained was water remaining in the washing machine that could have confirmed the presence of flammable chemicals from Stremke's son, who lived in the house at the time of the fire and worked as a floor refinisher. RP 407.

³ Demolition started on or before August 14, 2008. *See* RP 237 (confirming that demolition started five or six weeks after the initial walkthrough, which took place one or two days after the July 1, 2008 fire).

⁴ Although the letter reflects a July 21, 2008 date, during trial the parties stipulated that F&P did not receive notice until August 5, 2008. *See* RP 769-74. Accordingly, the jury was instructed as follows: "The parties agree that a letter dated July 21, 2008 was sent to Fisher & Paykel, in which it was alleged that Ms. Stremke suffered damage to her home caused by failure of the dryer Fisher & Paykel acknowledges receipt of a copy of this letter no later than August 5, 2008." CP 2376.

August 20, 2008. RP 482, 868.⁵ F&P had no reason to believe that a more extensive investigation of the home was necessary until after the August 20, 2008 dryer examination. By that date, it is undisputed that the residence had been stripped to the studs, with the drywall, electrical and insulation removed and the 2x4 wall studs spray sealed. RP 233-38.⁶ As a consequence, F&P's ability to evaluate the fire scene was limited to reviewing photos taken during the initial investigations by Unitrin and the fire department. CP 147; RP 976, 1003, 1037.

In total, Unitrin spent more than \$272,768.78 to make repairs⁷ to a partially-damaged residence that was worth only \$190,000 before the fire. RP 240; CP 1890-1963,⁸ 2115-21. Despite this, Stremke remained dissatisfied with the amount paid for the residence and Unitrin's insurance valuation based on the personal property's replacement cost. CP 4223.

⁵ Unitrin represented that the first available date for F&P to visit the lab in Clinton, Washington on Whidbey Island where the dryer was being stored was August 22, 2008, but F&P was able to make special arrangements to conduct the investigation two days earlier on August 20, 2008. RP 868.

⁶ See RP 234-35 (explaining that the laundry room "ended up having to be completely gutted [taken down to the framing] and smoke sealed ... framing ... had to be broken all the way down and stripped out"); RP 238 ("the kitchen was totally removed ... it was gutted down to the bare framing").

⁷ Unitrin/Stremke presented testimony that an estimate identifying a "Replacement Cost Value" for \$272,768.78 in proposed repairs accurately reflected the work done to the Stremke home. CP 4734-63; RP 231.

⁸ The appraisal report shows \$260,000 for the home and the land combined, with \$70,000 of that sum attributable to the land (which was not impacted by the fire).

C. Stremke Sues F&P and Then Unitrin.

In an effort to recover additional sums, Stremke filed suit against F&P, asserting only a product liability claim. CP 1. Unable to reach agreement with Unitrin on certain parts of the claim, including the valuation of personal property lost in the fire, Stremke⁹ added Unitrin as a defendant in the lawsuit. CP 8-11, 4223. Unitrin, in turn, asserted a counterclaim against Stremke. CP 22-23.

D. Unitrin Teams Up with Stremke Against F&P.

Despite the adversarial positions taken throughout the lawsuit, Unitrin and Stremke settled the claims between them and joined forces together against F&P.¹⁰ CP 85-86.¹¹ The parties were formally realigned, with the formerly-adverse homeowner now being represented by her insurance company's attorney. CP 108-13.

Shortly before the close of discovery and nearly three years after the lawsuit was initiated, Unitrin/Stremke (over F&P's objection) added a new claim for violations of the Consumer Protection Act ("CPA"). CP 105-06, 422-30, 433-439, 796, 1162-71. The alleged basis for the

⁹ Stremke's adult son (Tye Panzone) and his wife (Jami Panzone), who were living in the residence at the time of the fire, were also named as plaintiffs. CP 108-13.

¹⁰ Another defendant, Lowe's, was also added and thereafter settled. CP 108-13.

¹¹ The trial brief filed by Unitrin's counsel explained that "Unitrin and the insureds [Stremke] reached an agreement ... in order to work together as plaintiffs in the pursuit of Fisher [& Paykel]." CP 1650.

CPA claim¹² was that F&P had prior knowledge about the potential for electrical fires in its dryers associated with heating elements, but failed to fix the problem or warn customers of the associated fire risk. CP 1655. Thus, the CPA claim could only succeed if the jury accepted, among other things, Unitrin's explanation of the cause of the fire.

E. Unitrin Selectively Preserved One-Sided Evidence at the Fire Scene, Prevented F&P From Investigating, and Then Blamed F&P for the Missing Evidence.

1. Unitrin/Stremke's Theory: Fire Started Inside the Dryer.

Unitrin/Stremke's causation theory was that the fire was caused by an electrical failure inside the dryer. CP 201; RP 397, 677.¹³ Under this theory, the fire started when heating elements inside the dryer failed, causing a buildup of lint inside the dryer cabinet (or metal box) to ignite. RP 726, 736-37; CP 153-58. Notably, Unitrin/Stremke never provided a plausible explanation for how failed (non-heat producing) heating elements could possibly ignite a fire,¹⁴ opting instead to show the jury

¹² The CPA prohibits "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." RCW 19.86.020.

¹³ Unitrin/Stremke had an expert who testified during trial that he was first contacted by Unitrin's counsel two years after the fire "to see if [he] could determine what the cause of the fire was." RP 677. Although that expert never investigated the fire scene (RP 680), he testified that he believed that the fire started in the dryer. RP 682.

¹⁴ Even assuming as Unitrin posited, that the dryer heating elements had broken, this could not have been the cause of the fire because broken heating elements produce no heat at all. RP 483-84.

charred dryer parts and argue simply that “a clothes dryer should not catch fire.” RP 1243.

2. F&P’s Theory: Fire Started Outside of the Dryer.

When F&P was finally given the opportunity to examine the parts of the dryer that Unitrin selected for retention, it became apparent that any failure of the heating elements inside the dryer could not possibly have been the cause of the fire.

First, the parts confirmed that the dryer’s operation before the fire, the dryer was not even producing heat. The dryer contained a “black box memory system that records the previous 200 minutes of operation and prints out a report[.]” RP 970. The report for the Stremke dryer confirmed there was only a three-and-a-half degree difference between the high and low temperatures during the recorded cycles, even though the dryer was on the “denim” (highest heat) setting. RP 973, 1095, 1098.¹⁵ In addition, the dryer cycles varied in length depending on the moisture in the clothes as detected by the dryer. RP 1094-99. The most recent cycle recorded in the Stremke dryer, which had a normal cycle length of 45 to 55 minutes was one hour and 58 minutes. RP 1094-98.

¹⁵ At the time of the fire, expert testimony was presented that it is not unreasonable to assume that the ambient temperature in the laundry room, which had south-facing doors, was close to the temperatures recorded in the dryer, *i.e.*, in the 80s and 90s Fahrenheit. RP 1095-1104.

Second, when F&P first examined the dryer parts that Unitrin removed from the fire scene, it confirmed that the thermostat reset button was in an extended “tripped” (“fail safe” or “abort”) position, meaning that electricity to the heating elements was disconnected automatically as a safety measure.¹⁶ RP 1026-27. When tripped, the button extends like a spring-loaded pen. RP 1026. The button on the Stremke dryer was in an extended position and covered in a significant amount of lint, indicating that the button had been extended for enough time to accumulate lint. RP 1076-78; Exhibits 225-002, 225-004.¹⁷ Thus, the dryer could not possibly have been producing heat at the time of the fire. RP 1026-27.

Finally, the burn patterns were inconsistent with Unitrin/Stremke’s theory that the fire originated inside the dryer. RP 1083-84, 1066-68. A test burn of a fire inside the dryer cabinet produced different burn patterns than those visible in Unitrin’s fire scene photos from Stremke’s house. RP 1049, 1052-54, 1062, 1084-85.

After confirming that the fire could not have been caused by failed heating elements inside the dryer, F&P attempted to explore other causes

¹⁶ “Trip” is defined as follows: “Activate (a mechanism), especially by contact with a switch, catch, or other electrical device: “*somebody tripped the alarm*” ... (Of part of an electric circuit) disconnect automatically as a safety measure: “*the plugs will trip as soon as any change in current is detected*[.]” Oxford Dictionaries, <http://www.oxforddictionaries.com/definition/english/trip> [last visited 7/19/14].

¹⁷ Attached as Appendix A is a copy of these photos. Color copies are being provided with F&P’s original brief with annotations illustrating the location of this lint as established in trial testimony. RP 1077-78.

from outside the dryer. As the dryer's ducting and ventilation system were destroyed and never investigated, it was not possible to conclusively establish a cause originating in those dryer parts. Notably, the dryer was connected to the ventilation system utilizing flexible foil ducting and landscape (drainage) pipe that existed in the home at the time of installation. CP 244; RP 1030.¹⁸ This configuration was contrary to the F&P owner's manual and warning labels on the dryer itself. *Id.* This type of ventilation system created a significant reduction in airflow, contributing to dangerous lint buildup and putting significant strain on the heating elements. RP 706, 734, 1117-18.

3. F&P's Request for a Remedy for Unitrin's Admitted Failure to Preserve Evidence.

Although F&P uncovered some evidence that helped expose problems in Unitrin/Stremke's theory, F&P's ability to bolster, refute, and explore alternate causes of the fire was hindered by Unitrin's failure to preserve evidence before F&P had the opportunity to investigate. RP 1010-11. The electrical components in the laundry room were destroyed before F&P could examine them, and the venting materials were neither investigated nor preserved. RP 713-14. When asked later if he would have preserved the venting system if were to do it again, Unitrin's

¹⁸ The delivery instructions state: "CUST WILL USE OLD CORD AND VENT." CP 244.

own on-the-scene investigator testified that he “probably would” because “it might be a good thing to take the vent system and at least trace it further ... to see if there was any blockage in that system.” RP 388-89.

F&P joined a “spoliation motion” that asked the trial court to fashion a remedy, providing three possible options. CP 120-30, 159-66. One option was for the trial court to give the jury “an order of inference that the missing duct work ... would be unfavorable to [Unitrin.]”¹⁹ CP 120, 125-27. The trial court denied the spoliation motion, explaining that Unitrin “did not intentionally destroy relevant evidence” CP 222.

Thereafter, during trial, F&P raised the issue again, asking the trial court to instruct the jury that it must infer that the destroyed evidence would have been unfavorable to Unitrin/Stremke, as required by Washington law governing spoliation of evidence.²⁰ RP 1192-95; CP 2322-24. The trial court declined to provide relief, again relying on the notion that Unitrin did not act *intentionally* in its destruction of evidence. RP 1195.²¹ Consequently, the court’s instructions provided no direction to the jury as to the appropriate inferences to be made based

¹⁹ The spoliation motion also sought exclusion of the evidence and dismissal of the action. CP 128-30.

²⁰ See, e.g., *Homeworks Const., Inc. v. Wells*, 133 Wn. App. 892, 900, 138 P.3d 654 (2006) (discussing spoliation instructions and the requirement that all inferences must be unfavorable to the party that destroyed the evidence where, as here, the evidence was in control of a party that destroyed it without satisfactory explanation).

²¹ RP 1195 (“I’m not going to give the spoliation instruction. I think that it is correct that I would need to find some intentional destruction.”).

upon evidence that was destroyed by Unitrin before F&P had the opportunity to investigate. *See* CP 2364-95.

4. Unitrin/Stremke Blame F&P for Not Presenting the Very Evidence That Unitrin Destroyed.

F&P's ability to explain where and how the fire started was severely hindered by Unitrin's destruction of the dryer's ducting and ventilation system, and premature demolition of the home. The trial court's refusal to give the jury a spoliation instruction prompted Unitrin/Stremke to use the lack of evidence as a sword to affirmatively attack F&P.²²

Unitrin/Stremke's theme throughout trial was that the evidence discovered by F&P during its examination of the retained dryer parts on August 20, 2008, was untrustworthy or inadequate, even though Unitrin's handling of the fire scene was the very reason that evidence was disrupted or was not available for the jury to see. They encouraged the jury to discount the critical buildup of lint on the thermostat button (in the "tripped" position) by offering various theories of speculation about what could have happened to alter the position of the lint buildup before F&P was given access to the dryer on Whidbey Island. RP 1183. Having been prevented from examining the dryer before it was transported, F&P was

²² Unitrin/Stremke even asked the trial court to exclude any argument that ventilation caused the fire. CP 1412-20. The trial court properly denied this motion. CP 1522-23.

unable to present evidence to refute Unitrin/Stremke's speculation. In closing, Unitrin/Stremke's counsel belittled F&P for not being able to explain where or how the fire started. RP 1252.²³

F. Stremke's Damages Calculations Were Based Solely Upon Unitrin's Own Insurance Investigation That the Trial Court Prevented F&P From Relying Upon to Assess Stremke's Claimed Damages.

During discovery, Stremke was asked to list and substantiate damages associated with the fire. CP 4260-67. The responsive statement was prepared by Unitrin, and was supported by the Unitrin insurance claim file. CP 4223-4321. The Unitrin claim file showed the amounts paid under the insurance contract, and included real property repair estimates, personal property claims, and costs associated with Stremke's temporary living arrangements. CP 4223-4321.²⁴ The personal property claims were based on an inventory that listed the property claims by item detailing the age, condition, and market value of each. CP 4283-4315.²⁵ The only damages evidence disclosed during discovery and offered during trial by Unitrin/Stremke was Unitrin's own insurance calculations.

²³ "In this case, we have Fisher & Paykel's theory of causation. It's pretty simple. The fire started somewhere else. And where it started, they don't know. They don't have an opinion. How it started, they don't know. They don't have an opinion." RP 1252:14-18.

²⁴ CP 4274-4315 (Real Property Repair, Personal Property Claims, Temporary Living Expenses (ALE)).

²⁵ CP 4283-4315 (personal property inventory); CP 4275-76 (summary page of all three categories); CP 2133-61 (detailed room by room real property repair (early estimate)); CP 2213-42 (detailed room by room real property repair final estimate).

To respond to Stremke's damages claims, F&P retained a damages expert (Tim Owen) to provide opinions on the proffered damage evidence. Tragically, just one month before the scheduled trial date, Expert Owen and his wife were killed when a tree fell and crushed their vehicle. CP 1785.²⁶ F&P promptly retained a new damages expert, Steve Larkin. CP 1791.

Although trial court assured F&P that it would have the opportunity to present damages evidence at trial, it thereafter ruled that F&P could not present damages testimony from Expert Larkin or any other expert. RP 962; *see* 852-53 (assuring F&P it would have an opportunity to "attack" Unitrin/Stremke's damages testimony). The explanations provided for the exclusion of Expert Larkin following the sudden death of F&P's initial expert were: (1) he had never physically been to the house, which of course not possible because he was not retained until long after the house repairs had been completed, and (2) the basis for his opinions was the Unitrin insurance claim file, which the trial court interpreting as an improper discussion of insurance – a topic that Unitrin/Stremke asked not be addressed in front of the jury. RP 915-18, 955-56, 960-61; CP 1524-32; *see* CP 1596-70 (order *in limine* prohibiting

²⁶ In the wake of this tragedy, Unitrin and Stremke refused to agree to a trial continuance. CP 1802. The trial court ultimately continued the trial date approximately one month. CP 1868-69.

references to “any evidence of [insurance] coverage or payments made thereunder”); CP 1524-32 (Unitrin/Stremke’s motion).

As a result, the jury was never told that Unitrin was a party or that insurance was involved in the case at all. At the same time, the jury was limited to the universe of damages as unilaterally crafted by Unitrin, ironically using evidence and calculations from Unitrin’s insurance claim file and related insurance investigation. RP 916-63, 962.

G. The Jury’s Verdict and Post-Trial Motions.

At the end of trial, the jury returned a verdict against F&P, awarding a total of \$537,612. CP 2398-99; RP 1298-1302. The \$537,612 lump sum award is nearly all of the \$571,000 total sum requested by Unitrin/Stremke, including: \$272,000 in real property damages, \$176,000 in personal property damages, and the remainder in other damages. RP 1256. Identical damages of \$537,612 were awarded under both the product liability theory and under the CPA theory, and the jury explained that the CPA damages constituted “duplicative recovery.” CP 2399.

The trial court denied F&P’s post-trial motions and entered judgment. CP 3641-46, 4213-15. Although the jury did not award any sums to Unitrin (as it is an entity the jury never knew existed), the trial court identified Unitrin as a judgment creditor over F&P’s objections. CP 4196-4202, 4203-07, 4213-15. After concluding that treble damages

under the CPA were not warranted, the trial court proceeded to order F&P to pay Unitrin's counsel's attorney fees under the CPA, *i.e.*, a claim on which the jury awarded no damages.²⁷ The trial court applied a 1.5 multiplier to counsel's time, including hours billed long before the CPA claim was pleaded and hours spent litigating unsuccessful and non-CPA claims. CP 4016-37, 4029-31, 4184-95. In the end, the trial court awarded \$624,354.75 in CPA fees, plus \$3,627.87 in costs, for a total sum of \$1,165,594.62. CP 4184-94. F&P appeals.

V. ARGUMENT

A. Unitrin's Destruction of Evidence Was Compounded by Erroneous Jury Instructions and Prevented F&P From Explaining Alternate Plausible Causes of the Fire.

F&P has a constitutional right to put on a defense. "No person shall be deprived of life, liberty, or property, without due process of law." Wash. Const. art. I, § 3; U.S. Const. amend. XIV, § 1. A critical component of F&P's defense was establishing that something other than the dryer ignited the fire. Although this Court ordinarily affords deference to a trial court's decision on spoliation, where, as here, the spoliation issue was decided as a matter of law before trial, this Court's review is *de novo*. *Tavai v. Walmart Stores, Inc.*, 176 Wn. App. 122, 135, 307 P.3d 811 (2013); *Henderson v. Tyrrell*, 80 Wn. App. 592, 604, 910 P.2d 522 (1996).

²⁷ The jury's special verdict form confirms that the full \$537,612 awarded under the CPA was duplicative of the recovery awarded under the Product Liability Act. CP 2399.

As it is undisputed that F&P presented evidence to support this defense, F&P was entitled to have the jury instructed on its theory of the case. *See State v. Hughes*, 106 Wn.2d 176, 191, 721 P.2d 902 (1986); *Henderson v. Tyrrell*, 80 Wn. App. at 612 (“A party is entitled to have its theory of the case set forth in jury instructions . . .”) (citation omitted). “[A]n erroneous statement of the law is reversible error where it prejudices a party.” *Gregoire v. City of Oak Harbor*, 170 Wn.2d 628, 635, 244 P.3d 924 (2010).

1. As the Destroyed Evidence Was of the Utmost Importance to F&P’s Defense and Should Have Been Preserved, the Trial Court’s Failure to Impose a Remedy for the Spoliation Necessitates Reversal.

In deciding what consequence to impose on a party that fails to preserve evidence, “courts consider the potential importance or relevance of the missing evidence and the culpability or fault of the adverse party.” *Ripley v. Lanzer*, 152 Wn. App. 296, 326, 215 P.3d 1020 (2009) (footnote omitted). “To remedy spoliation the court may apply a rebuttable presumption, which shifts the burden of proof to a party who destroys or alters important evidence.” *Marshall v. Bally’s Pacwest, Inc.*, 94 Wn. App. 372, 381, 972 P.2d 475 (1999) (citations omitted).

In this case, the importance and relevance of the destroyed ventilation system and flexible foil ducting are not in dispute. Likewise,

being deprived of an opportunity to examine parts of the dryer and the damaged parts of the home before they were demolished had an even broader effect. It will never be known what other evidence could have been collected, including but not limited to burn patterns and other electrical items in the laundry room. Likewise, without the ability to investigate the age, condition, and value of the personal property and replaced components of real property, F&P's ability to present evidence in its defense was severely limited.

Unitrin's own expert confirmed that both the lint and the washing machine water were informative as to the cause of the fire. RP 676-77. Unitrin's investigator nonetheless altered the former and disposed of the latter. RP 407, 825-29. Similarly, the importance of the ventilation to determining causation cannot be disputed. Stremke herself testified that the dryer was properly ventilated to the exterior of the home, but photos of the home shown to the jury demonstrated that no such exterior venting existed. RP 1030-34. F&P's inability to examine or explain other possible causation theories prevented F&P from arguing its theory of the case, and improperly bolstered the causation theory proposed by Unitrin/Stremke.

Addressing the second factor, *i.e.*, the culpability or fault of the adverse party, Washington law does not require that a party destroy

evidence in bad faith or with a malicious intent in order to be culpable for the destruction of evidence; rather, a party that has a duty to preserve evidence and proceeds to disregard the importance of the evidence may be responsible for spoliation. *Homeworks Const., Inc. v. Wells*, 133 Wn. App. 892, 900, 138 P.3d 654 (2006); *Henderson*, 80 Wn. App. at 611 n.7 (explaining that culpability lies where the destruction is done in violation of a duty to preserve same without reasonable excuse). If a party controls evidence and fails to preserve it without satisfactory explanation, the only inference the finder of fact may draw is that such evidence would be unfavorable to that party. *Pier 67, Inc. v. King County*, 89 Wn.2d 379, 385-86, 573 P.2d 2 (1977).

Here, Unitrin's culpability for the destruction of evidence is multifaceted. Unitrin assumed an independent duty to preserve the fire scene when it sent an investigator to the fire scene one day after the fire to determine the cause and origin of the fire. In addition, that on-the-scene investigator had an independent duty under the applicable "NFPA 921" standards of professional fire investigation to preserve the evidence at the fire scene. RP 1051. Unitrin's on-the-scene investigator confirmed that the NFPA 921 guide was the "authoritative treatise on fire investigation," but nonetheless admitted that he did not follow it in this case. RP 404-05. During trial, he even conceded that he "probably would" have preserved

the venting system if were to do it again, though he offered no reasonable explanation for his initial failure to do so. RP 388-89.

Unitrin breached its duty to preserve the evidence when it allowed parts of the dryer and other items in the laundry room to be disposed of and the dryer removed from the scene before even notifying F&P of the fire. Unitrin even demolished interior 2x4 stud walls before giving F&P the opportunity to see the dryer. Under these circumstances, the trial court was obligated to impose a consequence on Unitrin for failing to preserve evidence. CP 222.

2. The Trial Court's Refusal to Give a Spoliation Instruction Was Based on an Incorrect Statement of Washington Law.

F&P renewed its request for a spoliation remedy by providing the trial court with the following proposed jury instruction,²⁸ accompanied by cites to *Lynott*, 123 Wn.2d at 689; *Pier 67, Inc.*, 89 Wn.2d at 385-86; and *Henderson*, 80 Wn. App. at 604-13:

You have heard testimony regarding the destruction of or failure to preserve evidence. If you find that Fisher & Paykel has shown that a plaintiffs have destroyed evidence which was in their control, and they have not provided a satisfactory explanation for doing so, the only inference you may draw is that the evidence, if produced, would have been unfavorable to them.

²⁸ See *Washburn v. City of Federal Way*, 178 Wn.2d 732, 748, 310 P.3d 1275 (2013) (“We do not necessarily require a correct alternate instruction to preserve an objection.”).

In determining whether a party's explanation for destroying or failing to produce evidence is satisfactory, you may consider the relevance of the missing evidence to the issues in the case, whether the loss or destruction of the evidence has resulted in an advantage for one party over another, and whether the party not controlling the evidence was afforded an adequate opportunity to examine the evidence. You may also consider whether the party destroying or failing to produce the evidence acted in conscious disregard of the importance of the evidence, or whether there is some innocent explanation for the destruction.

CP 2322-23. Unitrin opposed this instruction, arguing that the instruction is not warranted because Unitrin did not *intentionally* destroy evidence.

RP 1194. Although Washington law does not require a showing that a party intentionally destroyed evidence before the rebuttable presumption is warranted, the trial court agreed with Unitrin, adopted the "intentional" standard and refused to give F&P's or any other spoliation instruction to the jury. RP 1195; CP 2364-95; *see Henderson*, 80 Wn. App. at 611 n.7.

The trial court's refusal to provide any remedy for Unitrin's spoliation of critical evidence was legal error, as it was based upon an incorrect statement of Washington law. As discussed above, a party that has a duty to preserve evidence and proceeds to disregard the importance of the evidence is responsible for spoliation even if there is no bad faith or malicious intent. *See Homeworks*, 133 Wn. App. at 900; *Henderson*, 80 Wn. App. at 611 n.7. As a result, the jury was not given a correct statement of the law on spoliation and was, as a result, improperly

instructed. As the legal accuracy of the instructions is reviewed *de novo*, this Court should conclude that the trial court erred as a matter of law when it refused to properly instruct the jury and prevented F&P from arguing its theory of the case. *See Gregoire*, 170 Wn.2d at 635 (“Instructions are proper if, when read as a whole, they permit both parties to argue their theories of the case, are not misleading, and properly inform the jury of the law.”) (citation omitted). The only question that remains is whether this error is reversible, *i.e.*, whether the erroneous jury instructions prejudiced F&P, thereby warranting reversal. *See id.*

3. The Trial Court’s Instructional Errors Necessitate Reversal.

It is undisputed that Unitrin failed to preserve important fire scene evidence that would have assisted the jury in assessing competing theories of what caused the fire and the extent of any resulting damages. F&P’s ability to bolster, refute, and explore alternate causes of the fire was hindered by Unitrin’s failure to preserve evidence before F&P had the opportunity to investigate. F&P has a right to present its theory of the case, including evidence supporting alternate causes and origins, and was unable to properly do so. Although it is Unitrin’s position that the discarded evidence would not have mattered, that is a decision Unitrin alone cannot decide. Unitrin was the only party with the ability and the

power to investigate without restriction one day after the fire, and it failed to do so. It cannot be permitted to benefit from its own self-serving action and inaction during the days and weeks after the fire.

Unitrin/Stremke had a significant advantage during trial in being able to present to the jury evidence that supported their causation theory without having to explain any inconsistent evidence or other possible cause. They even used the disturbance of evidence to their own advantage to undermine F&P's expert's determination that the buildup of lint on the dryer's manual reset thermostat confirmed that the cause of the fire could not have been associated with functioning heating elements by offering testimony that the deposit the lint must have occurred when Unitrin transported the dryer to the lab before F&P was given notice of the fire. RP 1181. F&P, on the other hand, was restricted in not being able to explain the state of destroyed evidence or provide an innocent explanation for gaps in the investigation. Unitrin's on-the-scene investigator's inexplicable failure to preserve the evidence forever changed the landscape of this litigation and continuously hampered F&P's ability to defend its product through the case.

As the premise underlying not only Unitrin's product liability claim, but also Stremke's CPA claim was an assumption that there was a defect in the F&P dryer that caused an electrical failure that, in turn,

caused the fire, the trial court's instructional error infected all of the claims at issue, and its impact on the jury's assessment of the claims asserted in this case cannot be understated. Stremke's CPA violation theory was that F&P had prior knowledge about the potential for electrical failure in its dryers, but failed to warn customers (including Stremke) of the associated fire risk. CP 1655. Although evidence indicated that F&P received notice of certain failures in the heating element of Stremke's dryer model, there was never any associated fire risk because broken heating elements produce no heat at all. RP 483-84. The CPA theory was premised on two assumptions: (1) that Stremke's fire was, in fact, caused by an electrical failure inside the dryer (based on the one-sided evidence retained by Unitrin), and (2) that an electrical failure caused the heating elements to overheat, as opposed to shutting off entirely as the evidence indicated. CP 201; RP 726. In other words, Unitrin/Stremke's CPA claim could only succeed if the jury accepted Unitrin/Stremke's theory of what caused the fire.

After Unitrin prevented F&P from investigating the fire scene and collecting proof of the cause of the fire, Unitrin was then allowed to use F&P's lack of information to bolster Unitrin's own theories of causation and damages. The trial court's refusal to provide the jury with a correct statement of Washington law was erroneous and it deprived F&P of its

right to argue its theories of the case and misled the jury. *See* RP 1195. This error caused prejudice to F&P and was not harmless, as in the absence of the correct guiding legal principles, the jury was allowed to (and did) erroneously conclude that missing evidence must have supported Unitrin/Stremke's claims against F&P. Then, having blamed F&P for the gaps in evidence caused by Unitrin, the jury moved forward to impose consequences on F&P in the form of significant damages. As the jury's \$537,612 damages award is inexorably intertwined with the erroneous instructions and evidentiary rulings (and, as discussed below, cannot be affirmed for independent reasons), it must be reversed as well.

B. Stremke's CPA Claim, Described by the Trial Court as "Very, Very Thin," Must be Dismissed.

The Washington Consumer Protection Act ("CPA") prohibits "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." RCW 19.86.020. A private cause of action exists under the CPA only if the plaintiff can prove all of the following elements: (1) the conduct is unfair or deceptive, (2) occurs in trade or commerce, (3) affects the public interest, and (4) causes injury (5) to plaintiff's business or property. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780, 719 P.2d 531 (1986). The purpose of the CPA is to protect consumers from harmful practices,

and this is why the plaintiff must allege an actual or potential impact on the general public, not merely a private wrong. *See Lightfoot v. MacDonald*, 86 Wn.2d 331, 333, 544 P.2d 88 (1976).

Stremke's CPA violation theory was that F&P had prior knowledge about the potential for electrical failure in its dryers, but failed to install \$3.85 sensor or warn customers (including Stremke) of the fire risk Unitrin/Stremke alleged was present in the dryer. CP 1655; RP 1252. At the conclusion of Unitrin/Stremke's case-in-chief, F&P moved for a directed verdict on Stremke's CPA claim. In response, the trial court *twice* characterized the evidence as "very, very thin":

I think that the evidence with regard to knowing, failure to reveal the problems in this case is very, very thin, but I'm going to allow the jury to consider it at any rate. The plaintiffs have made an argument that leaves me to believe that it's not appropriate for me to make the decision. But I think the evidence of the first element of the CPA claim [proving that F&P engaged in conduct that is unfair or deceptive] is very, very thin in this case.

So I'm going to deny the motions for a directed verdict and we will move on with the defense case.

RP 852-53. F&P renewed its motion during the discussion of jury instructions and the trial court again denied it. RP 1205.

1. There is No Evidence of a CPA Violation.

This Court reviews *de novo* a trial court's decision to deny a motion for a directed verdict in favor of allowing a claim to be considered by a jury. *Hizey v. Carpenter*, 119 Wn.2d 251, 271-72, 830 P. 2d 646 (1992). "A directed verdict is appropriate if, as a matter of law, there is no substantial evidence or reasonable inference to sustain a verdict for the nonmoving party." *Chaney v. Providence Health Care*, 176 Wn.2d 727, 732, 295 P.3d 728, 731 (2013) (citations omitted); *see, e.g., Bennett v. Maloney*, 63 Wn. App. 180, 185-86, 817 P.2d 868 (1991) (reversing a trial court's denial of a directed verdict where plaintiff failed to offer competent evidence on one element of claim).

The crux of Unitrin/Stremke's argument that F&P's conduct was unfair or deceptive and caused injury was their contention that F&P knew of a defect in its dryers that caused fires. As any such alleged prior knowledge had no connection to the Stremke fire, the trial court properly prohibited Unitrin/Stremke from presenting evidence of unrelated incidents and products. CP 2261-64.²⁹ The evidence presented at trial, at

²⁹ The trial court's order reads, in part, as follows: "The parties and counsel are instructed not to directly or indirectly mention, refer to, testify about, interrogate concerning, offer into evidence, or attempt to convey to the jury in any manner the existence and contents of any document, photograph, or material of any kind, offered by [Unitrin/Stremke] as alleged 'evidence' of other issues with Fisher & Paykel products in an attempt to show that those issues are similar to the alleged design defect asserted by [Unitrin/Stremke] in this action, and all evidence supporting same" CP 2262.

best, shows that F&P removed a low airflow fault indicator light without a corresponding change to the user guide, and made an engineering change to the wire gauge of the smaller elements. RP 900-03. Significantly, no evidence whatsoever was presented to the jury to indicate that those product updates were causally related to Stremke's or any other fire. In fact, near the close of Unitrin/Stremke's case-in-chief, the trial court even commented as follows: "I have not heard evidence yet, that [F&P] knew that there were fires or dangerous situations resulting from the element configuration." RP 791-92.

As the evidence and reasonable inferences considered most favorably to Stremke are insufficient to support a jury's verdict, the trial court erred by allowing the CPA claim to be considered in the first instance. Accordingly, Stremke's CPA claim should be dismissed as a matter of law, including not only the jury's finding that F&P violated the CPA, but also that any such violation proximately caused damage to Stremke and the trial court's associated award of CPA attorney fees. CP 2399.

2. The \$624,354.75 in CPA Attorney Fees Awarded to Unitrin/Stremke Should Be Vacated.

"Washington follows the American rule in awarding attorney fees. Under that rule, a court has no power to award attorney fees as a cost of

litigation in the absence of contract, statute, or recognized ground of equity providing for fee recovery.” *Dayton v. Farmers Ins. Group*, 124 Wn.2d 277, 280, 876 P. 2d 896 (1994). Unitrin/Stremke’s counsel asked the trial court to award \$818,738.50 in attorney fees under statutory authority in the Consumer Protection Act (“CPA”), which prohibits “[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce.” RCW 19.86.020. CP 4017. The rationale provided by Unitrin/Stremke’s counsel was that CPA serves the purpose of providing “sufficient financial rewards to victorious consumers ... to enable the injured plaintiff to pursue his own claim” CP 4022 (citations omitted).

- a) The Only Claim Eligible for a CPA Fee Award was Asserted by Stremke, Yet Fees Were Awarded to Unitrin.

Although Unitrin’s involvement was hidden from the jury, the record confirms that Unitrin/Stremke litigated claims that each asserted independent of the other.³⁰ Unitrin’s claim was a product liability subrogation action, under which Unitrin stood in the shoes of Stremke to

³⁰ The record confirms that Unitrin and Stremke “reached an agreement ... in order to work together as plaintiffs in the pursuit of Fisher [& Paykel].” CP 1650. Neither F&P nor the trial court were not advised of (and record contains no evidence of) the specific nature of the agreement reached between them. The Fourth Amended Complaint confirms that Unitrin asserted the product liability claim and that Stremke asserted the CPA claim (CP 1166), and that both remain parties after the re-alignment of interests. CP 1162-68. Likewise, the judgment identifies Unitrin and Stremke as joint judgment creditors on the Unitrin product liability jury award and the Stremke CPA attorney fee award. CP 4213-15.

recover the \$538,071.55 Unitrin paid under a product liability theory on Stremke's insurance claim.³¹ Stremke's claim independent of the subrogation claim was a CPA claim for damages, including treble damages and attorney fees based on a theory that F&P knew the dryer was defective and failed to warn Stremke of the associated fire danger. CP 1166.

In the subrogation context, our Supreme Court has confirmed that individual recipients of “deceptive insurance subrogation collection [letters]” sent on behalf of insurers have the right to assert CPA claims (including claims for attorney fees on successful CPA claims) *against* those insurers. *Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 55, 204 P.3d 885 (2009); RCW 19.86.090. However, there is no authority that gives a subrogating insurer the ability to assert CPA claim in its own right against a tortfeasor. Indeed, it is well established that insurers that pursue subrogation claims do not have a right to recover their own attorney fees. *See, e.g., Dayton v. Farmers Ins. Group*, 124 Wn.2d 277, 281, 876 P. 2d 896 (1994). Thus, the only claim asserted that is eligible for potential recovery under the CPA, which serves as the only possible basis for an attorney fee award, is Stremke's CPA claim. No claim asserted by Unitrin is eligible for recovery of attorney fees.

³¹ *See Mahler*, 135 Wn.2d at 411 (explaining subrogation).

- b) As the Jury Awarded \$0 in Damages on Stremke's CPA Claim, the CPA Attorney Fee Award Cannot Stand.

The jury awarded \$537,612 on Unitrin's \$538,071.55 subrogation (product liability) claim and \$537,612 on the CPA claim, but in doing so confirmed that the entire CPA award was duplicative of the subrogation award. CP 2399. In other words, the special verdict form (drafted by Unitrin/Stremke and given to the jury over F&P's objection) confirms that the jury awarded \$537,612 on Unitrin's subrogation product liability claim, and \$0 to Stremke based upon her CPA claim. CP 2399.

Even though Unitrin is an insurance company (ordinarily not permitted to recover its attorney fees and undoubtedly able to pay for counsel to pursue claims) and Stremke was not victorious on her CPA claim, the trial court ordered F&P to pay most of the attorney fees incurred by Unitrin/Stremke for a total of \$624,354.75. The claims asserted and damages awarded are summarized in the following chart to illustrate that the trial court's CPA "victorious consumer" attorney fee award is not warranted, as the jury confirmed that no damages were warranted under the CPA:

Claims:	Unitrin's Product Liability Subrogation Claim (to recover \$538,071.55 paid by Unitrin)	Stremke's CPA Claim for Damages	Stremke's CPA Claim for Treble Damages	Stremke's CPA Claim for Attorney Fees and Costs
Awards:	\$537,612 awarded on Unitrin's claim	\$0 awarded	\$0 awarded	\$624,354.75 awarded (plus \$3,627.87 costs)

Thus, the only claims that are eligible for a CPA attorney fee award are the CPA claims, which the jury confirmed merely reflected damages that were already addressed by the product liability claim. As no CPA damages were awarded, an attorney fee award under that statute is not justified by the purposes of the CPA. Consistent with the American Rule, this Court should vacate the trial court's \$624,354.75 CPA attorney fee award, thereby reducing the \$1,165,594.62 judgment against F&P by more than 50%.

3. At a Minimum, the CPA Attorney Fee Award Must Be Reduced.

Unitrin/Stremke asked for an award of more than \$818,000 in CPA attorney fees. CP 4016-37. The trial court awarded \$624,354.75, which includes an upward adjustment of 1.5. CP 4193-94. Even if Stremke could establish a CPA violation, this amount is not supported by Washington law and, consequently, any such fee award must be vacated or reduced.

- a) The Fees Requested are Patently Unreasonable, Given the Amount in Controversy.

On review of a fee award, this Court must determine whether an attorney fee request is reasonable, taking into consideration the amount in controversy. *See Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 150-52, 859 P.2d 1210 (1993) (concluding that fees requested were “patently unreasonable” given the “gross disparity between the amount requested [\$180,914], and even the amount actually awarded by the trial court [\$72,746], when compared to the amount in controversy [\$19,000]”).

In this case, Unitrin/Stremke did not request *any* independent damages resulting from their CPA claim. During closing argument, their counsel asked the jury for a total award of \$571,000, which included specific amounts for personal property, real property, and other damages under the product liability and CPA claims combined. RP 1256. Counsel made clear that “[u]nder both claims, the damages in this case are the same; that is, the damage from the Product Liability Act claim is the same as the damage from the Consumer Protection Act claim.” RP 1258. The jury agreed, finding that any CPA damages would duplicate recovery already provided by the product liability claim. CP 2399. Thus, Unitrin/Stremke and the jury valued the CPA claim at \$0.

The amount in controversy on the CPA claim was \$0; Unitrin/Stremke requested more than \$818,000 in fees on this claim; and the trial court awarded \$624,354.75. The gap between the amount in controversy and the fees requested/awarded is nearly ten times the gap that our Supreme Court characterized as a “gross disparity” that rendered the associated fee request as “patently unreasonable” in *Scott Fetzer*, 122 Wn.2d at 150-52. Therefore, this Court should conclude that the entire fee request is unreasonable as a matter of law.

- b) Any CPA Attorney Fee Award Must be Limited to Fees Generated by Work on CPA Claims, and Reduced to Reflect Unproductive Efforts.

Our Supreme Court has confirmed that attorney fee awards under CPA must be limited to fees generated by work on CPA aspects of the litigation. *Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d 735, 743-44, 733 P.2d 208 (1987); see *Travis v. Wash. Horse Breeders Ass'n*, 111 Wn.2d 396, 759 P.2d 418 (1988). Any attorney fees awarded is appropriately reduced to reflect wasteful, duplicative, or otherwise unproductive efforts. *Mahler*, 135 Wn.2d at 434. It is Stremke’s burden to establish that any award is related to the claim upon which she prevailed. See *Schmidt v. Cornerstone Investments, Inc.*, 115 Wn.2d 148, 171, 795 P.2d 1143 (1990); *State v. Black*, 100 Wn.2d 793, 676 P.2d 963 (1984).

Unitrin/Stremke asked to be paid for time spent prosecuting claims they did not prevail upon against another party (Lowe's, which settled after the trial court declined to dismiss the CPA claim on summary judgment, CP 4594-95)³² and for time spent litigating before the CPA claim was added to the case. Although Unitrin/Stremke had an opportunity to do so, they refused to segregate time spent on CPA claims from time spent on product liability claims that are not eligible for attorney fees within the 2,334.25 hours for which they seek payment. CP 4027-28. Unitrin/Stremke feigned impossibility because the claims are "premised upon a common nucleus of facts," though they were able to undertake the same task addressing other claims that were also premised on these same facts. CP 4025; CP 4026 (confirming that counsel was able to, and did, segregate time spent addressing claims between Unitrin/Stremke before they aligned their interests).

The trial court agreed with F&P that the billing entries submitted contained tasks that were not eligible for a CPA fee award, and *sua sponte* examined the bills and segregated out fees for certain tasks. CP 4189.³³ After doing so, the trial court awarded most but not all of the attorney fees requested by Unitrin/Stremke. As the award includes fees for significant

³² Unitrin/Stremke admit that their "calculation of the total hours under the CPA ... includes time spent prosecuting the claim against Lowe's as well as Fisher[.]" CP 4027.

³³ As Unitrin/Stremke did not undertake this task (despite having the burden of proof), F&P was deprived of the opportunity to respond to it.

time spent on tasks that should have been excluded, including but not limited to the exclusion of evidence of Unitrin's involvement on the product liability subrogation claim³⁴ and motions related to the criminal history of Stremke's son.³⁵

This Court should conclude that Stremke failed to meet her burden and vacate the award accordingly. In the alternative, this Court should remand for a re-calculation of attorney fees, reflecting deductions in the more than 300 pages of invoices for tasks that Stremke failed to prove are eligible for a CPA fee award.

- c) The Amount Sought (Insurer Defense Hourly Rates Plus a Multiplier) is Not Reasonable.

The trial court's attorney fee award included a 1.5 multiplier on top of the hourly fee charged by Unitrin/Stremke's counsel. CP 4184-95.³⁶ The general rule is that the lodestar fee, without any upward adjustment, is presumed to adequately compensate an attorney for his or her services. *Henningsen v. Worldcom, Inc.*, 102 Wn. App. 828, 847, 9 P.3d 948 (2000). Although multipliers are warranted in exceptional circumstances to help poor clients with good claims secure competent help, and encourage attorneys to accept "risky" cases, this is not such a case. *See*

³⁴ CP 3700, CP3717, CP 3721, CP 3722, CP 3725, CP 3732, CP 3733.

³⁵ CP 3746, CP 3753, CP 3754, CP 3755, CP 3758.

³⁶ As there is no evidence in the record of a contingency fee arrangement for this case, it appears that counsel was paid on an hourly basis.

Bowers v. Transamerica Title Ins. Co., 100 Wn.2d 581, 598, 675 P.2d 193 (1983).

Stremke (the only party with a CPA claim) was represented as a plaintiff by her insurance company's attorneys, working at typical hourly rates actually charged by their law firm, *i.e.*, at hourly rates that Unitrin/Stremke aver is reasonable for *defense* work done on behalf of *insurers*. CP 4028, 4065. As the compensation for attorney time in this case was not based upon any percentage of the damages award and involved no more risk than any other hourly case, there is no reasonable justification for application of a 1.5 multiplier on top of the hourly fee.

C. The Damages Award Must Be Reversed.

In addition to the reasons set forth above that necessitate reversal of the jury's verdict, there are additional, independent legal reasons why the jury's \$537,612 damages award cannot be affirmed. RP 1256. For the reasons discussed below, the claim for personal property damages should have been dismissed as a matter of law because there is no substantial evidence or reasonable inference to sustain a verdict for Unitrin/Stremke on that claim. Therefore, the personal property claim must be reversed and dismissed. In the alternative, a remand is required so a jury can consider erroneously-excluded evidence offered by F&P in its defense. With regard to real property damages, reversal and remand are required

because F&P was prejudiced by erroneous jury instructions that failed to properly inform the jury of the measure of real property damages.

1. The Personal Property Damages Claim Should Be Dismissed as a Matter of Law.

On the issue of personal property damages, the trial court instructed the jury, at Unitrin/Stremke's request, to calculate personal property damages as follows:

The reasonable value to Plaintiffs of household goods, wearing apparel, and other personal effects kept for personal use and not for sale, and not able to be repaired, based on Plaintiffs' actual money loss, taking into consideration all the circumstances and conditions. You should consider the cost of the items, the extent of their use, whether worn or out of date, and their condition at the time of the fire, to determine what they were fairly worth.

CP 2392-93. The language in this instruction was based upon the "Kimball rule" announced in *Kimball v. Betts*, 99 Wash. 348, 169 P. 849 (1918). CP 2039-40.³⁷ Our Supreme Court has confirmed that the specific information identified in the instruction is required when this standard is utilized, explaining that "it would be difficult to estimate the value of such goods, except by reference to the former price in connection with wear, depreciation, change of style, and present condition." *Kimball*, 99 Wash. at 352; *see also Herberg v. Swartz*, 89 Wn.2d 916, 931-32,

³⁷ Unitrin/Stremke cannot deny that this standard is correct in an effort to obtain a remand and a second chance to present supporting evidence, as they proposed the jury instruction and argued for adoption of this rule. CP 2039-41.

578 P.2d 17 (1978). Thus, the *Kimball* rule requires testimony from the owner of the property as to its value to him or her, as well as the age, purchase price, and condition of the property before the fire. *Id.*

At trial, Stremke testified that a lump sum of \$176,000 was paid to replace lost items of personal property, including some property she owned and some property owned by others (including her son and his family). RP 637-38, 640-41, 653-54.³⁸ The trial court allowed this testimony over F&P's objections (including a reminder that the necessary elements set forth in *Herberg* and *Kimball* do not include replacement cost). *Id.*; see *Herberg*, 89 Wn.2d at 931-32; *Kimball*, 99 Wash. at 352.

Stremke's testimony was based upon items identified on a list (referred to as "Exhibit 132"³⁹). Neither Stremke nor any other witness identified or described with any particularity the items that were lost or whether any items were actually replaced. No evidence whatsoever was presented during trial on any item's original cost,⁴⁰ wear, depreciation,

³⁸ Stremke testified as follows during trial:

Q. (By [counsel for Unitrin/Stremke]) Approximately how much did it cost to buy all of those things on the inventory after the fire?

A. About 176,000.

Q. I've written on the board "Personal Things 176,000"; is that correct?

A. That's correct.

RP 641:11-16.

³⁹ Exhibit 132 is a redacted version of Unitrin's insurance inventory list that was never admitted into evidence and not shown to the jury.

⁴⁰ Stremke testified as follows during trial:

Q. [By counsel for Unitrin/Stremke] What was the original price -- are you able to tell the jury what the original price was for any of the items on the list?

change of style, or present condition. Neither Stremke nor anyone else ever testified that \$176,000 represented the reasonable value of each item of property to its respective owner, which is the legal standard set forth in the jury instruction based upon *Herberg*, 89 Wn.2d at 931-32 and *Kimball*, 99 Wash. at 352.

Under these circumstances, this Court must conclude that even if liability could be established under applicable laws, there is no substantial evidence or reasonable inference to sustain a verdict for Unitrin/Stremke on a personal property damages claim.⁴¹ Accordingly, Unitrin/Stremke's personal property damages is properly dismissed as a matter of law.

- a) The Jury's Personal Property Damages Award Was the Product of an Erroneous and Prejudicial Evidentiary Ruling.

If the personal property damages claim is not dismissed, a remand is required for consideration of all admissible evidence, including Expert Larkin's testimony addressing Unitrin/Stremke's claimed personal property damages.

Although a trial court's exclusion of evidence is ordinarily reviewed for an abuse of discretion, "a ruling based on an erroneous legal

A. No.
RP 653:23-654:1.

⁴¹ As noted above, "[a] directed verdict is appropriate if, as a matter of law, there is no substantial evidence or reasonable inference to sustain a verdict for the nonmoving party." *Chaney*, 176 Wn.2d at 732 (citations omitted).

interpretation is necessarily an abuse of discretion.” *Endicott v. Icicle Seafoods, Inc.*, 167 Wn.2d 873, 886, 224 P.3d 761 (2010) (citation omitted). “[I]mproper admission of evidence constitutes harmless error if the evidence is cumulative or of only minor significance in reference to the evidence as a whole.” *Hoskins v. Reich*, 142 Wn. App. 557, 570, 174 P.3d 1250 (2008).

In this case, the trial court’s extraordinary decision to exclude testimony from Expert Larkin following the tragic death of F&P’s initial expert constitutes prejudicial and reversible error in violation of F&P’s constitutional right to put on a defense. *See* Wash. Const. art. I, § 3; U.S. Const. amend. XIV, § 1. The trial court’s ruling (which was based upon underlying evidence that formed the entire basis of Unitrin’s claim) came mid-trial after the trial court assured F&P that it would have the opportunity to present damages evidence at trial, thereby leaving F&P unable to present other evidence necessary to defend itself.

In this case, an order *in limine* prohibited references to “any evidence of [insurance] coverage or payments made thereunder.” CP 1596-70. Likewise, the trial court’s instruction directed the jury not to speculate on whether a party has insurance, as insurance “has no bearing on any issue that you must decide.” CP 2374. The trial court, however, went on to apply these rules to bar F&P from presenting any evidence

whatsoever about Stremke's claims of lost personal property. If the trial court had applied this standard equally to both sides, it would be less problematic. It did not. On one hand, the trial court gave Unitrin/Stremke permission to present testimony in support of Unitrin/Stremke's personal property claim using information in Unitrin's insurance claim file. Then, on the other hand, the trial court prohibited Expert Larkin from testifying because the basis for his opinions was the same information from Unitrin insurance claim file. The sole purpose of having Expert Larkin evaluate the personal property evidence was to assist in the jury's assessment of the evidence, providing an alternate expert view in response to Unitrin/Stremke's expert's opinions.

The trial court's exclusion of F&P's replacement expert under the circumstances presented lacks support under the law and also deprived F&P of its right to present a defense on the personal property damages. As a result, the jury was limited to the universe of damages as unilaterally crafted by Unitrin, ironically using evidence and calculations from Unitrin's insurance claim file and related insurance investigation. RP 962; CP 4223-4321. As it cannot be said that the exclusion of Expert Larkin's testimony was cumulative or of only minor significance in reference to the evidence as a whole, the error is not harmless and reversal is required with

instructions to allow Expert Larkin to opine about Unitrin/Stremke's personal property damages.

b) The Evidence Presented Does Not Support the Jury's Personal Property Damages Award.

"The rule in Washington on the question of sufficiency of the evidence to prove damages is that: [t]he fact of loss must be established with sufficient certainty to provide a reasonable basis for estimating that loss." *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 331, 858 P.2d 1054 (1993) (citation omitted). This Court's inquiry focuses on "whether the award is outside the range of substantial evidence in the record[.]" *Id.* at 330.

By awarding Unitrin/Stremke personal property damages in essentially the full amount requested, *i.e.*, \$176,000, the jury adopted the number provided by Stremke as the cost for replacing the lost items. As no evidence was presented on the reasonable value of the personal property items to its owner or owners, which necessarily includes consideration of "the cost of the items, the extent of their use, whether worn or out of date, and their condition at the time of the fire, to determine what they were fairly worth[.]" there is no reasonable basis for estimating the loss. *See Fisons Corp.*, 122 Wn.2d at 331. As the jury's personal

property damages award is outside the range of substantial evidence in the record, reversal is required.⁴² *See id.* at 330.

2. The Real Property Damages Award Was the Product of an Erroneous Instruction That Prejudiced F&P.

Jury instructions are erroneous when, read as a whole, they fail to properly inform the jury of the applicable law. *See Keller v. City of Spokane*, 146 Wn.2d 237, 249, 44 P.3d 845 (2002). As noted above, “an erroneous statement of the law is reversible error where it prejudices a party.” *Gregoire*, 170 Wn.2d at 635.

“Generally, the measure of damages in tort actions is the amount that will adequately compensate for the loss suffered as the direct and proximate result of the wrongful act.” *Puget Sound Power & Light Co. v. Strong*, 117 Wn.2d 400, 403, 816 P.2d 716 (1991) (citation omitted). Under longstanding Washington law, plaintiffs are “entitled to recover the entire cost of restoring [their home] to its former condition unless such cost exceeds its diminution in value as the result of the injury, in which event the recovery must be limited to the amount of such diminution.” *Hogland v. Klein*, 49 Wn.2d 216, 220, 298 P.2d 1099 (1956); *Burr v. Clark*, 30 Wn.2d 149, 158, 190 P.2d 769 (1948).

⁴² In the event this case is remanded, F&P reserves the right to renew its opposition to use of the *Kimball* rule in this case.

F&P proposed the following jury instruction⁴³ on the measure of real property damages:

With regard to Plaintiffs' real property, you should consider the lesser of the following:

1. The cost of restoring the damaged building to its former condition; or
2. The diminution in value of the damaged building as the result of the fire.

CP 2315-16 (footnote omitted) (citing WPI 30.11, 6 Washington Pattern Jury Instructions: Civil (6th ed. 2009); *Burr v. Clark*, 30 Wn.2d 149, 190 P.2d 769 (1948)). By contrast, Unitrin/Stremke urged the trial court to modify the pattern instruction by deleting the "lesser than" language. CP 2039. As support for this modification, Unitrin/Stremke relied upon the damages calculation exception that applies to real property that is completely destroyed. *See Thompson v. King Feed & Nutrition Service, Inc.*, 153 Wn.2d 447, 458, 105 P.3d 378 (2005) (confirming that "lesser than" rule does not apply to costs incurred to rebuild a barn that was completely destroyed by fire).

Although it is undisputed that the Stremke home was only partially damaged, the trial court opted to deviate from the "lesser than" rule.

RP 405, 853; CP 2768-69. Instead, it instructed the jury to calculate real property damages equal to the full costs spent to repair and upgrade the

⁴³ *See Washburn*, 178 Wn.2d at 748 ("We do not necessarily require a correct alternate instruction to preserve an objection.").

home without consideration of whether those costs exceeded the value of the home before the fire, as follows:

If you find for Plaintiffs [Unitrin/Stremke], you should consider the following past economic damages elements:

- 1) Real Property
 - a) The reasonable value of necessary repairs to any real property that was damaged and able to be repaired.

CP 2392.

This instruction is erroneous because it failed to properly inform the jury of the applicable law – a defect that was not addressed or cured by any other instruction given. CP 2364-95; *see Keller*, 146 Wn.2d at 249. This is not a technical defect; rather it allowed – even directed – the jury to award damages for the vast array of enhancements and improvements to the Stremke home, without distinguishing between damages that were actually caused by the fire.

As noted by our Supreme Court in *Thompson*, the “lesser than” rule ensures the appropriate focus on making plaintiffs whole, and confirms that additional expenses incurred for upgrades or unnecessary repairs to partially-damaged real property are not included in recoverable damages. *See Thompson*, 153 Wn.2d at 457 (confirming that the “lesser than” rule applies when real property is damaged but capable of repair);

see Falcone v. Perry, 68 Wn.2d 909, 912, 416 P.2d 690 (1966) (“lesser than” rule applied to partial destruction of a home by a runaway truck); *Hogland v. Klein*, 49 Wn.2d 216, 220, 298 P.2d 1099 (1956) (“lesser than” rule applied to portion of building damaged in transit).

In this case, the jury was actually directed to award a windfall to Unitrin/Stremke, contrary to well-established make-whole principles, and in doing so prevented F&P from defending itself on the appropriate scope of damages. Unitrin/Stremke presented testimony that an estimate identifying a “Replacement Cost Value” for \$272,768.78 in proposed repairs accurately reflected the work done to the Stremke home. CP 4734-63; RP 231. Worse yet, this evidence was presented with no context, as Unitrin/Stremke never informed the jury that the pre-fire value of the Stremke home was only \$190,000. Thus, as a result of the erroneous instruction, the jury incorrectly accepted Unitrin/Stremke’s proposed damages amount, thereby prejudicing F&P. Accordingly, the jury’s real property damages award must be reversed. If a properly-instructed jury determines that Unitrin/Stremke are able to prove a product liability claim, then that jury must also evaluate the amount of real property damages resulted from such a claim under proper law.

VI. CONCLUSION

In conclusion, the trial court's judgment is the product of prejudicial legal errors and cannot be affirmed. As Unitrin/Stremke were unable to establish a CPA violation, the CPA claim (and the CPA attorney fee award) must be dismissed as a matter of law. Because the jury was deprived of the opportunity to consider evidence critical to F&P's defenses, remand is required for a determination of liability on the product liability claim before a properly-instructed jury (including a spoliation instruction, and a measure of damages instruction that includes the applicable "lesser than" rule), considering all properly-admitted evidence (including testimony from Expert Larkin). With regard to damages, as Unitrin/Stremke were unable to meet their burden of proving personal property damages under the legal standard they requested, the personal property damages are not recoverable as a matter of law on remand.

DATED this 23rd day of July, 2014.



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DECLARATION OF SERVICE

Dava Bowzer states as follows:

I am a citizen of the United States of America and a resident of the State of Washington, I am over the age of 18 years, I am not a party to this action, and I am competent to be a witness herein.

On this 23rd day of July, 2014, I caused to be filed with the Court of Appeals of the State of Washington, Division I, the foregoing APPELLANT’S OPENING BRIEF. I also served copies of said document on the following parties as indicated below:

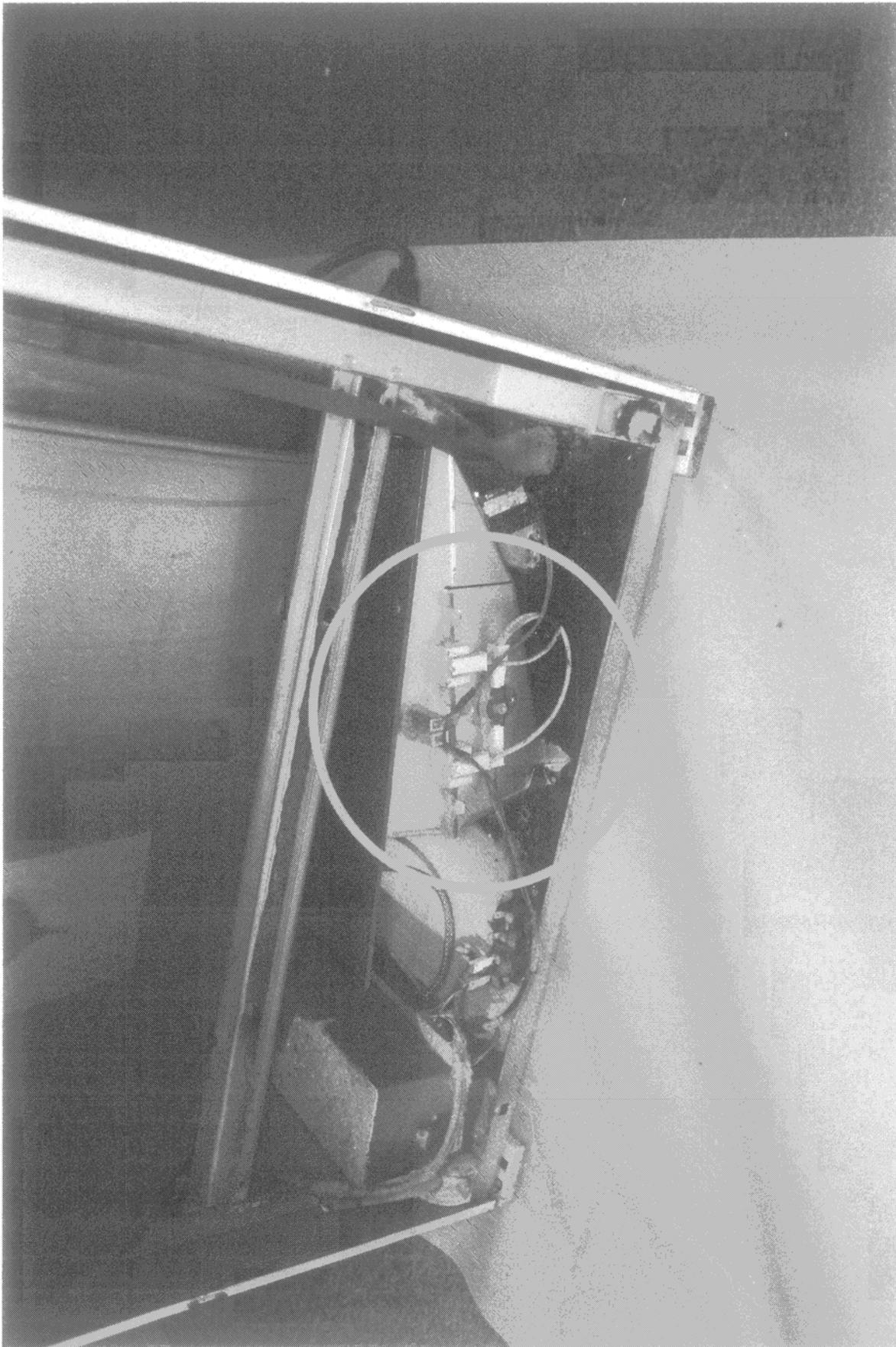
<p><i>Counsel for Plaintiffs Stremke and Panzone:</i> Douglas R. Cloud Law Office of Douglas R. Cloud 901 S. “I” Street, Suite 101 Tacoma, WA 98405 253/627-1505 253/627-8376 Fax</p> <p>and</p> <p><i>Counsel for Plaintiff Unitrin dba Kemper:</i> Matthew J. Sekits Jerret E. Sale Daniel R. Bentson Bullivant Houser Bailey PC 1700 Seventh Ave Ste 1810 Seattle, WA 98101 206/292-8930 206/386-5130 Fax</p>	<p><input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> Email: drc@dcloudlaw.com cmarsh@dcloudlaw.com <input type="checkbox"/> E-service through Court <input type="checkbox"/> Legal Messenger</p> <p><input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> Email: matthew.sekits@bullivant.com matthew.sekits@bullivant.com jerret.sale@bullivant.com dan.bentson@bullivant.com leslie.narayan@bullivant.com janice.mcginity@bullivant.com genevieve.schmidt@bullivant.com <input type="checkbox"/> E-service through Court <input type="checkbox"/> Legal Messenger</p>
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

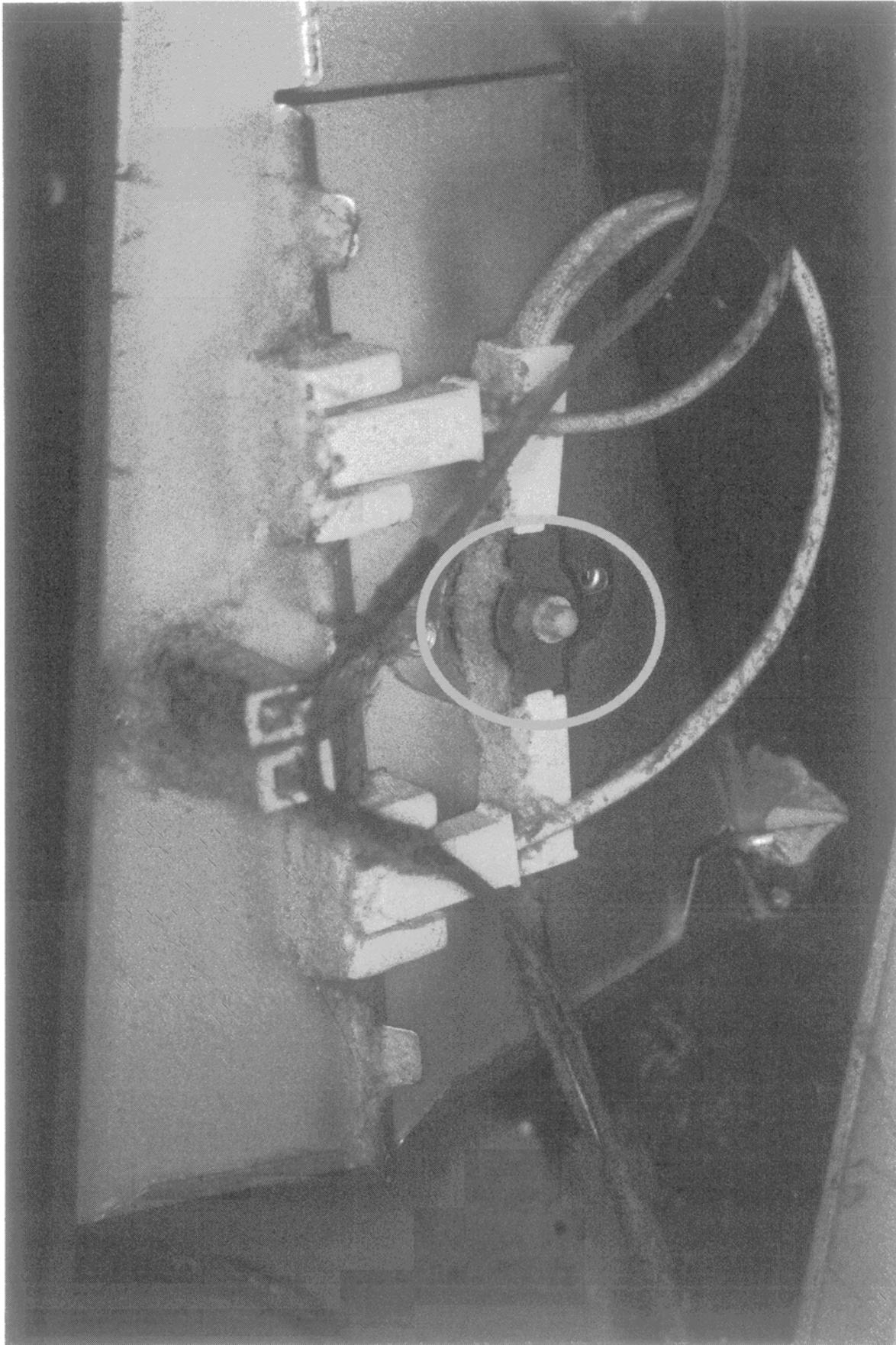
Executed at Seattle, Washington, this 23rd day of July, 2014.


Dava Bowzer

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Red circle added for emphasis for the Court's case of reference. It was not part of the exhibit shown to the jury.



Red circle added for emphasis for the Court's ease of reference. It was not part of the exhibit shown to the jury.