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COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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FOREST RIVER, INC., a corporation,

Appellant,

v.

WILLIAM THORN AND BARBARA THORN, a married couple,

Respondents.

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**BRIEF OF APPELLANT**

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## I. INTRODUCTION

In this matter, Appellant seeks to overturn an Order granting a new trial. On August 16, 2019, the Honorable Susan Serko granted Respondents, William and Barbara Thorns' (the "Thorns" or "Respondents") Motion for New Trial following a defense verdict in favor of Forest River, Inc. ("Appellant" or "Forest River").

In 2014, Sunset Chevrolet ("Sunset"), an independent RV dealership, purchased a motorhome from Forest River, a motorhome manufacturer and distributor. The motorhome was delivered to Sunset on June 4, 2014. The vehicle remained unsold on Sunset's lot for over 24 months. During this time, over 800 miles were placed on the vehicle. It no longer constituted a "new" vehicle.

On June 8, 2016, Forest River informed Sunset it would no longer offer a Forest River warranty on the vehicle, explaining that, "[a]fter such an extended period of time it is difficult if not impossible to distinguish what one would consider a manufacturing defect from routine maintenance or lack thereof." With the letter, Forest River tendered Sunset \$1,500.00 "towards the purchase of an extended warranty service plan in lieu of the warranty for the above identified unit to be supplied to the consumer purchaser when sold as a "used, as is" product." Sunset accepted this

consideration and cashed the check, thereby, entering into a contract to sell the motorhome “used, as-is.”

Sunset sold the motorhome to the Thorns on March 31, 2017, approximately two years and nine months after it accepted delivery from Forest River. Sunset told the Thorns it was a new vehicle, covered by a Forest River factory warranty. After the sale, Sunset tried to register the vehicle in Forest River’s computerized warranty program, but the vehicle was already listed as having no Forest River warranty. Instead of telling the Thorns, Sunset concealed the lack of a Forest River warranty from the Thorns for months. Sunset also did not inform Forest River of the sale. Sunset performed repairs on the vehicle without charging the Thorns and without making warranty claims to Forest River.

In July 2017, a service adviser at Sunset informed the Thorns there was no Forest River warranty and asked them to pay for repairs. On August 1, 2017, the Thorns’ son contacted Forest River and asked if it was true there was no Forest River warranty. Forest River’s representative viewed the computer records and confirmed this fact. This was the first time Forest River learned the vehicle had been sold. The Thorns did not ask Forest River for a warranty.

Forest River then contacted Sunset about the sale and warranty issue. Sunset claimed it was a mistake and told Forest River it was handling

the dispute directly with the Thorns and had offered equivalent warranty coverage. The Thorns did not contact Forest River again.

The Thorns retained Eugene Bolin, who wrote a demand to Sunset and Forest River seeking rescission and money damages (attorney fees, loss of use, etc.). Forest River reached out to Mr. Bolin to attempt a resolution, but he was unresponsive and filed suit. The Complaint alleged (1) negligence, (2) breach of contract, (3) violation of the Auto Dealers Act, RCW 46.70, et seq., (4) violation of the Consumer Protection Act, and (5) rescission. CP at 16-21. Sunset settled before trial, taking possession of the motorhome. As a result, the Court dismissed the Thorns' rescission claim against Forest River.

At trial, the Thorns argued Forest River violated the Lemon Law and Consumer Protection Act by entering into an agreement with Sunset to sell the motorhome without a Forest River warranty. They proposed jury instructions stating that Washington law requires a minimum one year/12,000-mile warranty on all new motor vehicles. The Court refused to give the instruction.

The jury found Forest River did not violate the Consumer Protection Act and rendered an 11-1 defense verdict. The Thorns filed a motion for a new trial. Judge Serko granted the motion.

Judge Serko's Order granting a new trial constituted an abuse of discretion usurping the role of the jury. Appellant requests this Court reinstate the defense verdict.

## **II. ASSIGNMENT OF ERROR**

The trial court erred in granting Respondents' Motion for New Trial. *See* CP 353.

## **III. ISSUES ON APPEAL**

Whether this Court should reverse the trial court's Order Granting Plaintiffs' Motion for New Trial and remand the matter for reinstatement of the jury verdict?

## **IV. STATEMENT OF THE CASE**

### **A. Forest River contracted with Sunset to sell the motorhome "used," but Sunset breached the contract by telling the Thorns it was new and came with a Forest River warranty.**

Sunset purchased the motorhome from Forest River. It was delivered to Sunset on June 4, 2014. Trial Exhibit 14; Verbatim Report of Proceedings ("VRP") at 716:2. The motorhome remained unsold for more than two years. On June 8, 2016, Forest River sent Sunset a letter stating it would "no longer participate in a warranty repair nor offer a warranty...." Trial Exhibit 22; CP at 37. The letter explained after "such an extended period of time it is difficult, if not impossible to distinguish what one would consider a manufacturing

defect from routine maintenance or lack thereof.” *Id.*<sup>1</sup> As consideration for Sunset’s agreement to sell the motorhome “used, as-is,” Forest River included a check for \$1,500.00, which Sunset cashed. *See* VRP at 766:6-7 (at trial, the owner of Sunset, Phillip Mitchell, admitted his company cashed this check).

Sunset sold the motorhome to the Thorns on March 31, 2017, approximately two years and nine months after delivery to Sunset. *See* Trial Exhibit 5; CP at 6. Sunset told the Thorns the motorhome was new and came with a Forest River warranty. *See* VRP at 232:8-14.

At trial, Forest River witnesses discussed its policy to ask dealers to sell vehicles “used, as-is” if they failed to sell the vehicle after two years. Paul Pierce, Former Director of Parts, Service and Warranty, explained:

Q. Okay. And you talked about that you kind of decided with these other Forest River representatives that two years was the appropriate amount; why two years? [By Peter Nierman]

A. It's rare for a product to sit on a dealer's lot for one year, much less two. And at two years, it was our belief that if the proper maintenance is not being administered to the product, if it's not being taken care of properly on a dealer's lot, it could have some detrimental effects.

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<sup>1</sup> Forest River’s warranty covers primarily the living portion of the motorhome. The agreement with Sunset did not alter the warranties provided by other component manufacturers of the motorhome, such as the Freightliner warranty which applied to the chassis. *See* VRP at 998:16-23 (Dan Evans of Forest River testified: “our intent to this letter was directly relating to Forest River's warranty. That would have nothing to do with anybody else's warranty.”). The Thorns were notified of these other warranties via Forest River’s owner’s manual.

VRP at 801:2-9.

Forest River's 30(b)(6) representative, Dan Evans, testified RV dealerships occasionally add wear and tear to vehicles on their lot by using them as "demonstrator" vehicles (*e.g.*, taking vehicles to shows in order to encourage customers to come back to the dealership to look at other RVs on the lot or even using vehicles for personal use). VRP at 947:15 to 948:6; VRP at 952:3-10. Mr. Evans testified Sunset drove the motorhome an abnormally high number of miles before selling it to the Thorns, suggesting it may have been used as a "demonstrator." VRP at 905:22-23. Sunset had driven the motorhome 872 miles. Forest River's policy only allows up to 500 miles. VRP at 951:2-12. Mr. Evans testified, had there been a warranty, Forest River would have required Sunset to explain the high mileage. *Id.*

Forest River dealership expert, Doug Lown, testified regarding situations where vehicles are sold "used" even though there has been no prior retail sale to a consumer (*i.e.*, off a certificate of origin). *See* VRP 1025:15 to 1026:22. Mr. Lown testified the average turnaround time for an RV on a dealer's lot is typically three or four months. VRP at 1021:14-19. He testified he entered into agreements with manufacturers, to sell motorhomes "used, as-is" where the vehicles had remained unsold for extended periods of time or where the vehicle was damaged prior to sale. VRP 1025:23 to 1026:21; *see also* VRP at 1021:14-19. Lown testified it is the dealer's responsibility, not

the manufacturer's, to ensure state law titling requirements are satisfied prior to sale. VRP at 1026:22 to 1027:4.

**B. Approximately four months after the purchase, the Thorns learned their motorhome was not covered by a Forest River warranty.**

After the sale, the Thorns encountered problems with the motorhome and brought it in for repairs. *See* Trial Exhibit 11. Sunset performed repairs without informing them the vehicle was not covered by the Forest River warranty and without charge. The Thorns testified they first learned there was no factory warranty about four months after the purchase when one of Sunset's employees told them they would have to pay for repairs. VRP at 608:6-18. Respondents called Forest River, on August 1, 2017, to confirm there was no Forest River warranty. *See* VRP at 609:17-23; *id.* at 610:18 to 611:3. A Forest River representative, unaware of the sale of the vehicle let alone any repairs, informed him the records showed no warranty. *See id.* at 612:4-9. Respondents did not request Forest River to provide a warranty. *Id.* at 612:10-15. Instead, they took up the issue with Sunset.<sup>2</sup>

Following the Thorns' call, Forest River contacted Sunset. Sunset informed Forest River it sold the vehicle representing it was new with a Forest River warranty. At trial, Philip Mitchell, Sunset's owner, testified upon

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<sup>2</sup> The Thorns testified, "[w]ithout these wrongful representations by Sunset and its employees, the plaintiffs would not have purchased the RV." CP at 11 (emphasis added); *see also* VRP at 240:16-24.

realizing its mistake, Sunset offered the Thorns an identical warranty to what would have been offered by Forest River. VRP at 718:15-23.

For several months, after learning of the warranty issue, neither the Thorns nor Sunset contacted Forest River. Forest River believed the issue was resolved by Sunset. *See* VRP at 959:18-24. On October 18, 2017, Forest River received a letter from the Thorns' counsel addressed to Sunset and Forest River rescinding the sale and demanding money damages. Trial Exhibit 7; *see also* VRP at 304:8 to 307:20.

After receiving the letter, Forest River contacted Sunset to determine what had happened. *See* VRP at 816:21 to 817:1. Sunset representatives reiterated that Sunset was in negotiations with the Thorns and had offered identical warranty coverage. *See* VRP 816:3 to 818:23. Forest River also reached out to the Thorns' counsel, Mr. Bolin, via an e-mail on October 23, 2017, but Mr. Bolin was unresponsive. Trial Exhibit 8; *see also* VRP at 820:18-25; 822:12 to 826:2; 828:10-12.

Forest River sent a letter to Mr. Bolin on October 26, stating it understood Sunset had offered to provide its own warranty and reimburse the Thorns for any repairs. Trial Exhibit 9; *see also* VRP at 825:4 to 828:12. Given this understanding, Forest River informed it was not "in a position to honor the demands or requests" made in the Thorns' demand letter but did invite a response from counsel. *Id.* Mr. Bolin did not respond. Respondents have

never requested Forest River to provide warranty coverage. *See* VRP at 828:10-12; 612:4-9.

**C. The evidence at trial demonstrated Sunset was aware of the lack of Forest River warranty on the Motorhome prior to delivering it to the Thorns yet concealed this fact from the Thorns and Forest River.**

Evidence admitted at trial demonstrated Sunset was well aware there was no Forest River warranty prior to selling the motorhome. *See* Trial Exhibits 15, 16, and 23. On January 30, 2017, months before the sale, Sunset accessed Forest River's warranty website and printed a screenshot of a document referencing the check Sunset cashed, which stated there was, "No Factory Warranty." Trial Exhibit 16. Sunset placed the document in its file. *See* VRP at 965:6 to 966:13, and 972:15-21.

On March 31, 2017, Sunset sold the vehicle to the Thorns, telling them it was new with a Forest River warranty. *See* VRP at 232:8-14. Prior to delivery, Sunset again accessed documents stating the vehicle had no Forest River warranty. *See* Trial Exhibit 15; VRP at 976-979. On the day of delivery, May 10, 2017, Respondents signed a warranty registration form provided by Sunset. Trial Exhibit 15; VRP at 238:10 to 240:12. Per its practice, Sunset attempted to register the warranty on Forest River's website but was unable to do so because Forest River had entered "NO FACTORY WARRANTY" under "owner's name." *See* Trial Exhibits 15 and 23; *see also* VRP at 721:14.

Sunset printed this form, which again referenced the check cashed by Sunset. Trial Exhibit 15; *See* VRP at 976-979.

After delivery, Sunset performed warranty repairs on the vehicle for several months, without billing for any work (as Sunset would ordinarily do for a vehicle under warranty). *See* VRP at 604:2 to 605:21.

**D. At trial, both Respondents testified they did not find Forest River's conduct to be unfair or deceptive.**

William Thorn testified he did not find Forest River's conduct to be unfair or deceptive:

Q. Do you think that Forest River did something that was unfair or deceptive as it relates to you and your family with this RV?

A. **No, not really.**

VRP at 249:9-12 (emphasis added). Mr. Thorn also testified his family would not have purchased the motorhome had they been notified it was not covered by the factory warranty. VRP at 284:23 to 285:1.

Darlene Thorn also testified she did not find Forest River's actions to be unfair or deceptive. VRP at 354:15 to 355:1. Rather, her complaint was with Sunset for failing to tell her the motorhome did not come with a Forest River warranty. VRP at 354:15 to 355:1.

**E. Testimony of Respondent expert Doug Walsh and disputed jury instructions proposed by Respondents.**

On the first day of trial, Judge Serko heard argument on Appellant's

motion *in limine* to exclude the testimony of Doug Walsh. Mr. Walsh is the former head of the Consumer Protection Division of the Washington State Attorney General's Office. Respondents offered him to testify Appellant violated the Lemon Law and the Consumer Protection Act. *See* CP at 67-70 and *VRP* at 38-134. The trial court initially reserved ruling.

On July 17, 2019, the third day of trial, the trial court entertained further argument on the admissibility of Mr. Walsh's testimony. Judge Serko advised Mr. Walsh would not likely be permitted to testify other than a brief offer of proof outside the presence of the jury:

THE COURT: All right. So, the whole point of this discussion is to tell you that I don't necessarily believe that Mr. Walsh should testify in front of the jury and give his --"

MR. BOLIN: At all?

THE COURT: At all. Unless I hear something in an offer of proof with him that convinces me otherwise, but right now, I don't believe that he should. But I do want to hear from him outside the presence of the jury, especially on the issue of the Auto Dealer Act, and whether or not he believes or can opine -- I should maybe be more clear -- that there is a statute in the State of Washington that requires a new vehicle to have at the very least a 12-month or 12,000-mile warranty.

*VRP* at 393:25 to 394:2.

Walsh provided testimony in support of the Thorns' offer of proof for

approximately 45 minutes regarding a number of legal conclusions and how they related to the Thorns' claims against Forest River. *See* VRP 406.

After the offer of proof, Judge Serko changed her mind and stated she was going to allow Walsh to testify before the jury. VRP at 429:22-24. In part, Judge Serko equated Walsh's testimony to that of a medical doctor in a medical malpractice case (*i.e.*, regarding the standard of care):

**THE COURT: .... Really what *I'm trying to wrestle with is the issue of whether or not this area of law is complicated enough that it needs to have interpretation by an expert*; and -- and what happened right at the end of that formal proof was, based on my knowledge, experience, education, and working with Washington statutes, dealers, manufacturers, in my opinion this was an unfair or deceptive practice. Now that's the ultimate potentially factual issue, but *I don't see it any differen[ce] necessarily* -- and this will go to Mr. Steilberg -- *than having an expert physician say, this breached the standard of care....***

VRP at 429:9-20 (Emphasis added). Court adjourned early and Appellant was permitted to take a second deposition of Walsh that evening concerning several previously undisclosed opinions. The morning of July 18, 2019, the Court heard additional argument regarding the admissibility of Walsh's testimony. *See* VRP at 439. Judge Serko denied the bulk of Appellant's requested relief. VRP at 453:7-14.

On July 18, 2019, Walsh testified before the jury regarding his

interpretation of a litany of statutes (including portions of the UCC, Auto Dealers Act (RCW 46.70 *et seq.*), and Washington Lemon Law (RCW 19.118 *et seq.*). Walsh testified: “In the State of Washington there is a requirement that [the vehicle manufacturer] offer a warranty on a new motor vehicle. The time limit that is identified in the law is 12 months and 12,000 miles.” VRP at 557:21-24. Walsh further opined:

The lemon law, the New Motor Vehicle Warranties Act, applies to new motor vehicles sold for the first time at retail in the State of Washington. And it applies to the self-propelled driving portion of the vehicle and the chassis, and it applies to other stage manufacturers whose stage work, which could include the domicile or the components, impact the self-propelled driving portion of the vehicle. The new motor vehicle lemon law doesn't apply to the domicile portion unless it impacts the driver's area or the self-propelled chassis of the vehicle.

VRP at 558:3-12.

During his testimony before the jury, Mr. Walsh applied facts to law and offered his legal opinions on ultimate legal issues under the guise of expert testimony. He testified Forest River’s June 8, 2016, letter to Sunset had “the capacity to mislead a substantial number of consumers as to whether the new motor vehicle that was the subject of the letter was new or used...[and that] the vehicle that’s subject of this letter was a new motor vehicle and could not have been represented as a used motor vehicle when sold in the State of

Washington. It would have misled a substantial number of consumers.” VRP 500:14-21.

At the end of evidence, the parties and the trial court spent several days working on jury instructions. Counsel for the Thorns submitted several instructions based upon the UCC and various Washington statutes (including the Lemon Law and Auto Dealer’s Act). *See* CP 241-291; 411-439.

Proposed Instruction No. 64, which was denied, stated: “The manufacturer’s written warranty shall be at least one year after the date of the original delivery to the consumer of the vehicle or the first twelve thousand miles of operation, whichever occurs first.” CP at 435.

Appellant argued any jury instructions based on the Lemon Law were improper because Respondents had not asserted a Lemon Law claim. Appellant also argued that Respondents’ proposed Instruction No. 64 misinterpreted the applicable Lemon Law statutes, RCW 19.118.031(3) and 19.118.041(2). The Court chose not to give Respondents’ proposed jury instruction 64 as well as several proposed instructions based upon the UCC. *See* CP at 272 (RCW 62A.2-314); CP at 286 (RCW 62A.2-313); CP at 287 (RCW 62A.2-316).

**F. The jury rendered a verdict in favor of Appellant, but the trial court granted the Respondents a new trial.**

The jury deliberated for nearly two full days. During that time, they

asked several questions.

The first set of questions, on July 30, 2019 were:

1. Is Forest River required to abide by the Washington State Consumer Protection Act? Answer: Yes.
2. Is there a specific time limit for new motor vehicle warranties under the Washington State Consumer Protection Act? Answer: No.
3. Is Forest River required to provide a warranty to the first titled owner for new vehicles regardless of age of vehicle under Washington law? Answer: Please refer to your notes and jury instructions.

CP at 443-45.

On July 31, 2019, the jury asked the following questions:

1. Was the Freightliner warranty in effect during the Thorns' ownership? Answer: Please refer to your notes and jury instructions.
2. Does Washington State law require more than a power train warranty on new motor vehicles? Answer: Please refer to your notes and jury instructions.
3. Why is Sunset Chevrolet still listed as one of the defendants on the first page of the instructions? Answer: Once a case is filed, the case caption cannot be changed.

CP at 446-48.

On July 31, 2019, the jury came back with an 11-1 verdict in favor of the defense. CP at 475.

On August 2, 2019, Respondents filed a Motion for a New Trial or Alternatively a Judgment on Liability Notwithstanding the Verdict. CP at

299. On August 16, 2019, Judge Serko granted the Thorns' request for a new trial. CP at 353.

At the hearing, Judge Serko stated:

I've been troubled about this case since the jury verdict came in. And the reason I'm troubled is because I feel like I shirked my responsibility to make a determination as a matter of law either during the course of some kind of argument as a matter of law, or during jury instructions. And based on that, I'm going to grant the motion for a new trial. I am not granting a motion as to liability, but that is without prejudice to be reargued before the new trial judge.

VRP at 1473:21 to 1474:4.

When asked by Appellant's counsel to explain the rationale behind her decision and whether it was her opinion she should have granted Respondents' request for jury instructions based upon the UCC and/or Lemon Law, Judge Serko stated: "Well, I'm also not going to go quite that far either because I'm not going to put the burden on a new judge to do what -- you know, to correct whatever error I may have made. I want that new judge to be the one that sees this fresh." VRP at 1474:23 to 1475:2. Judge Serko's Order fails to elaborate on the rationale for her decision or to explain what was defective about the jury instructions given at trial. *See* CP at 354.

This appeal followed.

## V. ARGUMENT AND AUTHORITY

### A. Standard of Review

An order granting a new trial is reviewed for abuse of discretion *Osborn v. Lake Washington School Dist.*, 1 Wn. App. 534, 462 P.2d 966 (1969). A trial court’s discretion to grant a new trial “is not without limits.” *Thompson v. Grays Harbor Community Hospital*, 36 Wn. App. 300, 307 675 P.2d 239 (1983). First, it is “well-established that discretion does not permit the trial court to weigh the evidence and substitute its judgment for that of the jury simply because it disagrees with the verdict.” *Id.* Second, “[t]o warrant and justify the exercise of the permitted discretion, *the verdict must be so manifestly inconsistent and irreconcilable with the total evidentiary composition* – viewed in the favorable light required – as to compel the conclusion that the moving party has been deprived of a fair trial.” *Id.* at 308 (internal quotation marks omitted) (emphasis added). This demanding approach appropriately reflects both the sanctity of the jury process and the substantial rights of the non-moving party.

### B. The trial court’s failure to enter an Order containing definite reasons of law and fact, as required by CR 59(f), warrants reversal of the Order granting Respondents a new trial.

CR 59(f) states:

**(f) Statement of Reasons.** In all cases where the trial court grants a motion for a new trial, it shall, in the order granting the motion, state whether the order is based upon the record or

upon facts and circumstances outside the record that cannot be made a part thereof. If the order is based upon the record, the court shall give definite reasons of law and facts for its order. If the order is based upon matters outside the record, the court shall state the facts and circumstances upon which it relied.

An order granting a new trial will not be sustained on appeal if definite reasons of law and fact, required by subd (f) of CR 59, are not given. *Dravo Corp. v. Moses (L. W.) Co.*, 6 Wn. App. 74, 492 P.2d 1058. (1971). Oral statements of the court that indicate only a disagreement with the outcome of the trial do not constitute definite reasons of fact or law as required by subd (f). *Simmons v. Koeteew*, 5 Wn. App. 572, 489 P.2d 364 (1971); *see also Noll v. Hancock (John) Mut. Life Ins. Co.*, 66 Wn.2d 540, 403 P.2d 898 (1965) (Trial judge's statement that "substantial justice has not been done, and that the said verdict is against the overwhelming weight of evidence" does not constitute reasons of law and fact as required by rule to support granting of new trial, but merely indicates disagreement with jury determination; and in such a situation, a motion for new trial is properly denied).

The trial court is required to include reasons for its action in granting a motion for new trial in order to inform the adverse party and Supreme Court as to the basis thereof. *Bensen v. South Kitsap School Dist.*, 63 Wn.2d 192, 386 P.2d 137 (1963). Where an order granting new trial does not state

any definite reasons of law or facts for so doing, neither the Appellate Court nor Supreme Court can review the order and it must be reversed. *Johnson v. Department of Labor & Industries*, 46 Wn.2d 463, 281 P.2d 994 (1955) (reversing order granting new trial where order did not state definitive reasons of law and fact); *see also Reiboldt v. Bedient*, 17 Wn. App. 339, 343, 562 P.2d 991 (1977) (reversing trial court order granting new trial where the order “provide[d] little or no assistance respecting appellate review of this case.”); *Stigall v. Courtesy Chevrolet-Pontiac, Inc.*, 15 Wn. App. 739, 740, 551 P.2d 763, 764 (1976) (“Since the order granting the new trial does not comply with CR 59(f), it must be vacated.”).

In a similar case to the one at bar, Division II reversed an order granting a new trial based upon a claim the jury instructions and special verdict form were defective. *Sdorra v. Dickinson*, 80 Wn. App. 695, 910 P.2d 1328 (1996). In reversing the trial court order, Division II stated:

The order granting new trial states only that the jury instructions were “contradictory and inconsistent, constituting prejudicial error as given.” It does not state which instructions were contradictory or inconsistent. It does not state why the instructions were contradictory and inconsistent. It does not state whether, or why, any error was prejudicial. For these reasons, it does not comply with CR 59(f). *See Greenwood v. Bogue*, 53 Wash.2d 795, 337 P.2d 708 (1959).

*Id.* at 700.

Here, the trial court's order is even more defective than the order in *Sdorra* and fails to provide any specificity as to what the court felt was deficient about the jury instructions given at trial. The order merely states: "IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Plaintiffs' Motion is hereby Granted. As to the motion for a new trial, only." CP at 354.

Judge Serko failed to explain the legal or factual basis for her ruling even when requested to do so by counsel. *See* VRP at 1474:23 to 1475:2. Absent explanation, Judge Serko's ruling should be viewed as nothing more than an attempt to substitute her own judgment for that of the jury. *See Johnson v. Department of Labor & Industries*, 46 Wn.2d at 466 (citations omitted) ("it is not within the competency of the trial court (nor of this court) to invade the province of the jury and substitute its judgment for that of the jury in weighing the evidence."). The trial court's order should be reversed, and the defense verdict upheld.

**C. Neither Washington Lemon Law nor the UCC impact the legality of Forest River's contract with Sunset.**

If the Court disagrees with Appellant's argument in Section B, *supra*, Appellant is left to speculate as to the trial court's rationale for its order. Appellant assumes Respondents will argue the trial court erred in failing to give jury instructions stating Washington law required the

motorhome to be sold with a minimum one year/12,000-mile warranty. *See* CP at 435 (Respondents' Proposed Jury Instruction No. 64 regarding a purported one year/12,000-mile warranty requirement); CP at 272 (RCW 62A.2-314); CP at 286 (RCW 62A.2-313); CP at 287 (RCW 62A.2-316). This argument fails for a number of reasons.

1. Washington Lemon Law does not prevent a manufacturer and dealer from agreeing to sell a vehicle "used, as-is" due to the passage of time nor does it require all motor vehicles to be sold with a one year/12,000-mile warranty.

At trial, the court ruled the Thorns did not have standing to contest the validity of Forest River's contract with Sunset. That ruling is not at issue on appeal. Lacking standing to attack the validity of the contract at trial, Respondents relied on an erroneous argument that Washington's Lemon Law required the subject vehicle to be sold with a minimum one year/12,000-mile Forest River warranty. However, there is no such requirement in Washington and certainly not under its Lemon Law statute, RCW 19.118 *et seq.*

RCW 19.118.031(3) and 19.118.041 set forth a one year, 12,000-mile, statutory time period "for purposes of this subsection" within which manufacturers must comport to a specific statutory framework that imposes specific duties and potential penalties on manufacturers. These provisions do not require manufacturers to provide an express warranty beyond that

“subsection,” nor do they prohibit a manufacturer and dealer from entering into a contract to sell a particular vehicle “used as-is” when it has sat on the dealer’s lot for several years.

The plain language of the Lemon Law and its legislative history support Appellant’s position. For example, RCW 19.118.010 states:

**Every manufacturer of motor vehicles sold in this state and for which the manufacturer has made an express warranty** shall maintain in this state sufficient service and repair facilities reasonably close to all areas in which its motor vehicles are sold to carry out the terms of the warranties or designate and authorize in this state as service and repair facilities independent repair or service facilities reasonably close to all areas in which its motor vehicles are sold to carry out the terms of the warranties. As a means of complying with this section, a manufacturer may enter into warranty service contracts with independent service and repair facilities.

RCW 19.118.010 (emphasis added). In other words, if a manufacturer sold a new motor vehicle without an express warranty, it need not satisfy these minimum requirements regarding repair facilities.

Similarly, the Lemon Law defines “new motor vehicle” as follows:

The term "new motor vehicle" includes a demonstrator or lease-purchase vehicle **as long as** a manufacturer's warranty was issued as a condition of sale.

RCW 19.118.021(12). The plain language of this statute allows a dealer to sell a vehicle which qualifies as a “new motor vehicle,” but which was used

as a “demonstrator,” without providing a manufacturer’s warranty as a condition of sale, even though that vehicle has never been previously sold (or titled) to another consumer.

Senate Bill Report, ESSB 5502 (March 11, 1987) further states:

In 1983, the Legislature established standards regarding express warranties of new motor vehicles. An express warranty is a written statement arising out of the sale of the motor vehicle. ***If a manufacturer provides an express warranty, then it must adhere to the current law.***

CP at 366 (Emphasis added). The same Bill Report also provides:

Any self-propelled motor vehicle ***for which a warranty is provided*** except motorcycles and trucks with 19,000 pounds or more gross vehicle weight rating, are covered. The self-propelled vehicle and chassis of motor homes are covered, but not the housing structure.

CP at 366-67 (Emphasis added); *see also* CP at 369 (Final Legislative Bill Report, SSB 3034) (“Manufacturers who sell motor vehicles in this state ***under express warranty*** are required to operate, or designate others to operate, repair facilities in the state to provide customer service.”) (Emphasis added).

A logical reading of the Lemon Law and its legislative history is that a manufacturer’s warranty is not required as a condition of sale. *See Rivard v. State*, 168 Wn.2d 775, 783, 231 P.3d 186 (2010) (in giving meaning to

ambiguous statutory provisions, “we interpret a statute to give effect to all language, so as to render no portion meaningless or superfluous”). Here, if the Lemon Law required manufacturers to issue express warranties (which it does not), then the foregoing statutes would be rendered superfluous.

Assuming Respondents’ position is true, a manufacturer could be required to honor warranties on any vehicle, not previously titled to a consumer, no matter how long the vehicle lingered on the dealer lot, unsold. The dealer could place dealer plates on the vehicle and drive it for personal use for an indefinite period of time, yet still sell the vehicle with a factory warranty. Under Respondents’ rationale, the manufacturer is powerless to prevent this sort of abuse. Even if the vehicle is left on the dealer’s lot for ten years, the manufacturer is required to provide its full warranty when the vehicle is eventually sold to a consumer purchaser (even if the dealer is willing to sell the vehicle “used, as-is”).

Even Respondents’ expert, Doug Walsh, agreed during his first deposition the passage of time may justify a manufacturer and dealer agreeing to have a vehicle sold “used, as-is” and without a manufacturer’s warranty:

- Q. If a dealer has an RV on its lot for ten years, obviously at that point it's going to be more likely to have some sort of deterioration than an RV

which has been on the lot for one year; right? [By Mr. Nierman]

A. Right.

Q. **And it would be your opinion that at that point, even after ten years, the manufacturer cannot step in and say, Hey, we need to reach an agreement where this vehicle is going to be sold used as-is?**

A. **Yeah, now you are talking about a different set of account facts,** because you are talking about a vehicle that -- let's take today. It's 2019 and comes on the lot. Ten years from now, 2029, that vehicle in will have a far different presentation to the purchasing public because it's 10 years old. It's an old vehicle. In fact, it's an old new motor vehicle; right? Still being delivered off of a certificate of origin. But that intervening ten years, the consumer would walk and say, Wow, that's a 10-year-old vehicle. What the heck is going on? **And you would start to engage in the kind of back-and-forth that would get to potential full and fair disclosure resulting in a knowing and voluntary waiver of warranty rights at that point.**

CP at 142 (emphasis added).

In fact, Mr. Walsh testified the exact circumstances present in this case (a 2015 model year sold in 2017) may “invite a conversation” about selling the vehicle “used as-is”:

Q. What if it's two years after the fact [after delivery], in, does that –

A. That would be -- **that would start to move into unusual in terms of why is this vehicle not -- you know, it's being offered as 2015, but you are selling in it 2017, that might invite a conversation about that situation [i.e., selling the vehicle without a manufacturer's warranty]....**

CP at 142-43 (emphasis added). Therefore, even Mr. Walsh contradicts Respondents' argument that Forest River's contract with Sunset somehow violated the Washington law. The fact is the Lemon Law does not regulate the dealer/manufacturer relationship—or the parties' freedom to contract—in the manner suggested by Respondents.

Respondents' argument that RCW 19.118 *et seq.* mandates one-year express warranties leads to strained and absurd circumstances. So read, one would expect the statute to dictate the nature and scope of such statutorily mandated warranties. Automotive express warranties are complex and are designed to operate in all 50 states. Vehicle warranties are typically limited in time and scope, and various components such as tires, batteries, brakes, electronics, and emissions controls are warranted under special provisions or warranted by other manufacturers—and certain items are often only warranted for 90 to 180 days. Vehicle warranties often limit consequential

damages, exclude attorney fees, and limit the time in which implied warranty claims must be filed. Many implied warranties may be disclaimed.

RCW 19.118 specifically recognizes, in the case of recreational vehicles, numerous manufacturer's warrant various aspects of the vehicle including the "final stage manufacturer" – Forest River's role in this case. Nowhere does the statute suggest the final stage manufacturer must warrant the entire vehicle or what each component manufacturer's warranty should include. Rather, the statute provides for allocation of fault among component and final stage manufacturers. That the legislature did not provide guidance to manufacturers on what components to warrant, or how long, dictates Respondents' reading of the statute is in error.

2. The UCC does not prohibit a manufacturer and dealer from entering into an agreement to have a motorhome sold "used, as-is."

At the hearing on the Thorns' Motion for New Trial, their counsel argued Forest River's agreement with Sunset violated RCW 62A.2-316(1) and (2). *See* VRP 1465:11 to 1467:11. If the trial court relied on this argument in granting Respondents' Motion for New Trial, the court's ruling was in error.

RCW 62A.2-316(1) provides:

- (1) Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be

construed wherever reasonable as consistent with each other; but subject to the provisions of this Article on parol or extrinsic evidence (RCW 62A.2-202) negation or limitation is inoperative to the extent that such construction is unreasonable.

Nothing in this statute impacts the legality of Forest River's agreement with Sunset. Forest River was clear it was no longer providing a warranty with the vehicle, and Sunset agreed.

RCW 62A.2-316(1) would apply to the instant case if Forest River had, for example, offered a warranty with the sale of this vehicle and then attempted to negate or change the warranty after sale. That is not what occurred here. *See, e.g., Travis v. Washington Horse Breeders Ass'n, Inc.*, 111 Wn.2d 396, 759 P.2d 418 (1988) (Disclaimers in horse auction sale catalog were inoperative to disclaim sellers' express warranties that horse in question was "healthy and fit for racing and breeding purposes."). Simply put, had the trial court read Respondents' Proposed Jury Instruction No. 43 to the jury, the result still would have been a defense verdict in favor of Forest River. *See CP at 287.*

RCW 62A.2-316(2) is similarly inapplicable to the instant set of facts. That statute provides:

(2) Subject to subsection (3) of this section, to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of

a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that “There are no warranties which extend beyond the description on the face hereof.”

This statute would apply to Respondents’ claim against Sunset, assuming there was an argument Sunset failed to make a proper disclaimer of implied warranties. However, RCW 62A.2-316(2) does not impact Respondents’ claim against Forest River regarding the legality of its contract with Sunset and whether it somehow violated the Auto Dealer’s Act or the CPA. Moreover, any implied warranties made by Sunset, as the seller in contractual privity with Respondents, were no longer at issue after Sunset settled.

There is no provision of the UCC which in any way prohibited Forest River’s actions in this case. As such, the trial court’s decision not to give a number of the Thorns’ proposed jury instructions based on the UCC was proper and does not serve as a basis for a new trial.

3. Repondents’ interpretation of Washington law violates Appellant’s freedom of contract.

Requiring all vehicle manufacturers in Washington to provide a one-year uniform warranty on every vehicle component would also unconstitutionally infringe on the freedom to contract in Washington State.

See U.S.C. Const. art. 1, § 10; RCW Const. art. 1, § 23. *Ketcham v. King Cty. Med. Serv. Corp.*, 81 Wn.2d 565, 502 P.2d 1197 (1972). Even if RCW 19.118 clearly set forth a legislative intent to require vehicle manufacturers to issue one-year express warranties—which it does not—such a statutory requirement would not pass constitutional muster. In order to override constitutional freedom of contract, a statute must pass a reasonableness test.

Courts will not sustain restrictions upon useful, lawful and unharmed activities of the people or the use of property in pursuance thereof unless it is shown the restrictions sought to be imposed by means of the police powers are rationally connected to improving or benefiting the public peace, health, safety and welfare. *County of Spokane v. Valu-Mart, Inc.*, 69 Wn.2d 712, 419 P.2d 993 (1966); *State v. Spino*, 61 Wn.2d 246, 377 P.2d 868 (1963); *Tukwila v. Seattle*, 68 Wn.2d 611, 414 P.2d 597 (1966). *Remington Arms Co. v. Skaggs*, 55 Wn.2d 1, 345 P.2d 1085 (1959); A contract is impaired by a statute which alters its terms, imposes new conditions or lessens its value (*Tremper v. Northwestern Mut. Life Ins. Co.*, 11 Wn.2d 461, 119 P.2d 707 (1941)). This is precisely what RCW 19.118 would do if read to mandate all inclusive one-year warranties. Such a statutory reading would be a first in the United States and would likely run afoul of other state laws raising due process, commerce clause and contract clause issues.

Respondents' reading of RCW 19.118 to mandate one-year vehicle warranties is not only unconstitutional and illogical, it is also unnecessary. Respondents offer a policy argument that the lack of an express warranty effectively denied them the opportunity for relief under the Lemon Law. This is not true. As stated above, RCW 19.118 *et seq.* does not require a written warranty in order to provide relief. The statute specifically affords relief based on implied warranties as well. *See* RCW 19.118.021(22). RCW 19.118 *et seq.* applies to any vehicle so long as it meets jurisdictional criteria and the consumer requests repurchase within 30 months of the original retail delivery date. RCW 19.118.090(3). In other words, RCW 19.118 *et seq.* applies even to used vehicles so long as the vehicle qualifies, and the claim is timely. The lack of an express warranty does not preclude Lemon Law relief.

4. The common law does not impose an obligation on vehicle manufacturers to provide a warranty.

There is no obligation for automobile manufacturers to provide a warranty under the common law. "A manufacturer's liability for breach of an express warranty derives from, and is measured by, the terms of that warranty." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 525-26 (1992). "Accordingly, the 'requirement[s]' imposed by an express warranty claim are not 'imposed under State law,' but rather imposed by *the*

*warrantor.*” *Id.* (emphasis in original). “In short, a common-law remedy for a contractual commitment voluntarily undertaken should not be regarded as a ‘requirement ... imposed under State law’ ....” *Id.* Indeed, “common understanding dictates that a contractual requirement, although only enforceable under state law, is not ‘imposed’ by the State, but rather is ‘imposed’ by the contracting party upon itself.” *Id.* at 526 fn 24.

“[A] cause of action on an express warranty asks only that a manufacturer make good on the contractual commitment that it *voluntarily* undertook by placing that warranty on its product.” *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 444 (2005) (emphasis supplied). And, “this common-law rule does not require the manufacturer to make an express warranty, or in the event that the manufacturer elects to do so, to say anything in particular in that warranty....” *Id.* (citing *Cipollone*, 505 U.S. at 525-26). In enacting RCW 19.118 *et seq.*, the legislature imposed minimum requirements on motor vehicle manufacturers *when a warranty is provided* (either express or implied), similar to the Magnuson-Moss Warranty Act. However, the legislature did not impose requirements on manufacturers to issue express warranties, nor has it passed legislation which would render Forest River’s contract with Sunset unfair or deceptive.

## VI. CONCLUSION

The trial court abused its discretion when it granted Respondents a new trial without providing any rationale for the ruling in its Order. This was an abuse of discretion warranting reversal of the Order at issue.

The trial court Order should also be reversed because Forest River had a valid contract with Sunset. As no law prevented Forest River and Sunset from agreeing to have the motorhome sold “used, as-is,” the jury instructions were proper, and the trial court’s Order constitutes an abuse of discretion. The jury’s verdict in favor of Forest River should be upheld.

Appellant seeks its cost under RAP 14.

DATED this 2nd day of March 2020.

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