

FILED  
Court of Appeals  
Division II  
State of Washington  
6/1/2020 2:51 PM

NO. 53739-7-II

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COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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FOREST RIVER, INC., a corporation,

Appellant,

vs.

WILLIAM THORN and DARLENE THORN, a married couple,

Respondents.

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**BRIEF OF RESPONDENT**

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## INTRODUCTION

The Thorns purchased a new Forest River Berkshire XL RV motorhome. The Thorns believed that it was a high-quality vehicle with a manufacturer's warranty. Soon after their purchase, however, the Thorns discovered that the Berkshire was unsafe and defective in many ways. But Forest River denied their warranty claims, asserting it had cancelled the Berkshire's warranty under an undisclosed corporate "policy" of canceling new vehicle warranties on RVs that remain unsold for two years.

The Thorns filed Consumer Protection Act (CPA) claims in the Superior Court. At trial, it was undisputed that the Thorns were faultless. The Thorns proved that the warranty cancellation policy was unfair and deceptive under the CPA because (a) the Lemon Law *requires* Forest River to provide a new motor vehicle manufacturer's warranty; and (b) the UCC limits negation of such express warranties. Forest River's policy violated these laws, unfairly and deceptively foisting the risk of unsafe, defective vehicles entirely onto unwitting consumers like the Thorns.

The trial court denied the Thorns' repeated requests to instruct the jury regarding the Lemon Law requirements and UCC limitations. The jury returned a defense verdict. But the trial court granted a new trial, recognizing its own prejudicial error in failing to instruct the jury on the Thorns' well-supported theory of the case. This Court should affirm.

## STATEMENT OF THE CASE

**A. Forest River unfairly and deceptively canceled its warranty on the Berkshire RV under its unlawful warranty cancellation policy before the Thorns purchased it.**

As a final stage manufacturer of motorized RVs, Forest River purchases RV components from hundreds of vendors and assembles them into motor homes and travel trailers. RP 205, 838, 1024. Forest River provides a manufacturer's warranty on all new RVs, and the vendors for each RV component provide warranties independent of Forest River's warranty. RP 502-04, 1024.

Forest River has an internal "warranty-cancellation policy" by which it cancels its new vehicle warranty on new RVs that dealers do not sell to a consumer within two years. RP 780-81, 946; CP 458. This internal policy is not disclosed to consumers or dealers. Forest River's policy eliminates its costs associated with resolving claim disputes and paying for repairs when Forest River asserts that the warranty claim is attributable to "lot rot"<sup>1</sup> rather than a defect in workmanship or materials. RP 800-01, 880-82, 980.

Forest River enforces its warranty cancellation policy regardless of the RV's actual condition and makes no attempt to investigate the

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<sup>1</sup> "Lot rot" is the term used in the RV industry to describe defects that allegedly arise in unsold vehicles due to exposure to the elements, extended periods of non-use, poor maintenance, and normal degradation of materials. RP 801, 980.

vehicle's condition before sending a warranty cancellation notification to the dealer. RP 1000. In other words, Forest River deems its own RVs *presumptively* defective if they are not sold within two years. RP 517, 519, 595. At least 8-12 warranties have been cancelled under this policy in the past 5 years. RP 981-82, 989, 1394.

The warranty cancellation policy was not posted on Forest River's website or otherwise available to consumers or dealers. RP 886. Forest River does not disclose its warranty cancellation policy to consumers before they purchase a new Forest River RV. RP 889. Dealers become aware of the policy only when they receive a letter from Forest River canceling the warranty. RP 891.

On June 4, 2014, Forest River delivered the new Berkshire XL RV (hereinafter "the Berkshire") to Sunset Chevrolet, an authorized RV dealer for Forest River. RP 715-16; Ex 14. *At the time of delivery* in 2014, Sunset recorded numerous "concerns with unit," including slide outs (i.e., expandable living portions) that did not function properly; a misaligned deadbolt; and dead batteries that would not take a charge. Ex 14.

Approximately two years after Sunset received the Berkshire, it remained unsold on Sunset's lot. Ex 22; RP 956. Asserting its warranty cancellation policy, Forest River attempted to unilaterally cancel the Berkshire's warranty in a letter to Sunset:

This letter is written to inform you that as of this date, June 8, 2016 Forest River Inc. will no longer participate in a warranty repair nor

offer a warranty on the above mentioned Berkshire motor home. This coach has been on your premises and out of the control of Forest River, Inc. since May 29, 2014. 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.

Forest River Inc will however in the interest of good faith contribution and in support of your dealership, pay the amount of one thousand five hundred dollars (\$1,500) 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. We have enclosed a check for that amount.

Ex 22; RP 956, 998.<sup>2</sup> Sunset received and cashed the \$1,500 check, but corporate personnel (who would understand the significance of Forest River’s letter) never received or reviewed it. RP 718, 752-755. Forest River had mailed the check and letter to a *retail sales lot*, not the corporate office and not the lot where the Berkshire was offered for sale. RP 752-55, 770. The letter also mis-identified the RV at issue. RP 753-54, 957.

On January 30, 2017, a Sunset staff member looked up the still-unsold Berkshire in the web-based warranty portal “Dealer Central,” through which dealers register warranties, process warranty repairs, and look up customer warranty information. Ex 16; RP 966-70. Forest River had removed warranty coverage and entered “No Factory Warranty” on

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<sup>2</sup> The letter did not refer to the approximately 100 other express warranties attached to various components and systems on the RV, nor did the letter explain how a vehicle could be sold “used, as-is” while retaining the numerous new motor vehicle and component part warranties from other manufacturers that had *not* been canceled. RP 998; Ex 22.

the Berkshire's Dealer Central page. RP 966, 971-73; Ex 16; Ex 23. Forest River then claimed that Sunset, in cashing the \$1,500 check, had agreed to sell the new RV "used, as-is," transferring all safety and defect risk to the first retail purchaser. *See* RP 74.

**B. The Thorns purchased the new Berkshire believing it was warranted and later discovered that the RV had unsafe defects and that Forest River had canceled the warranty.**

On March 31, 2017, Plaintiffs William and Darlene Thorn, accompanied by son Ben Thorn and daughter-in-law Barbara Thorn, purchased the Berkshire. RP 222, 241, 600-01. The 2015 Berkshire was advertised and sold as a new vehicle. RP 600-01, 237, 260-61, 771. The Berkshire, like all new motor vehicles, was sold off the certificate of origin, and the Thorns were its first titled owners. Ex 3.<sup>3</sup>

The salesman assured the Thorns that the Berkshire was fully covered by a Forest River manufacturer's warranty, which was a condition of sale (*i.e.*, part of the basis of the bargain) to the Thorns. RP 232, 237, 240, 610. The Thorns reasonably believed the Berkshire would have fewer defects than a used vehicle and that any issues with the RV would be covered by a new vehicle warranty. RP 232, 240; 260-62. The warranty

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<sup>3</sup> Forest River contends that the Berkshire RV was "used." BA 1, 6. The Berkshire was a new vehicle and, based on uncontroverted trial evidence, satisfied the definition of "new vehicle" provided in Instruction 17 ("New motor vehicle' means any motor vehicle that (1) is self-propelled and is required to registered and titled under this title, (2) has not been previously titled to a retail purchaser or lessee, and (3) is not a used vehicle.") App. A at CP 468.

promised by Sunset was consistent with Forest River marketing materials and its website that advertised a warranty on new vehicles for 12 months or 12,000 miles, whichever occurred first. Ex 1-2; RP 501. At the time of delivery, the Thorns filled out a manufacturer's warranty registration form. Ex 6; RP 238-40, 636-38.

Almost immediately after the Thorns took possession of the Berkshire, they discovered numerous persistent defects, many of which had existed when Forest River delivered the vehicle to Sunset in 2014.<sup>4</sup> *Compare* Ex 14 with RP 225, 263-65, 563-64, 602. The tail lights intermittently failed; the steps into and out of the vehicle spontaneously loosened and fell to the ground; the batteries died every three days, so the Thorns could not start the Berkshire or operate its electric-powered amenities and components; the slide-outs did not function such that the living space failed to expand; and a broken rocker switch prevented use of the generator. RP 225, 263-65, 563-64, 602. The Thorns were unable to use the Berkshire because its substantial defects rendered it unsafe and unreliable.<sup>5</sup> RP 564.

On three separate occasions, the Thorns brought the RV to Sunset for repairs that the Thorns believed were covered by the Forest River

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<sup>4</sup> These defects and safety issues were *not* attributable to the "lot rot" or the vehicle's age, given that they were present when the dealer received the Berkshire in 2014. Ex 14; RP 222, 225, 241, 263-65, 563-64, 600-02.

<sup>5</sup> Some of these defects directly or indirectly impacted the self-propelled driving portion of the vehicle and the chassis, which invokes Lemon Law protection. *See* RP 558.

manufacturer's warranty. RP 266, 604-05, 608-10, 646. In late July 2017, after the *third* attempt to diagnose and repair the RV, Sunset disclosed to the Thorns for the first time that the Berkshire did not have a Forest River new motor vehicle warranty. RP 606-08, 975. Sunset stated that the Thorns were responsible for repair costs because they did not have a warranty and suggested that the Thorns utilize the service contract they had purchased at the time of sale to cover the repair cost. RP 608-09.

Ben Thorn, on behalf of his parents, called Forest River to ask whether the vehicle had a Forest River warranty. RP 606-07, 611-13. Forest River told Ben that "there was no warranty" on the Berkshire and the warranty "had been canceled and that a check had been written to Sunset to pay off for the warranty." RP 612. The Forest River representative who spoke to Ben Thorn noted that "the coach *no longer had* a factory warranty." Ex 19 (emphasis added); RP 843.

After Ben Thorn confirmed that Forest River refused to honor its warranty, Sunset offered to pay the deductible on the Thorns' service contract. RP 583-84. The Thorns were dissatisfied with Sunset's offer and no longer trusted Sunset nor Forest River. RP 613-16, 622. The Thorns told Sunset that they paid for a factory warranty and that is what they expected. RP 622. In October 2017, the Thorns returned the Berkshire to Sunset and left the keys. RP 274, 641. Soon after, the Thorns obtained

legal counsel and sent a letter revoking acceptance of the vehicle under RCW 62A.2.608. Ex 7; RP 832.

**C. The Thorns' CPA action against Forest River arising from the warranty cancellation policy proceeded to jury trial.**

On June 8, 2018, the Thorns filed a superior court CPA action against both Sunset and Forest River. CP 1-40. The Thorns settled claims against Sunset before trial.<sup>6</sup> RP 27, 713. On June 15, 2019, the claim against Forest River proceeded to an eleven-day jury trial. RP 1-1460.

The Thorns presented testimony from William, Darlene, Ben, and Barbara Thorn and expert witness Douglas Walsh. RP 216-252, 253-286, 330-362, 493-559, 560-651. In addition to testifying about the harm that the Berkshire's defects and the purportedly canceled warranty had on their family, Darlene, Ben, and Barbara Thorn testified that the family would not have purchased the Berkshire if they knew that Forest River had canceled the warranty, nor would they have purchased the RV if Sunset had complied with Forest River's request and sold the vehicle used, as-is. RP 284-285, 353-354, 359, 641, 1353-1355.

Douglas Walsh, a retired former Chief of the Consumer Protection Division for the Attorney General's Office and former counsel to the

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<sup>6</sup> Forest River never brought any crossclaims against Sunset. *See* CP 41-50. Sunset settled and was dismissed. CP 211; RP 27, 66. Forest River has raised no issues about Sunset's dismissal on appeal. *See generally* BA. It is final.

Lemon Law Administration, testified as an expert<sup>7</sup> in motor vehicle consumer issues. RP 494-495. Walsh testified to *issues of fact* related to the motor vehicle industry's practices related to warranties; common consumer expectations regarding new motor vehicle warranty coverage; and whether the warranty cancellation letter from Forest River to Sunset had the "capacity to mislead a substantial number of consumers." RP 499; *see generally* RP 498-559.

Walsh *did not* testify during direct or cross-examination regarding the Lemon Law's requirement that that manufacturers provide a warranty on new motor vehicles; nor did Walsh testify at any point regarding the legality of disclaiming or negating an express warranty under the UCC or any other statute. *See generally* RP 498-557. Only in response to a jury question did Walsh briefly testify about the warranty requirement:

THE COURT: . . . Is there a legal requirement for a vehicle manufacturer to offer a warranty; and if so, what is the minimum warranty time requirement?

THE WITNESS: In the State of Washington there is a requirement that they offer a warranty on a new motor vehicle. The time limit that is identified in the law is 12 months and 12,000 miles.

THE COURT: I'm going to rephrase this question just a little bit. What is the criteria for the Lemon Law to apply?

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<sup>7</sup> Forest River moved to exclude Walsh's testimony. RP 456. After extensive voir dire, the trial court allowed Walsh to testify. RP 406-427, 453. Judge Serko granted Forest River a week to find their own expert to counter Walsh's testimony during which the trial was delayed. RP 291-92, 480. Forest River failed to present their own expert at trial. Forest River has not assigned error to the admission of Walsh's testimony, or argued the point. BA 4, 17-33.

THE WITNESS: 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.

RP 557-58. Walsh provided no additional testimony before the jury on any particular law relevant to this appeal.<sup>8</sup>

**D. The trial court repeatedly denied the Thorns' requested jury instructions on the Lemon Law warranty requirement and the UCC limitation on negation of express warranties.**

The Thorns repeatedly requested jury instructions<sup>9</sup> on the Lemon Law's requirement that manufacturers provide a 12-month/12,000 mile warranty and the UCC's limitations on negation of express warranties.

**1. The Thorns' proposed instructions regarding the Lemon Law warranty requirement, including Instruction 64: denied.**

The Thorns proposed and the trial court declined to give three substantively similar instructions regarding the Lemon Law warranty

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<sup>8</sup> Walsh also testified that the National Highway Traffic Safety Administration (NHTSA) requires motor home manufacturers to report warranty claims to NHTSA as part of an early warning system to identify and correct safety issues. *See* RP 530-33; 49 CFR §§ 579.22, 579.4. Forest River's warranty cancellation policy prevents consumers from filing warranty claims against presumptively defective vehicles, which in turn deprives NHTSA of crucial information to monitor and regulate vehicle safety.

<sup>9</sup> The court's instructions to the jury are contained in App. A. The proposed and rejected instructions at issue are contained in App. B.

requirement: the Thorns' proposed instructions 35, 47, and 64. App. B at CP 279, 291, 435.<sup>10</sup> The Thorns' counsel repeatedly argued that an instruction on the warranty requirement was necessary for them to argue their case. RP 1150-1152, 1160-62. Regarding Instruction 35, Counsel argued:

The threshold requirement is that all new manufacturers provide a warranty for 12 months or 12,000 miles. That's part of the Lemon Law scheme. . . . If there had been a warranty on this vehicle, then my clients could have gone through the Lemon Law arbitration process and resolved this a long time ago. So it was the wrongful deprivation of that warranty that precluded them from making the Lemon Law claim. I don't think that the defendant should be able to, by virtue of their wrongful conduct, take their conduct out of the Lemon Law where it should have rightfully been if they had not committed the wrongful act. And that on instruction about 12/12 is essential for that.

...

The essence of the wrongful conduct is the cancellation of that warranty. You're rewarding the defendants if you let them take that wrongful conduct and use it as an argument to defeat plaintiff's proposed 35.

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<sup>10</sup> Instruction 35 stated in relevant part: "A 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." App. B at CP 279.

Instruction 47 stated in its entirety: "A Washington statute provides that: A manufacturer's written warranty must 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." App. B at CP 291.

Instruction 64 stated in its entirety: "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." App. B at CP 435.

RP 1150-52. Days after the Thorns' proposed Instructions 35 and 47 were denied, they offered proposed Instruction 64 and filed a motion to support the instruction. *See* RP 1302-1311.

Defense counsel conceded the centrality of the warranty requirement contained in Plaintiffs' proposed Instructions 35, 47, and 65 to the Thorns' claim. RP 1079, 1202, 1294. Nevertheless, the trial court declined all three proposed instructions. RP 1151, 1175, 1311. However, the trial court suggested that it *agreed* with the Thorns' assertion that manufacturers must provide a new motor vehicle warranty when it declined Forest River's request to argue otherwise in closing argument. *See* RP 1174-75.

In direct violation of Judge Serko's ruling prohibiting Forest River from arguing that no new vehicle manufacturer's warranty requirement existed, defense counsel stated in closing:

Now, one thing you didn't hear in the jury instructions was an instruction stating that the law requires all vehicles like this to be warranted for a minimum of one year and 15,000 (sic) miles or anything like that. It's because there is no law that states that. And if there was, it would be in the jury instructions.

RP 1389.

Following Forest River's closing argument, the Thorns again requested proposed Instruction 64, asserting that it was necessary to correct Forest River's misstatement in closing that the law does not

require a manufacturer's warranty on new vehicles. RP 1405. Judge Serko stated that she was "struggling" with whether to offer proposed Instruction 64 and needed to consider it overnight. RP 1406-07.<sup>11</sup> Ultimately, Judge Serko declined, again, to give Instruction 64:

So when I kept thinking about this issue – when I really got down to the bottom line of this case, I thought; should I be giving Instruction 64? In my mind, I cannot do that. And the reason I could not do that is that that would be a direct comment on what Mr. Nierman said in closing argument and in essence saying to the jury, he was wrong. And I think that that would unduly prejudice the defense case.

...

So I'm going to allow this case to go to the jury. I'm going to allow them to deliberate to a verdict if that's possible. And if the case is a defense verdict by the jury saying either there was no violation of the Consumer Protection Act or there was no proximate cause, I would consider a motion posttrial for a new trial based on this circumstance.

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<sup>11</sup> Judge Serko also admonished Forest River outside the presence of the jury for its misconduct in closing arguments, stating, "Counsel doesn't get to get up and say definitely there is no law when this has been a pivotal issue in this case and we've been going back and forth, and the Court specifically gave the defense extra time to try to find an expert to say that very thing." RP 1408. The trial court ultimately instructed the jury to disregard Forest River's improper statement, saying, "During closing, the defense commented that Washington law does not require all new motor vehicles to be sold with a manufacturer's warranty. This statement by counsel was improper and you are instructed to disregard it." RP at 1433; App. A at CP 474.

In granting the new trial, the trial court was clear that the error underlying her order was her own and opposing counsel's misconduct was "cured with a curative instruction." RP 1476. Nevertheless, the curative instruction establishes that the trial court agreed that Washington law requires a manufacturer's warranty on new motor vehicles.

RP 1423-24. The Thorns objected to this ruling. RP 1425.

**2. The Thorns' proposed Instruction 43, regarding limitation on negating express warranties under RCW 62A.2-316(1): denied.**

The Thorns' proposed Instruction 43 contained the UCC's limitation on exclusion of express warranties under RCW 62A.2-316(1). App. B at CP 287.<sup>12</sup>

The trial court denied Instruction 43, regarding the UCC, because it was confusing. RP 1171-72 (“I would dare a group of 12 people, lay people, to interpret that. That is very confusing.”)

**E. The jury returned a defense verdict and the trial court granted the Thorns' new trial motion based on the trial court's erroneous denial of proposed Instructions 64 and 43.**

During deliberations, the jury asked, “Is Forest River required to provide a warranty to the first titled owner for new vehicles regardless of age of vehicle under Washington law[?]” CP 445. The court responded, “Please refer to your notes and jury instructions.” CP 445.

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<sup>12</sup> Instruction 43 states: “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 negation or limitation is inoperative to the extent that such construction is unreasonable.” CP at 287.

RCW 62A.2-316(1) states: “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.”

The jury returned a defense verdict. RP 1455; CP 475. The Thorns filed a motion for a new trial under CR 59. CP 299-328.

The central basis of the new trial motion was that the Court's failure to grant the Thorns' instructions regarding the Lemon Law warranty requirement and UCC limitation on disclaiming express warranties "prevented the plaintiffs from arguing their theory of the case to the jury—that Forest River clearly violated Washington law by its warranty cancellation policy, and its attempt to negate or limit its warranties on an RV already sold to a dealer." CP 300. During oral argument on the motion for a new trial, the Thorns argued:

So we asserted from the beginning that the Washington law required a warranty. There are three statutes all under the Lemon Law that required this. . . . But if the interpretation of these three statutes is accurate that Forest River urges, presses on the Court, then the entire Lemon Law would be turned on its head because all a manufacturer would have to do to avoid the Lemon Law is to void, cancel, negate, or limit their warranties, all of which is expressly against the UCC statute . . . .

. . .

Now we proposed the statute three times in jury instructions; three times it was rejected by the Court; and we believe that if the jury had that instruction they would have made the correct decision. The jury is free to choose its own facts in the case; they can't make up their own law when there's a statute dead on point.

RP 1465-66. After the Thorns' argument, the Court clarified that the basis of the Thorns' motion was:

because of error that I committed, not because of any error or misconduct or anything of the jury. But the point is that the Court should have either determined as a matter of law that there was liability or on some kind of directed verdict or summary judgment or something else, but as a matter of law; or given those instructions on the UCC. And I think it was 64 . . . .

RP 1467. The Thorns' counsel responded that he was "hoping to avoid saying" the trial court erred, to which Judge Serko responded, "I'll say it. I don't mind." RP 1468. She reiterated that she could "say it out loud" that she had erred. The trial court went on:

And I will say it for Mr. Nierman's benefit that this is where I was most troubled on the legal analysis of whether or not the Court should have done something different, either—even when the defense brought the halftime motion and for directed verdict; even when plaintiff brought summary judgment, not timely, for the first day of trial; even when the Court had before it each of these various instructions that the Court declined to give and tried to simplify it; I've been troubled by it, I have been. I've second guessed myself quite a bit since this jury verdict came.

RP 1468.

During its arguments on the motion for a new trial, defense counsel *explicitly acknowledged* the reasoning underlying the new trial, stating, "It sounds like the arguments now in their brief have been whittled down to, I guess, the Lemon Law argument and then this UCC argument as far as I—that's what I'm understanding." RP 1469. The Court elaborated:

Well, and also—I mean, Mr. Bolin, maybe correct me, but also the failure of the Court to give certain instructions basically as a matter

of law that this is what the law says and you must follow this law, including the UCC, including the Lemon Law, and including the instruction that doesn't identify UCC or Lemon Law, 19.118, but specifically says you can't do this. I mean, I think that was the 64. So that is where I'm troubled. I will make no bones about it. I feel like I tried to simplify it too much, the case.

RP 1469. After argument on the motion, the Court 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.

This has been a unique case to say the least. I've never, ever, undone what a jury has done, ever. I mean, when I saw this motion, Mr. Bolin, I just thought, I don't know, I don't know. Having read the pleadings and going back and thought about this case, I feel like a new trial is appropriate and I'm going to grant it.

RP 1473-74. Judge Serko entered an order granting a trial. CP 353-354.

The new trial order stated:

THIS MATTER having come on for hearing this day before the undersigned Judge of the above-entitled court, upon the motion of the plaintiffs for a new trial or alternatively a judgment on liability notwithstanding the verdict; the Court having reviewed all materials submitted by counsel, and having read the record and files herein, and being fully advised on the premises, NOW THEREFORE,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Plaintiffs' Motion is hereby GRANTED as to the motion for a new trial, only.

IT IS FURTHER ORDERED that:

The request for JNOV on the issue of liability is denied w/o prejudice.

CP 353-54. Forest River filed a motion for reconsideration, arguing that the Lemon Law does not require a manufacturer's warranty on new vehicles and that, even if it did, the Thorns were not prejudiced by the absence of an instruction on this issue. CP 355-60. The trial court tellingly denied the motion for reconsideration on those grounds. CP 404.

#### ARGUMENT

**A. Highly deferential abuse of discretion standard of review applies.**

It is well settled that the granting of a new trial is within the considerable sound discretion of the trial court, and the order will not be disturbed on appeal in the absence of an abuse of discretion. *See State v. Pete*, 152 Wn.2d 546, 557, 98 P.3d 803 (2004); *Coats v. Lee & Eastes, Inc.*, 51 Wn.2d 542, 552, 320 P.2d 292 (1958). An order granting a new trial based on the trial court's erroneous failure to provide a jury instruction is reviewed for an abuse of discretion. *See State v. Allen*, 89 Wn.2d 651, 658-659, 574 P.2d 1182 (1978). The test for an abuse of discretion is whether "no reasonable judge would have reached the same conclusion." *Pete*, 152 Wn.2d at 552 (quoting *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 667, 771 P.2d 711 (1989)). Washington appellate

courts “require a much stronger showing of abuse of discretion to set aside an order granting a new trial than one denying a new trial.” *Teter v. Deck*, 174 Wn.2d 207, 215, 274 P.3d 336 (2012); *see also Hollins v. Zbaraschuk*, 200 Wn.App. 578, 580, 402 P.3d 907 (2017); *Holt v. Nelson*, 11 Wn. App. 230, 243, 523 P.2d 211 (1974).

Statutory interpretation is a question of law reviewed de novo. *HomeStreet, Inc. v. Dep't of Revenue*, 166 Wn.2d 444, 451, 210 P.3d 297 (2009).

Contrary to Forest River’s urging for a “demanding approach,” a much stronger showing of abuse of discretion is required to reverse a new trial order where, as here, the new trial is granted based on the trial court’s admitted failure to grant plaintiffs’ requested jury instruction. *See Holt*, 11 Wn. App. at 242-243.

The single case cited by Forest River to support its “demanding approach” is distinguishable. *See* Br. of Appellant (BA) at 17. In *Thompson*, the trial court granted a new trial on the basis that the jury erred by rendering a verdict that was “contrary to the law and evidence.” *Thompson v. Grays Harbor Cmty. Hosp.*, 36 Wn. App. 300, 308, 675 P.2d 239 (1983). Because the verdict was not contrary to the law or evidence, the appellate court emphasized that discretion is not without limits and reversed the new trial order. *Id.* at 307-08. Forest River has not explained why the “limits” discussed in *Thompson* are remotely relevant. Here,

unlike in *Thompson*, the trial court ordered a new trial not because the jury erred, but because of the court's own acknowledged error in failing to make the Thorns' requested legal determinations and furnish jury instructions on the Lemon Law warranty requirement and the UCC. RP 1467-69, 1473-74; *see also* CP 299-328; 353-54.

**B. CR 59(f) poses no impediment to appellate review.**

Forest River asserts that the trial court's failure to enter definite reasons of law or fact under CR 59(f) requires reversal of the new trial order. BA 17-20. This argument fails because the trial court's oral ruling demonstrates that the new trial order is based on an error of law under CR 59(a)(8).

CR 59(f) states:

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.

The purpose of CR 59(f) "is to permit appellate review of the basic question raised by an order granting a new trial, which is whether the party received a fair trial." *Gestson v. Scott*, 116 Wn. App. 616, 620, 67 P.3d 496 (2003) (quoting *Dybdahl v. Genesco, Inc.*, 42 Wn. App. 486, 488, 713 P.2d 113 (1986)).

CR 59(a)(8) provides that a new trial may be granted based on an “[e]rror in law occurring at the trial and objected to at the time by the party making the application.”

- 1. In the absence of a detailed statement of reasons under CR 59(f), the appellate court should consider the oral opinion and record.**

When confronted with an order granting a new trial that does not comply with CR 59(f), the appellate court “may resort to the trial court’s oral opinion.” *Gestson*, 116 Wn. App. at 620; *see also Knecht v. Marzano*, 65 Wn.2d 290, 292, 396 P.2d 782 (1964); *State v. Casey*, 7 Wn. App. 923, 928-930, 503 P.2d 1123 (1972); *Snyder v. Sotta*, 3 Wn. App. 190, 195-199, 473 P.2d 213 (1970). Strict compliance with CR 59(f) is improper where, as here, the oral ruling or record evinces all of the reasons for the trial court’s order granting a new trial.

In *Casey*, the Court of Appeals affirmed a new trial order that did not comply with CR 59(f), concluding that strict compliance with CR 59(f) is unnecessary when *the record* evinces the basis for the new trial order. *Casey*, 7 Wn.App. at 929-930. The court reasoned that even cases reversing new trial orders for noncompliance with CR 59(f) consistently examine the oral ruling and record to determine whether a new trial was justified. *See id.* at 923, 928-930 (citing *Bjork v. Bjork*, 71 Wn.2d 510, 429 P.2d 234 (1967); *Durkan v. Leicester*, 62 Wn.2d 77, 81, 381 P.2d 127

(1963); *Johnson v. Marshall Field & Co.*, 78 Wn.2d 609, 611, 478 P.2d 735 (1970)). The *Casey* court concluded:

[W]e cannot ignore facts appearing in the record that make evident the motion was granted by reason of the apparent false testimony of the complainant. Rules of court, as indeed rules of law, are instruments in aid of justice and should not be used to thwart it. We believe the strict application of CR 59(f) in the circumstances of the instant case would convert the rule into a sword, rather than an aid, and work a clear distortion of justice. This we cannot and should not do.

Here, “strict compliance” with CR 59(f) would work a “distortion of justice” because, as in *Casey*, facts appear in the oral ruling and record evincing the explicit reasons underlying the trial court’s new trial order. *See* RP 1467-69, 1473-74, 1423-25, 1405-07, 1150-1152, 1160-62; CP 279, 291, 299-328, 353-354, 425. Specifically, the oral ruling and record support that the new trial order was based on an error of law under CR 59(a)(8).

On numerous occasions throughout the trial, the Thorns preserved their objections to the trial court’s denials of jury instructions to which they were entitled, repeatedly asserting that the warranty instructions were necessary to argue their case. *See, e.g.*, RP 1150-1152, 1160-62, 1302-1311, 1465-66. And the trial court recognized these errors in its oral ruling, which describes in excruciating detail its position that the trial court erred in its duty to make legal determinations and properly instruct

the jury. RP 1467-69, 1473-74. Ignoring those facts in favor of strict adherence to CR 59(f) would not effectuate a just result.

The injustice in this case would be significant because the court understood the extraordinary nature of its order but stated in its oral ruling that it was justified based on the court's own errors. RP 1473-74 ("I've never, ever, undone what a jury has done, ever. . . . Having read the pleadings and going back and thought about this case, I feel like a new trial is appropriate . . . .") Ignoring this extraordinary ruling under CR 59(a)(8) and disposing of this appeal on strictly technical grounds would be unjust.

**2. Forest River's authority does not preclude review of the new trial order.**

Forest River cites numerous cases to support that the trial court's failure to comply with CR 59(f) prevents appellate review of the new trial order. BA 18-20. Forest River's arguments fail.

*Simmons* is distinguishable because the new trial order for which the judge failed to provide sufficient reasons was based on the trial court's groundless *disagreement with the verdict*. *Simmons v. Koeteew*, 5 Wn. App. 572, 576, 489 P.2d 364, 366 (1971). Conversely, the trial court here stated that the legal error was its own, not the jury's, and the trial court did not express any disagreement with the verdict. *See* RP 1467-68.

Furthermore, the trial court denied the Thorns' motion for judgment

notwithstanding the verdict, showing that its decision had nothing to do with the verdict itself. CP 353-54.

*Noll* is also distinguishable. *Noll v. John Hancock Mut. Life Ins. Co.*, 66 Wn.2d 540, 403 P.2d 898 (1965). In *Noll*, the trial court *denied* defendant's new trial motion but made oral statements that it disagreed with the verdict. 66 Wn.2d at 544-545. On defendant-appellant's appeal of the new trial denial, the Court of Appeals concluded that the trial court's brief, conclusory statements disagreeing with the verdict did not justify a new trial. *Id.* The brief, conclusory statements offered by the trial court in *Noll* are distinguishable from the detailed explanation of error provided by the trial court in the case at bar. *Noll*, a factually dissimilar case involving an order denying a new trial, does not support reversal.

*Stigall* is also distinguishable. In *Stigall v. Courtesy-Chevrolet-Pontiac, Inc.*, the trial court granted a car dealership's motion for a new trial in an action under the CPA without entering a statement of reasons, and car buyers appealed. 15 Wn. App. 739, 551 P.2d 763 (1976). On appeal, the defendant-respondent car dealership failed to file a brief, so appellate review was "limited to determining if plaintiffs' assignments of error present a prima facie showing of error upon which we may grant relief." *Id.* Here, the standard of review applied in *Stigall* is inapplicable because the Thorns have appeared and filed an appellate brief.

*Johnson v. Dep't of Labor & Indus.*, 46 Wn.2d 463, 464, 281 P.2d 994, 995, (1955) should not be considered because it was decided long before *Knecht*, in which the Supreme Court first established now longstanding precedent that appellate courts may look to the oral ruling in the absence of adequate reasons under CR 59(f). *Knecht*, 65 Wn.2d at 292.

*Sdorra* is distinguishable because the new trial order at issue was less precise than Judge Serko's oral ruling. *Sdorra v. Dickinson*, 80 Wn. App. 695, 700, 910 P.2d 1328 (1996). Unlike the trial court in *Sdorra* that failed to identify the instructions at issue, the new trial order here was based on the trial court's admitted failure to make legal determinations and provide the Thorns' proposed instructions regarding the Lemon Law mandatory warranty and the UCC's limitation on negation of warranties.

Contrary to Forest River's assertions, most of its cited authority *supports* the Thorns' position that the Court of Appeals should turn to the oral ruling to determine the sufficiency of the trial court's reasons for granting a new trial. For example, in *Sdorra*, the Court of Appeals recognized the deficiencies of the trial court's order granting a new trial and extensively analyzed the record to determine whether the new trial order was justified. 80 Wn. App. at 700-704. *Sdorra* supports that examining the oral ruling and record are appropriate where the new trial order lacks detail. *Id.*

Similarly, other cases cited by Forest River universally turned to the oral rulings and/or record when examining whether to uphold a new trial order. *See, e.g., Simmons*, 5 Wn. App. at 576 (“Neither were satisfactory reasons set forth in his oral comments.”); *Noll*, 66 Wn.2d at 545 (considering the oral statements of the trial judge in evaluating whether a new trial should have been granted); *Bensen v. S. Kitsap Sch. Dist.*, 63 Wn.2d 192, 196, 386 P.2d 137 (1963) (considering a document mentioned in the trial court’s new trial order to determine the court’s reasons for granting the new trial); *Reiboldt v. Bedient*, 17 Wn. App. 339, 343, 562 P.2d 991 (1977) (“Our review of the record does not support a conclusion that the jury verdict was so high as unmistakably to indicate passion or prejudice.”); *Dravo Corp. v. L.W. Moses Co.*, 6 Wn. App. 74, 94-95, 492 P.2d 1058 (1971) (construing trial court’s conclusions of law as the trial court’s reasons for a new trial and scouring the record to determine whether record supported reasons for granting the new trial). These cases support turning to the oral ruling and record to determine whether the trial court abused its discretion.

**3. Even if the court does not examine the oral ruling and record, the written order is sufficient under CR 59(f).**

Even if the Court of Appeals does not turn to the oral ruling or record, the written order and documents incorporated therein are sufficient for appellate review of the trial court’s new trial order.

To understand the reasons for the trial court's new trial order in *Bensen*, the Supreme Court examined an opinion incorporated by reference in the otherwise bare new trial order. *See* 63 Wn.2d at 196. Here, the new trial order states that, in forming its decision, the trial court reviewed the "motion of the plaintiffs" and "all materials submitted by counsel," materials filed in the trial court record and contained in the appellate record. CP 353. The parties and court all agreed that the new trial briefing was limited to two narrow issues: the court's failure to give instructions regarding the Lemon Law warranty requirement and UCC limitation on revocation of warranties. RP 1469; CP 299-328. Because the written order incorporates the parties' briefing, which the parties and court agreed were limited to two narrow issues, the order sufficiently identifies the basis of the trial court's decision to satisfy the purposes of CR 59(f).

**C. Proposed Instruction 64 correctly states that the Lemon Law requires a one-year, 12,000 mile warranty.**

Forest River appears to argue that the Thorns were not entitled to proposed Instruction 64<sup>13</sup> because the Lemon Law does not require a manufacturer to provide a warranty on new motor vehicles sold in the state. BA 20-27. This argument fails because Instruction 64 correctly

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<sup>13</sup> The trial court also erred in denying two other substantially similar instructions on the mandatory manufacturer's warranty for new vehicles. App. B at CP 279, 291. However, because Instruction 64 was the Thorns' final instruction on this issue, and because the trial court's oral ruling specifically identifies Instruction 64 as the basis of her ruling, the Thorns' argument focuses on Instruction 64.

articulates the Lemon Law’s non-waivable, mandatory warranty requirement. *See* RCW 19.118.031; RCW 19.118.041; RCW 19.118.130; RCW 62A.2-316(1).

“The primary objective of any statutory construction inquiry is ‘to ascertain and carry out the intent of the Legislature.’” *HomeStreet*, 166 Wn.2d at 451 (quoting *Rozner v. City of Bellevue*, 116 Wn.2d 342, 347, 804 P.2d 24 (1991)). To determine legislative intent, courts first consider the plain and ordinary meaning of the statutory language. *Id.* at 451. To determine plain meaning, the court considers all the Legislature has said in the statute and related statutes that disclose legislative intent. *Thorpe v. Insee*, 188 Wn.2d 282, 289, 393 P.3d 1231 (2017). The court also considers the ordinary meaning of the words, basic rules of grammar, and the statutory context. *In re Forfeiture of One 1970 Chevrolet Chevelle*, 166 Wn.2d 834, 838-39, 215 P.3d 166 (2009).

Only if a statute is ambiguous may the court resort to aids to construction, including legislative history. *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 12, 43 P.3d 4 (2002). A statute is ambiguous if it remains subject to multiple interpretations after analyzing the plain language. *Burton v. Lehman*, 153 Wn.2d 416, 423, 103 P.3d 1230 (2005). A statute is not ambiguous merely because different interpretations are conceivable. *State v. Hahn*, 83 Wn. App. 825, 831, 924 P.2d 392 (1996).

The CPA is to be liberally construed to effectuate its purpose. *Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 37, 204 P.3d 885, 889 (2009). The Lemon Law, as remedial legislation, is to be interpreted broadly. *Chrysler Motors Corp. v. Flowers*, 116 Wn.2d 208, 214, 803 P.2d 314 (1991).

“Shall,” when used in a statute, is presumptively imperative and operates to create a duty, rather than to confer discretion. *In re Parental Rights to K.J.B.*, 187 Wn.2d 592, 601, 387 P.3d 1072 (2017). “Apparently conflicting statutes must be reconciled to give effect to each.” *Tunstall v. Bergeson*, 141 Wn.2d 201, 211, 5 P.3d 691, 697 (2000).

**1. The Lemon Law unambiguously requires manufacturers to provide a one-year, 12,000 mile warranty.**

RCW 19.118.031(3) (“§ .031(3)”) and RCW 19.118.041(3)(a) (“§ .041(3)(a)”) provide that the manufacturer must replace or repurchase a new motor vehicle<sup>14</sup> if it remains unsafe and defective after a reasonable number of attempted repairs under a mandatory new vehicle warranty. *See also Chrysler Motors Corp.*, 116 Wn.2d at 211.

Section .031(3) provides a manufacturer’s obligation to make repairs to conform a new vehicle to the required manufacturer’s warranty:

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<sup>14</sup> “New motor vehicle” is defined in Instruction 17, and “used motor vehicle” is defined in Instruction 18. App. A at CP 468-69. The Berkshire is properly classified as a new motor vehicle based on uncontroverted evidence. Ex 3; RP 600-01, 237, 260-61, 771.

For the purposes of this chapter, if a new motor vehicle does not conform to the warranty and the consumer reports the nonconformity during the term of the eligibility period or the period of coverage of the applicable manufacturer's written warranty, whichever is less, to the manufacturer, its agent, or the new motor vehicle dealer who sold the new motor vehicle, the manufacturer, its agent, or the new motor vehicle dealer shall make repairs as are necessary to conform the vehicle to the warranty, regardless of whether such repairs are made after the expiration of the eligibility period. *Any corrections or attempted repairs undertaken by a new motor vehicle dealer under this chapter shall be treated as warranty work and billed by the dealer to the manufacturer in the same manner as other work under the manufacturer's written warranty is billed.* For purposes of this subsection, 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.

RCW 19.118.031(3) (emphases added). The plain meaning of § .031(3) mandates a manufacturer's warranty of at least one-year or 12,000 miles, whichever comes first, under which manufacturers must perform warranty work to bring a vehicle in conformance with the mandatory warranty. The word "shall" is used in the language establishing the minimum warranty, which supports that the provision creates a duty. *See In re Parental Rights to K.J.B.*, 187 Wn.2d at 601.

Further, § .041(3)(a) establishes a manufacturers' obligation to repurchase or replace a new motor vehicle that is a motor home (such as the Berkshire) when it remains unsafe and defective after a reasonable number of repair attempts. After enumerating the criteria that trigger a

manufacturer's obligation to repair and replace a motor vehicle motor home, § .041(3)(a) requires, in relevant part:

**For purposes of this subsection, each motor home manufacturer's written warranty must 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.**

*Id.* (emphasis added). The warranty repairs that dealers and manufacturers are obligated to perform under a mandatory one-year, 12,000 mile warranty referred to in § .031(3) are the "attempts" to repair that must be satisfied to trigger a manufacturers' obligation to repurchase or replace a vehicle under §.041(3)(a). The plain meaning of §§ .031(3) and .041(3)(a), read together, creates the consumer's right to repair or replacement of a vehicle once a certain number of repair attempts are made under the relevant manufacturer's required warranty.

By applying the mandatory warranty requirement to "each" motor home manufacturer, § .041(3)(a) recognizes that motor homes contain numerous manufacturers, including component and final-stage manufacturers, and each is required to provide a Lemon Law warranty.

Contrary to Forest River's assertion, the conditional language "for the purposes of this subsection" contained in both § .031(3) and § .041(3)(a) does not somehow limit which manufacturers must provide a warranty. BA 21-22. Instead, the language "for the purposes of this

section” helps to distinguish between the mandatory minimum warranty period and the longer “eligibility period” of two years or 24,000 miles referred to throughout the Lemon Law. *See* RCW 19.118.021(6). The “for the purposes of this subsection” language clarifies that the obligations and rights established by §§ .031(3) and .041(3)(a) are governed by the mandatory minimum warranty period provided therein rather than the longer eligibility period applicable in other provisions.

The mandatory nature of the mandatory manufacturer’s warranty for new vehicles is supported by a related statute, RCW 19.118.130:

Any agreement entered into by a consumer for the purchase of a new motor vehicle that waives, limits, or disclaims the rights set forth in RCW 19.118.021 through 19.118.140 shall be void as contrary to public policy. Said rights shall extend to a subsequent transferee of such new motor vehicle.

Under this section, every new motor vehicle consumer (including new motor home consumers) have non-waivable rights under the Lemon Law, including the right to a one-year, 12,000 mile warranty under which consumers can obtain warranty repairs and ultimately seek replacement or repurchase if appropriate. This right passes to a subsequent transferee such that even *used* vehicles are protected by the Lemon Law if the transfer of a new vehicle occurs during the eligibility and warranty period. The Legislature intended to hold manufacturers accountable, without exception, for ensuring that new motor vehicles sold in Washington are

safe and free from defects during a non-negotiable, non-waivable, mandatory warranty period. *See id.*

RCW 19.118.005 contains the legislative intent of the Lemon Law and must be read together with the mandatory warranty language in §§ .031(3) and .041(3)(a):

The legislature recognizes that a new motor vehicle is a major consumer purchase and that a defective motor vehicle is likely to create hardship for, or may cause injury to, the consumer. The legislature further recognizes that good cooperation and communication between a manufacturer and a new motor vehicle dealer will considerably increase the likelihood that a new motor vehicle will be repaired within a reasonable number of attempts. It is the intent of the legislature to ensure that the consumer is made aware of his or her rights under this chapter and is not refused information, documents, or service that would otherwise obstruct the exercise of his or her rights.

In enacting these comprehensive measures, it is the intent of the legislature to create the proper blend of private and public remedies necessary to enforce this chapter, such that a manufacturer will be sufficiently induced to take necessary steps to improve quality control at the time of production or provide better warranty service for the new motor vehicles that it sells in this state.

Notably, RCW 19.118.005 explicitly applies the Lemon Law to new motor vehicles that manufacturers *sell in the state*, not just new motor vehicles for which manufacturers voluntarily provide a warranty as Forest River posits. Forest River's proposed interpretation of the Lemon Law is antithetical to the Legislature's intent to protect consumers from the risk

of injury and hardship associated with unsafe and defective new motor vehicles. Moreover, Forest River’s proposed interpretation would enable vehicle manufacturers to circumvent the Lemon Law by canceling the warranty on vehicles they believe to be unsafe and defective, thus subjecting consumers to all the risks of harm of unsafe and defective vehicles that the Lemon Law was designed to protect against. This behavior is at the core of the Thorns’ claim, and they were entitled to the instructions necessary to present this argument to the jury.

Because the language of the relevant statutes is unambiguous, this Court should not consider sources other than the plain meaning of the statute as evinced by text, context, and related statutes. In the absence of ambiguity, the court may not consider legislative history. *Dep’t of Ecology*, 146 Wn.2d at 12.<sup>15</sup> The plain meaning is clear.

**2. Forest River’s proposed Lemon Law interpretation is unpersuasive.**

**a. RCW 19.118.010 supports a Lemon Law mandatory warranty.**

Forest River relies on RCW 19.118.010 to support that the Lemon Law does not require a mandatory new vehicle manufacturer’s warranty.

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<sup>15</sup> Even if the court were to conclude that the relevant provisions are ambiguous, legislative history supports that the Lemon Law requires manufacturers to provide a warranty on new motor vehicles. CP 367 (Senate Bill Report, ESSB 5502 (March 11, 1987)) (“Manufacturers *are required* to provide a warranty of 24 months or 24,000 miles, whichever occurs first.”) (emphasis added).

BA 21-22. Specifically, Forest River argues that the inclusion of the qualifier “and for which the manufacturer has made an express warranty” supports that manufacturers are authorized to sell new vehicles in the state *without* express warranties. This interpretation is erroneous.

RCW 19.118.010 states in relevant part, “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...”

Contrary to Forest River’s argument, RCW 19.118.010 is silent about whether the express warranties to which it refers are mandatory or voluntary. RCW 19.118.010 simply provides that manufacturers subject to the Lemon Law must maintain adequate repair facilities. This is necessary because the *mandatory* warranty on new motor vehicles would have no value if there were not adequate repair facilities to obtain warranty repairs. As detailed above, the Lemon Law requires *all* manufacturers of new motor vehicles to provide express warranties, and RCW 19.118.010 refers to express warranties that are *mandated* elsewhere in the chapter. *See* §§ .031(3) & .041(3)(a). These provisions should be read to be consistent, harmonious, and aligned with legislative intent.

An alternative explanation for why the Legislature included the language “*and for which the manufacturer has made an express warranty*” is that the Legislature intended to require adequate repair facilities for not

just new motor vehicles but *all* vehicles for which express warranties have been made. Because consumers' Lemon Law rights transfer to subsequent owners in some cases, meaning some used vehicles are subject to the Lemon Law, the statutory language ensures that manufacturers provide adequate repair facilities for *all* vehicles covered by manufacturers' express warranties, not just new vehicles. *See* RCW 19.118.130.

**b. RCW 19.118.021 supports a Lemon Law mandatory warranty.**

Forest River also relies on RCW 19.118.021(12)'s definition of "new motor vehicle" to support its erroneous Lemon Law interpretation.

RCW.118.021(12) defines "New motor vehicle" as:

any new self-propelled vehicle, including a new motorcycle, primarily designed for the transportation of persons or property over the public highways that was originally purchased or leased at retail from a new motor vehicle dealer or leasing company in this state, but does not include vehicles purchased or leased by a business as part of a fleet of ten or more vehicles at one time or under a single purchase or lease agreement. . . . If the motor vehicle is a motor home, this chapter shall apply to the self-propelled vehicle and chassis, but does not include those portions of the vehicle designated, used, or maintained primarily as a mobile dwelling, office, or commercial space. The term "new motor vehicle" does not include trucks with nineteen thousand pounds or more gross vehicle weight rating. **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.**

*Id.* (emphasis added). Forest River argues that the emphasized sentence authorizes a dealer to sell a demonstrator off a certificate of origin without a manufacturer's warranty. BA 22-23. This argument fails for at least two reasons.

First, the definition does not prohibit or authorize any behavior related to warranty representations; it simply defines which vehicles are "new motor vehicles" subject to the chapter's rights and obligations.

Second, the emphasized language must be read to harmonize with the mandatory warranty requirement established in §§ .031(3) & .041(3)(a). Thus, the conditional language "as long as a manufacturer's warranty was issued as a condition of sale" does not absolve manufacturers of their obligations to provide the mandatory warranty. Instead, this language recognizes that demonstrators and lease-purchase vehicles may incur significant use, such that the vehicle's mileage may *exceed* the Lemon Law's mandatory warranty period before the vehicle is ever sold at retail off the certificate of origin. When a demonstrator or lease-purchase vehicle is sold off of the certificate of origin with *mileage* that exceeds the Lemon Law's mandatory warranty period of 12,000 miles, such a vehicle would not need to be sold with the mandatory warranty. Thus, RCW 19.118.021(12) excludes from the definition of new motor vehicles *only* those demonstrators and lease-purchase vehicles for

which the mandatory warranty period has lapsed due to mileage and for which no express warranty was otherwise part of the basis of the bargain.

This interpretation is supported by *Chrysler Motors Corp.*, in which our Supreme Court concluded that a demonstrator with 23,410 miles of use was a “new motor vehicle” when it had only been used by the manufacturer, had never been titled, and was being sold at retail to the public for the first time. 116 Wn.2d at 216. The Court reasoned that a vehicle’s status as a new motor vehicle under the Lemon Law is supported if the vehicle was sold before it exceeds the Lemon Law warranty period<sup>16</sup>:

Washington's lemon law defines a consumer as anyone who buys a new car during the duration of the statutory warranty period. That period ends 2 years after the delivery of a new motor vehicle to a consumer or covers the first 24,000 miles of operation. In the present case, the purchaser bought the automobile when the mileage was less than the 24,000-mile warranty limitation established by statute, and also subject to a new car warranty issued by the manufacturer. Since the purchaser was the first party to take title to the automobile and since she bought it within both the manufacturer's and the statutory warranty period, she argues persuasively that the automobile was new when she bought it. Her argument is bolstered by our conclusion that the automobile fits the definition of “demonstrator”, which, as stated earlier, is a new car under this state's lemon law.

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<sup>16</sup> In 2009, the Legislature reduced the Lemon Law warranty period from two years, 24,000 miles to one year, 12,000 miles. Laws of 2009, ch. 351, § 2. *Chrysler* discusses the statute before the warranty period changed.

*Id.* at 215. Under *Chrysler*, our Supreme Court recognized that a new motor vehicle is new, in part, because its mileage is within the Lemon Law mandatory warranty period. It naturally follows that the “new motor vehicle” definition excludes vehicles that exceed the statutory warranty period. The conditional language “as long as a manufacturer's warranty was issued as a condition of sale” ensures that demonstrators and lease-purchase vehicles are only considered new motor vehicles if they are sold within the applicable mandatory warranty period.

**D. Proposed Instruction 43 correctly states the limitation on negation of express warranties under Washington’s UCC, RCW 62A.2-316(1).**

Forest River concedes that RCW 62A.2-316(1) limits a party’s ability to negate an express warranty once it has been made. BA 28. And Forest River acknowledges that when a warranty is offered as part of the basis of the bargain, RCW 62A.2-316(1) prohibits efforts to negate or change that warranty after sale. BA 28. Nevertheless, Forest River argues that nothing in RCW 62A.2-316 “impacts the legality” of its warranty cancellation policy such that the Thorns were not entitled to Instruction 43. See BA 28.

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

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.

*Id.* (emphasis added). Express warranties are not negated by the term “as is.” *Shelton v. Farkas*, 30 Wn. App. 549, 554 n.8, 635 P.2d 1109 (1981).

Here, the Thorns’ theory of the case included that Forest River canceled a warranty that *had been made and was part of the basis of the bargain with the Thorns*. See Ex 1-2, Ex 6; RP 232, 237-40, 502-04, 610, 636-38, 1024. This puts Forest River’s conduct squarely within the scenario that it concedes would be prohibited by RCW 62A.2-316(1).

Importantly, contrary to Forest River’s assertions, simply selling a product “as is” is not sufficient to waive an express warranty that has attached to a product. *Shelton*, 30 Wn. App. at 554. Thus, even if Sunset had complied with Forest River’s request and attempted to sell the Berkshire “as is,” that alone would not constitute an effective waiver of the express warranty.

To the extent Forest River and Sunset could have lawfully reached and executed an agreement to sell the motor vehicle “used, as-is,” *that did not occur here*. Forest River needs to pursue any available remedies for breach of contract against Sunset. Forest River’s attempt to evade responsibility for its own warranty and render the consumer responsible for Sunset’s alleged failure to sell the vehicle “used, as-is” is the core of Forest River’s unfair and deceptive behavior.

**E. The trial court did not abuse its discretion by granting a new trial based on its own instructional errors.**

The trial court's decision to grant a new trial was not an abuse of discretion because it was based on the trial court's self-identified prejudicial error in failing to grant instructions to which the Thorns were entitled, proposed Instructions 64 and 43.<sup>17</sup> Thus, this Court should affirm the trial court's order granting a new trial.

A party is entitled to have the jury instructed on his or her theory of the case as long as there is evidence to support the theory. *Hizey v. Carpenter*, 119 Wn.2d 251, 266, 830 P.2d 646 (1992). Whether to give a particular instruction to the jury is a matter within the discretion of the trial court, but a trial court must instruct the jury on a theory when it is supported by substantial evidence. *Stiley v. Block*, 130 Wn.2d 486, 498, 925 P.2d 194 (1996). Trial court error on jury instructions is reversible error when it is prejudicial. *Id.* at 499. An error is prejudicial when it affects the trial's outcome. *Id.* If the instruction misstates the law, prejudice is presumed and is grounds for reversal unless the error was harmless. *Hopkins v. Seattle Pub. Sch. Dist. No. 1*, 195 Wn. App. 96, 106, 380 P.3d 584 (2016).

The first element of a private action under the CPA is that the defendant has engaged in an unfair or deceptive act or practice. RCW

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<sup>17</sup> Forest River has not challenged the Thorns' proposed instructions. It cannot do so for the first time in its reply brief. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 808-809, 828 P.2d 549 (1992).

19.86.020; *Hangman Ridge Training Stables v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 785, 719 P.2d 531 (1986). “A plaintiff need not show that the act in question was *intended* to deceive, but that the alleged act had the *capacity* to deceive a substantial portion of the public.” *Id.* at 785.

**1. The Thorns’ case theory supported proposed Instructions 43 and 64.**

Proposed Instructions 43 and 64 supported the Thorns’ theory of the case. Instruction 43, based on RCW 62A.2-316(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 negation or limitation is inoperative to the extent that such construction is unreasonable.

App. B at CP 287. The same is true for Instruction 64, based on language in §§ .031(3) & .041(3)(a):

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.

App. B at CP 435.

The gravamen of the Thorns’ consumer protection action was that Forest River’s warranty cancellation policy unfairly and deceptively transferred the risk of unsafe and substantially defective vehicles from the

manufacturer to the consumer in violation of clear public policies and legal requirements articulated in the Lemon Law, CPA, and UCC.

As discussed at length *supra*, the Lemon Law's warranty requirement exists to protect the consumer from the risks associated with unsafe and defective vehicles and to require manufacturers to bear the risk of the same because manufacturers are in the best position to improve vehicle quality and provide repair services. *See* RCW 19.118.005. In a clear violation of this law and public policy, Forest River's warranty cancellation policy unfairly and deceptively subjects unwitting consumers to risks associated with presumptively defective vehicles. By revoking the Lemon Law's mandatory warranty on vehicles that remain unsold after two years, Forest River transfers to the consumer the very risks that the Lemon Law was designed to protect against. *See* Ex 22.

Moreover, Forest River's policy is unfair and deceptive and has the *capacity* to deceive a substantial portion of the public under the CPA because it misrepresents the "new" status of the vehicle as "used, as-is" without a factory warranty, despite the fact that the Berkshire had a non-waivable, non-negatable Lemon Law mandatory warranty as it entered the state. *See See* Ex 1-2, Ex 6; RP 232, 237-40, 502-04, 610, 636-38, 1024; RCW 19.118.010; RCW 19.118.130; RCW 62A.2-316(1); § .041(3)(a).

In turn, the misrepresentation of a new vehicle as "used" deprives consumers of the ability to pursue remedies for a persistently unsafe or

defective new vehicle under the Lemon Law, which may only be obtained after a consumer establishes a sufficient number of repair attempts *under the mandatory warranty*. See §.041. Here, the Thorns could not pursue a claim under the Lemon Law in part because Forest River did not acknowledge a warranty under which the Thorns could establish repair attempts.<sup>18</sup> If Forest River had not canceled the warranty, the Thorns could have obtained repairs and pursued Lemon Law remedies. *Abbs v. Georgie Boy Mfg.*, 60 Wn.App. 157, 160-161, 803 P.2d 14, 15-16 (1991) (holding that final stage manufacturer, like Forest River, was accountable under the Lemon Law mandatory warranty for defects in the domicile portion of a motor home that impacted the safety and operation of the self-propelled vehicle and driver area); WAC 44-10-170(1)(f) (providing Lemon Law arbitrators the power to “calculate and order the joint liability for compliance obligations of motor home manufacturers”).<sup>19</sup>

Revocation of the mandatory warranty was also a *per se* violation of the CPA. RCW 19.118.130 (prohibiting waivers, limitations, or disclaimers of Lemon Law rights, including mandatory warranty under RCW 19.118.041); RCW 19.118.120 (providing that a violation of the

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<sup>18</sup> Compounding the deceit, Forest River failed to communicate the presumption of defect and existence of “lot rot” to the Thorns who, like every consumer of new recreational vehicles in Washington, justifiably expected the manufacturer to ensure the safety and reliability of its product with a new motor vehicle warranty.

<sup>19</sup> Canceling the warranty also allows Forest River to evade arbitration of Lemon Law conflicts through the new motor vehicle arbitration board, thus undermining the legislative intent to increase judicial efficiency and provide administrative remedies to consumers without the need for superior court actions. See RCW 19.118.080.

Lemon Law is a *per se* violation of the CPA). Proposed Instructions 64 and 43 were essential to argue that Forest River violated the Lemon Law and committed a *per se* violation of the CPA.

The centrality of Proposed Instructions 64 and Instruction 43 to the Thorns' case was repeatedly recognized *by opposing counsel*. See, e.g., RP 1079 (“[W]e believe that the gravamen of the plaintiffs’ case is . . . the notion that the Lemon Law requires a 12-month, 12,000-mile warranty.”); RP 1202 (“The entire basis of plaintiffs’ claim is that there should have been a warranty.”); RP 1294 (“Plaintiff has premised the entire case against Forest River on this statutory violation allegedly under the Lemon Law.”)

The trial court’s repeated assertions regarding its own errors reflected its discomfort with having gutted the Thorns’ case. RP 1467-69, 1473-74. A new trial is necessary. This Court should affirm.

**2. Substantial evidence supported proposed Instructions 43 and 64.**

Not only were proposed Instructions 64 and 43 central to the Thorns’ theory of the case, but substantial evidence supported the instructions. It is undisputed that Forest River typically provides a one-year, 12,000 mile warranty on its new vehicles. RP 502-04, 1024. The Thorns presented evidence that Forest River *canceled* the new motor vehicle warranty on the Berkshire pursuant to its unfair, anti-consumer

warranty cancellation policy. RP 780-81, 946; CP 458. Forest River's warranty cancellation letter stated it would "no longer participate in a warranty repair nor offer a warranty on" the Berkshire. Ex 22; RP 956, 998. Forest River changed the warranty status of the Berkshire in Dealer Central to reflect that it no longer had a factory warranty. Ex 16; RP 966-73; Ex 23. Forest River's representative who spoke to Ben Thorn "[e]xplained that the coach *no longer had* a factory warranty." RP 843; Ex 19 (emphasis added). The Thorns were told repeatedly after their RV purchase that Forest River canceled the warranty. *See* RP 606-608, 612, 975. When the Thorns sought repairs for unsafe defects under the warranty, Forest River would not cover the cost of repairs or recognize a warranty. RP 606-608, 975.

These facts provide substantial evidence that Forest River represented that the Berkshire's warranty was canceled; that Forest River would no longer honor the new motor vehicle warranty required by the Lemon Law; and that the warranty that attached to the vehicle at the time it was delivered to the dealer was canceled in gross violation of RCW 62A.2-316(1)'s limitation on negation of warranties.

Substantial evidence supported Instructions 64 and 43 and these instructions were central to the Thorns' theory of the case. They were entitled to the instructions. *See Hizey*, 119 Wn.2d at 266; *Stiley*, 130 Wn.2d at 498. This Court should affirm and remand for a new trial.

**3. The trial court's error was prejudicial and thus reversible.**

The trial court's error in failing to give the instructions was prejudicial and thus reversible error because, without Instructions 64 and 43, the jury could not evaluate the Thorns' arguments that the illegal cancellation of the warranty was unfair and deceptive.

First, the error was prejudicial because Forest River has failed to overcome the presumption of prejudice that applies when the trial court denies instructions that contain accurate statements of the law and that are necessary for the jury to resolve the case. *See Hopkins*, 195 Wn. App. 106.

Second, to effectively evaluate the Thorns' theory, the jury needed clarity regarding the Lemon Law warranty requirement and UCC limitation on negating express warranties. Although expert Doug Walsh provided limited testimony about the Lemon Law's warranty requirement, this evidence could not be assessed without an instruction providing the *law* on this issue. In addition, the jury explicitly asked during deliberations whether Forest River is required to provide a warranty to the first titled owner for new vehicles regardless of age of the vehicle under Washington law. CP 445. Proposed Instructions 64 and 43 would have answered that question in the affirmative and provided the jury the law it needed to find that Forest River's warranty cancellation policy and its application to the Thorns was an unfair or deceptive act under the CPA.

Because the Thorns were entitled to proposed Instructions 64 and 43 and the trial court prejudicially refused to grant them, the trial court did not abuse its discretion in granting a new trial on this basis.

**F. Common law does not obviate mandatory express warranties imposed by state statute.**

In a final attempt to assert that vehicle manufacturers are not obligated to provide a warranty on new vehicles such that Thorns were not entitled to Instructions 64 or 43, Forest River asserts that the common law does not mandate express warranties. BA 31-32.

Forest River's argument fails on its face because the manner in which express warranties originate under common law is irrelevant. At issue is whether the Lemon Law statutory scheme requires a new motor vehicle manufacturer's warranty. Statutes routinely replace the common law to mandate express warranties. *See, e.g.*, RCW 64.34.440(6)(c)-(d).

Forest River cites *Cipollone v Liggett* to support its argument. In *Cipollone*, the Court concluded that state breach of warranty claims arising from statements in tobacco advertisements were not preempted by Federal law governing tobacco advertisements. 505 U.S. 504, 524, 112 S. Ct. 2608, 120 L. Ed. 2d 407 (1992). Contrary to Forest River's argument, the Court did not hold that state law never provides warranty terms, nor that express warranties may only exist by virtue of the terms *voluntarily* contained therein. It merely held that the Federal tobacco advertising law that

preempts state regulation of tobacco advertising did not preempt state common law breach of warranty claims that incidentally arose from statements in tobacco ads. *Cipollone*, 505 U.S. at 526. This case examining a preemption issue does not support that state law cannot mandate an express warranty.

### **ATTORNEYS' FEES**

The Thorns request attorneys' fees for this appeal under RCW 19.86.090 and RAP 18.1. RCW 19.86.090 provides attorneys' fees for "[a]ny person who is injured in his or her business or property" by violation of any of the enumerated CPA provisions, including RCW 19.86.020's prohibition on unfair or deceptive acts and practices. Appellate attorneys' fees may be recovered by the prevailing consumer under RCW 19.86.090. *See, e.g., Ewing v. Glogowski*, 198 Wn. App. 515, 526, 394 P.3d 418 (2017).

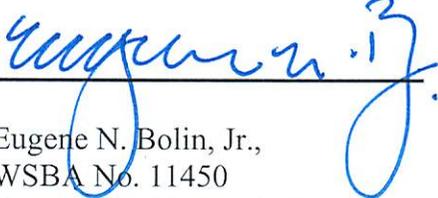
The Thorns request attorneys' fees under RCW 19.86.090 if they prevail on this appeal. In the alternative, the Thorns request that this Court rule that the Thorns are entitled to appellate attorneys' fees if they prevail on the underlying CPA claim upon retrial. *See Bishop v. Jefferson Title Co.*, 107 Wn. App. 833, 854, 28 P.3d 802 (2001) ("The trial court may award trial and appellate attorney fees to Bishop under the Consumer Protection Act, RCW 19.86.090, if Bishop ultimately prevails on his CPA

claim.”); RAP 18.1(i) (“The appellate court may direct that the amount of fees and expenses be determined by the trial court after remand.”)

### CONCLUSION

Forest River has failed to make the strong showing necessary to reverse the new trial order. Here, the trial court properly granted a new trial because it failed to give proposed Instructions 64 and 43, which were well-supported and pivotal to the Thorns’ case theory. The trial court did not abuse its discretion when it granted a new trial for its prejudicial denial of jury instructions to which the Thorns were entitled.

RESPECTFULLY SUBMITTED this 1<sup>st</sup> day of June, 2020.

 s/ Kelly W. Holler

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## DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington, that on the below date, I electronically transmitted a true and accurate copy of Brief of Respondent to counsel for Appellants at the following address:

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DATED this 1<sup>st</sup> day of June, 2020, at Edmonds, Washington.



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# Appendix A



IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR PIERCE COUNTY

WILLIAM S. THORN and DARLENE  
A. THORN, husband and wife, and the  
marital community composed thereof,

Cause No. 18-2-08897-1

Plaintiffs,

v.

SUNSET CHEVROLET, INC., a  
Washington corporation, also known as  
SUNSET RV OF FIFE, also known as  
SUNSET'S WHITE RIVER RV;  
FOREST RIVER, INC., a foreign  
corporation,

Defendants.

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COURT'S INSTRUCTIONS TO THE JURY

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Dated this 29 day of July, 2019.

The Honorable Susan K. Serko

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INSTRUCTION NO. 1

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. It also is your duty to accept the law as I explain it to you, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case.

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses, and the exhibits that I have admitted, during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.

Exhibits may have been marked by the court clerk and given a number, but they do not go with you to the jury room during your deliberations unless they have been admitted into evidence. The exhibits that have been admitted will be available to you in the jury room.

In order to decide whether any party's claim has been proved, you must consider all of the evidence that I have admitted that relates to that claim. Each party is entitled to the benefit of all of the evidence, whether or not that party introduced it.

You are the sole judges of the credibility of the witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things they testify about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all

of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict.

The law does not permit me to comment on the evidence in any way. I would be commenting on the evidence if I indicated my personal opinion about the value of testimony or other evidence. Although I have not intentionally done so, if it appears to you that I have indicated my personal opinion, either during trial or in giving these instructions, you must disregard it entirely.

As to the comments of the lawyers during this trial, they are intended to help you understand the evidence and apply the law. However, it is important for you to remember that the lawyers' remarks, statements, and arguments are not evidence. You should disregard any remark, statement, or argument that is not supported by the evidence or the law as I have explained it to you.

You may have heard objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer, and may have a duty to do so. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

As jurors, you have a duty to consult with one another and to deliberate with the intention of reaching a verdict. Each of you must decide the case for yourself, but only after an impartial consideration of all of the evidence with your fellow jurors. Listen to one another carefully. In the course of your deliberations, you should not hesitate to re-examine your own

views and to change your opinion based upon the evidence. You should not surrender your honest convictions about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of obtaining enough votes for a verdict.

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, bias, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

Finally, the order of these instructions has no significance as to their relative importance. They are all equally important. In closing arguments, the lawyers may properly discuss specific instructions, but you must not attach any special significance to a particular instruction that they may discuss. During your deliberations, you must consider the instructions as a whole.

**INSTRUCTION NO. 2**

The evidence that has been presented to you may be either direct or circumstantial. The term "direct evidence" refers to evidence that is given by a witness who has directly perceived something at issue in this case. The term "circumstantial evidence" refers to evidence from which, based on your common sense and experience, you may reasonably infer something that is at issue in this case.

The law does not distinguish between direct and circumstantial evidence in terms of their weight or value in finding the facts in this case. One is not necessarily more or less valuable than the other.

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**INSTRUCTION NO. 3**

The law treats all parties equally whether they are corporations or individuals: This means that corporations and individuals are to be treated in the same fair and unprejudiced manner.

INSTRUCTION NO. 4

Forest River, Inc. is a corporation. A corporation can act only through its officers and employees. Any act or omission of an officer or employee is the act or omission of the corporation.

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INSTRUCTION NO. 5

Any act or omission of an employee or representative of Forest River within the scope of their employment is the act or omission of Forest River.

**INSTRUCTION NO. 6**

A witness who has special training, education, or experience may be allowed to express an opinion in addition to giving testimony as to facts.

You are not, however, required to accept his or her opinion. To determine the credibility and weight to be given to this type of evidence, you may consider, among other things, the education, training, experience, knowledge, and ability of the witness. You may also consider the reasons given for the opinion and the sources of his or her information, as well as considering the factors already given to you for evaluating the testimony of any other witness.

INSTRUCTION NO. 7

The following is a summary of the claims of the parties provided to help you understand the issues in the case. You are not to take this instruction as proof of the matters claimed. It is for you to decide, based upon the evidence presented, whether a claim has been proved.

(1) The plaintiffs, claim that the defendant Forest River violated Washington law in one or more of the following respects:

1. Forest River committed deceptive and unfair conduct by failing to disclose to consumers its warranty-cancellation policy.
2. Forest River committed deceptive or unfair conduct in failing to disclose that its RVs are presumptively defective after two years, by the phenomenon known as "Lot Rot."
3. Forest River committed deceptive or unfair conduct by actually cancelling the warranty on the RV.
4. Forest River committed deception or unfair conduct by telling the dealer, Sunset, to sell the RV "used – as is."

The Plaintiffs also claim that they sustained economic damages as a result of the conduct described above, and they seek a judgment against Forest River for these damages.

Forest River denies these claims and claims Plaintiffs failed to mitigate damages by not asking Forest River to participate in a warranty repair or offer a warranty on the motorhome and by not responding to Forest River's communications regarding participation in a warranty repair or offering a warranty on the motorhome.

Forest River further denies the nature and extent of the plaintiffs' economic damages.

INSTRUCTION NO. 8

Plaintiffs claim that Forest River, Inc. has violated the Washington Consumer Protection Act. To prove this claim, plaintiffs have the burden of proving each of the following propositions:

- (1) That Forest River engaged in an unfair or deceptive act or practice;
- (2) That the act or practice occurred in the conduct of Forest River's trade or commerce;
- (3) That the act or practice affects the public interest;
- (4) That plaintiffs were injured in either their business or their property, and
- (5) That Forest River's act or practice was a proximate cause of plaintiffs' injury.

If you find from your consideration of all of the evidence that each of these propositions has been proved, your verdict should be for plaintiffs. On the other hand, if any of these propositions has not been proved, your verdict should be for Forest River.

INSTRUCTION NO. 9

When it is said that a party has the burden of proof on any proposition, or that any proposition must be proved by a preponderance of the evidence, or the expression "if you find" is used, it means that you must be persuaded, considering all the evidence in the case that the proposition on which that party has the burden of proof is more probably true than not true.

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INSTRUCTION NO. 10

In order to prove that Forest River engaged in an unfair or deceptive act or practice, it is sufficient to show that the act or practice had the capacity to deceive a substantial portion of the public. Plaintiffs do not need to show that the act or practice was intended to deceive.

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INSTRUCTION NO. 11

Deception exists if there is a representation, omission or practice that is likely to mislead a reasonable consumer.

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INSTRUCTION NO. 12

The phrase "trade or commerce" includes the sale of assets or services in any commerce directly or indirectly affecting the people of the State of Washington. The word "assets" includes anything of value.

INSTRUCTION NO. 13

An act or practice "affects the public interest" if the act or practice injured other persons, had the capacity to injure other persons, or has the capacity to injure other persons.

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INSTRUCTION NO. 14

To establish injury and causation in a claim under the Washington Consumer Protection Act, it is not necessary to prove one was actually deceived. It is sufficient to establish the deceptive act or practice proximately caused injury to the plaintiff's business or property.

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INSTRUCTION NO. 15

Plaintiffs have suffered an "injury" if their property has been injured to any degree. Under the Consumer Protection Act, Plaintiffs have the burden of proving that they have been injured, but no monetary amount need be proved and proof of any injury is sufficient, even if expenses or losses caused by the violation are minimal.

Injuries to business or property do not include physical injury to a person's body, or pain and suffering.

Injuries to property, if any, include damages related to the purchase of the RV and loss of use.

INSTRUCTION NO. 16

Plaintiffs have the burden of proving that Forest River's alleged unfair or deceptive act or practice was a proximate cause of their injury.

"Proximate cause" means a cause which in direct sequence unbroken by any new independent cause produces the injury complained of and without which such injury would not have happened.

There may be one or more proximate causes of an injury.

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INSTRUCTION NO. 17

"New motor vehicle" means any motor vehicle that (1) is self-propelled and is required to be registered and titled under this title, (2) has not been previously titled to a retail purchaser or lessee, and (3) is not a used vehicle.

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INSTRUCTION NO. 18

"Used vehicle" means a vehicle which has been sold, bargained, exchanged, given away, or title transferred from the person who first took title to it from the manufacturer or first importer, dealer, or agent of the manufacturer or importer, and so used as to have become what is commonly known as "secondhand" within the ordinary meaning thereof.

INSTRUCTION NO. 19

It is the duty of the court to instruct you as to the measure of damages. By instructing you on damages the court does not mean to suggest for which party your verdict should be rendered.

If your verdict is for the plaintiff, then you must determine the amount of money that will reasonably and fairly compensate the plaintiff for such damages as you find were proximately caused by the conduct of the defendant.

In addition you should consider the following past economic damages elements:

1. All expenses incurred by the plaintiffs which are reasonably related to their purchase and ownership of the RV.
2. Reasonable compensation for any loss of use of the RV.

The burden of proving damages rests upon the plaintiff. It is for you to determine, based upon the evidence, whether any particular element has been proved by a preponderance of the evidence.

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INSTRUCTION NO. 20

Economic damages are monetary losses that are reasonably capable of being verified.

INSTRUCTION NO. 21

When you begin to deliberate, your first duty is to select a presiding juror. The presiding juror's responsibility is to see that you discuss the issues in this case in an orderly and reasonable manner, that you discuss each issue submitted for your decision fully and fairly, and that each one of you has a chance to be heard on every question before you.

You will be given the exhibits admitted in evidence and these instructions. You will also be given a special verdict form that consists of several questions for you to answer. You must answer the questions in the order in which they are written, and according to the directions on the form. It is important that you read all the questions before you begin answering, and that you follow the directions exactly. Your answer to some questions will determine whether you are to answer all, some, or none of the remaining questions.

During your deliberations, you may discuss any notes that you have taken during the trial, if you wish. You have been allowed to take notes to assist you in remembering clearly, not to substitute for your memory or the memories or notes of other jurors. Do not assume, however, that your notes are more or less accurate than your memory.

You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during your deliberations.

If, after carefully reviewing the evidence and instructions, you feel a need to ask the court a legal or procedural question that you have been unable to answer, write the question out simply and clearly. For this purpose, use the form provided in the jury room. In your question, do not state how the jury has voted, or in any other way indicate how your deliberations are proceeding.

The presiding juror should sign and date the question and give it to the Judicial Assistant. I will confer with the lawyers to determine what response, if any, can be given.

In order to answer any question on the special verdict form, ten jurors must agree upon the answer. It is not necessary that the jurors who agree on the answer be the same jurors who agreed on the answer to any other question, so long as ten jurors agree to each answer.

When you have finished answering the questions according to the directions on the special verdict form, the presiding juror will sign the verdict form. The presiding juror must sign the verdict whether or not the presiding juror agrees with the verdict. The presiding juror will then tell the Judicial Assistant that you have reached a verdict. The Judicial Assistant will bring you back into court where your verdict will be announced.

INSTRUCTION NO. 22

During closing, the defense commented that Washington law does not require all new motor vehicles to be sold with a manufacturer's warranty. This statement by counsel was improper and you are instructed to disregard it.

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# Appendix B

INSTRUCTION NO. 35

A 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.

The legislature has declared that this statute applies to matters vitally affecting the public interest for the purpose of applying the consumer protection act. A violation of this statute is not reasonable in relation to the development and preservation of business and is an unfair or deceptive act in trade or commerce and an unfair method of competition for the purpose of applying the consumer protection act.

RCW 19.118.031(3) (modified) and RCW 19.118.120 (modified)

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INSTRUCTION NO. 43

A Washington statute provides:

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 negation or limitation is inoperative to the extent that such construction is unreasonable.

RCW 62A.2-316(1) - Exclusion or modification of warranties (modified)  
RCW 62A.2-316 - Exclusion or modification of warranties.

INSTRUCTION NO. 47

A Washington statute provides that:

A manufacturer's written warranty must 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.

RCW 19.118.041

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**INSTRUCTION NO. 64**

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.

RCW 19.118.031(3) and RCW 19.118.041(2)

**LAW OFFICES OF EUGENE N. BOLIN, JR.**

**June 01, 2020 - 2:51 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 53739-7  
**Appellate Court Case Title:** William S. Thorn, et al Respondents v. Sunset Chevrolet, Inc., et al, Appellant  
**Superior Court Case Number:** 18-2-08897-1

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