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Court of Appeals
Division III
State of Washington

No. 31569-0-III

COURT OF APPEALS, DIVISION III,
OF THE STATE OF WASHINGTON

GABRIEL ESPINOZA and IRMA ESPINOZA,
husband and wife, and the
marital community composed thereof,

Respondents,

v.

AMERICAN COMMERCE INSURANCE COMPANY,
an Insurance company,

Appellant,

and

AAA INSURANCE AGENCY, a Washington corporation,
and PAMELA S. TAYLOR and JOHN DOE TAYLOR,
husband and wife and the martial community
composed thereof,

Defendants.

BRIEF OF RESPONDENTS

George W. McLean, Jr., WSBA #14070
Law Offices of George W. McLean, Jr.
2825 Eastlake Ave. E., Suite 115
Seattle, WA 98102
(206) 310-7463

Michael T. Watkins, WSBA #13677
Law Offices of Michael Watkins
2825 Eastlake Ave. E., Suite 115
Seattle, WA 98102
(206) 400-6640

Philip A. Talmadge, WSBA #6973
Emmelyn Hart, WSBA #28820
Talmadge/Fitzpatrick
18010 Southcenter Parkway
Tukwila, WA 98188
(206) 574-6661

Attorneys for Respondents Espinoza

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A. INTRODUCTION

This appeal involves an insurance coverage dispute arising out of an accidental fire at the home of Gabriel and Irma Espinoza,[1] which was insured by American Commerce Insurance Company ("ACIC"). After a nine-day trial, the jury returned with an internally inconsistent verdict in its responses to interrogatories. The trial court ordered a new trial when it was unable to harmonize the inconsistent verdict.[2]

ACIC attempts to mislead this Court concerning the trial court's decision to deny it judgment as a matter of law and instead grant a new trial by omitting from its brief any mention of the jury's answer to a critical interrogatory. The trial court carefully assessed the jury's answers to all of the interrogatories presented and concluded the verdict was inconsistent, necessitating a new trial under CR 59 and/or RCW 4.44.440. The trial court did not abuse its discretion by ordering a new trial.

ACIC also contends the trial court erred by failing to grant its summary judgment motion seeking dismissal of the Espinozas' extra-contractual claims. The order denying summary judgment is not reviewable where it was followed by a trial on the merits and ACIC is

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[1] The Espinozas will be referred to by their first names for clarity and ease of reading. No disrespect is intended.

[2] A copy of the trial court's order for new trial is in the Appendix. The jury's verdict is attached to that order.

foreclosed from raising additional issues that are beyond the scope of the trial court's reason for granting a new trial. But even if the Court considers ACIC's challenge, it should be rejected. The Espinozas submitted substantial evidence or reasonable inferences to support their extra-contractual claims.

Rather than simply retry this case, ACIC unabashedly seeks to delay its resolution on the merits and to increase the expense to the Espinozas. This Court should determine that ACIC's appeal is frivolous or taken for purposes of delay and impose sanctions against ACIC accordingly. RAP 18.7; RAP 18.9(a).

B. ASSIGNMENTS OF ERROR

The Espinozas acknowledge ACIC's assignments of error, br. of appellant at 4-5, but believe the issues[3] pertaining to those assignments are more appropriately formulated as follows:

(1) Is an order granting a new trial a proper exercise of the trial court's discretion when the court is unable to harmonize contradictory interrogatory answers in a jury verdict that suggests both a verdict for the plaintiffs and a verdict for the defendant?

(2) Are an order denying summary judgment and denial of a CR 50(b) motion based upon the presence of material, disputed facts subject to review when raised after a trial on the merits and the trial court has ordered a new trial?

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[3] ACIC's rambling, argumentative "issues" in no way resemble properly formulated appellate issues. *See* Form 6, Rules of Appellate Procedure.

(3) Is an award of attorney fees and costs appropriate when an appeal is frivolous or brought for purposes of delay?

C. STATEMENT OF THE CASE

An accidental fire destroyed the Espinozas' modest home in Wapato, Washington in 2010. CP 188. Before the fire, the Espinozas had rented the home for a number of years from Gabriel's sister. CP 154, 309. She deeded them the home in January or February of 2009. CP 156.

In early October 2010, Gabriel contacted AAA Insurance Agency ("AAA") to obtain homeowner's insurance. CP 155. AAA employee Pamela S. Taylor interviewed Gabriel over the telephone and prepared a "Homeowner Application." CP 165, 171-73. Taylor inserted the word "Electric" in the application box labeled "Heat Type" "Primary." CP 163, 171. Shortly thereafter, Irma, who speaks limited English, met with Taylor in the AAA office, paid the requested premium, and signed the application that Taylor had prepared. CP 155-56, 165, 176-77.

On October 12, 2010, Taylor submitted the Espinozas' "Homeowner Application," signed only by Irma, to ACIC. CP 172. Taylor did not communicate with ACIC regarding the Espinozas or their insurance application. CP 162. ACIC admitted that it never saw the Espinozas' signed application and that it made its underwriting decision based solely on the unsigned typewritten application furnished to it by

Taylor. CP 181-82.

The same day, ACIC issued a homeowner's policy of insurance to the Espinozas. CP 69-114. It did not attach a copy of the application to the insurance policy. CP 167. Because the application was not attached, the Espinozas were unable to review it when they received the policy.

After ACIC issued the insurance policy, it retained inspector James Dixon to examine its risk. CP 207. On October 23, 2010, Dixon performed only an exterior inspection of the Espinozas' home at ACIC's request. CP 315; RP (3/8/13):775-76. Had Dixon entered the house, he would have seen that the Espinozas used *electric* space heaters and an *electric* wall mounted bathroom heater to heat the home. CP 156-57.[4]

On November 30, 2010, while no one was at home, a devastating fire destroyed the Espinozas' home. CP 188. The fire department determined that combustible materials accidentally placed too close to a space heater likely started the fire. CP 188. The Espinozas promptly submitted their insurance claim to ACIC and requested benefits pursuant to the terms of their homeowner's insurance policy. CP 15.

After the Espinozas reported the loss, ACIC retained an independent adjusting firm to adjust their claim. CP 67. The independent adjuster interviewed Gabriel, who told him that the Espinozas were using

[4] ACIC admitted that space heaters were not excluded under its policy. CP 184; RP (3/11/13):885.

electric space heaters to heat their home at the time of the fire. CP 192. They also used an electric, hard-wired, permanent wall mounted heater in their bathroom. CP 157.

ACIC conducted Examinations Under Oath ("EUOs") of the Espinozas, who again verified that they were using electric space heaters to heat their home. CP 197. After conducting the EUOs, ACIC rescinded the insurance policy – declaring it void from inception - and denied coverage for the loss. CP 67, 121-24, 522. In its denial of coverage letter, ACIC first quoted a portion of the insurance policy:

> Misrepresentation, Concealment, or Fraud
>
> *This coverage is void if before or after a loss:*
>
> *a. "you" or any "insured" has intentionally concealed or misrepresented:*
>
> *1) a material fact or circumstance that relates to this insurance or the subject thereof; or*
>
> *2) the "insured's" interest herein;*
>
> *b. there has been fraud or false swearing by "you" or any other "insured" with regard to a matter that relates to this insurance or the subject thereof.*

CP 123.

ACIC then stated, in relevant part:

> Your policy provides that there is no coverage for

> an insured who has intentionally misrepresented a material fact that relates to the insurance before or after a loss. Your policy also provides that there is no coverage for an insured who has falsely sworn to a matter relating to this insurance.
>
> During the application process for your policy, you advised your agent, Pamela Taylor, that your home was heated with baseboard electricity, and you failed to tell her that in heating your home you actually relied solely on space heaters. *Had American Commerce Insurance Company known that you used space heaters to heat your home, it would not have underwritten your policy.*

CP 123 (emphasis added).

ACIC based its decision to rescind the insurance policy and deny coverage solely on the Espinozas' statement in their insurance application that they heated their home with "electric" heat. CP 123. Because plug-in space heaters and a wall mounted electric bathroom heater are electric sources of heat, the Espinozas did not misrepresent their source of heat.[5] CP 208.

The Espinozas filed the underlying action in the Yakima County

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[5] ACIC later admitted that the space heaters the Espinozas used to heat their home were "electric." CP 208. It nevertheless claimed that their use of the term "electric" on their insurance application was an assertion of fact that their home had "hardwired" or "permanent" electrical heat. CP 208. Although ACIC was unable to cite to any applicable case law, treatise, or other insurance-related commentary standing for that proposition, it claimed that use of the term "electric" constituted a grievous material representation and that the Espinozas were not entitled to coverage under the policy. CP 208-09. ACIC's speaking agent, Pamela Brissette, apparently did not know that the Espinozas' bathroom contained a working wall-mounted, hardwired, permanent electric heater. CP 157. ACIC admitted that space heaters were not specifically excluded under the policy. CP 184; RP (3/11/13):885.

Superior Court against ACIC, AAA, and Taylor on June 30, 2011.[6] CP 1-19. They asserted a number of claims against ACIC, including breach of contract, negligence, bad faith, and violations of the Washington Administrative Code, the Consumer Protection Act, RCW 19.86 ("CPA"), and the Insurance Fair Claims Act, RCW 48.30.015 ("IFCA").[7] CP 16-17. They asserted claims for negligence and breach of fiduciary duty against AAA and Taylor. CP 17-18. ACIC answered, denying all claims and asserting a counterclaim for declaratory relief that the Espinozas were not entitled to any coverage based on their alleged misrepresentations in both the application and the coverage investigation. CP 20-27, 42-49. The case was assigned to the Honorable Douglas L. Federspiel.

The Espinozas moved to exclude the insurance application based on ACIC's failure to comply with RCW 48.18.080. CP 139-46. The application was ACIC's sole basis for rescinding the policy and for denying coverage. CP 123. The trial court granted the motion on December 21, 2012. CP 434-35. Evidence of the application was thereafter excluded from the trial and all other proceedings in the case. CP 434-35.

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[6] The Espinozas amended their complaint on August 29, 2011 and again on July 9, 2012. CP 18-34, 50-56.

[7] Relevant portions of the CPA and the IFCA are reprinted in the Appendix.

ACIC moved for partial summary judgment on liability.[8] CP 57-65. The trial court denied all aspects of ACIC's motion except one: the court determined that questions of material fact precluded summary judgment dismissal of the Espinozas' CPA and IFCA claim, but concluded that ACIC's investigation was reasonable as a matter of law. RP (1/16/13):31-33.

The Espinozas moved for partial summary judgment on coverage shortly thereafter, arguing that ACIC wrongfully denied coverage for their loss as a matter of law. CP 774-86. The court denied the Espinozas' motion. RP (2/22/16):17-19.

The nine-day jury trial began on March 4, 2013 with the parties' motions in limine. ACIC sought, among other things, an instruction allowing it to inform the jury that its investigation was reasonable as a matter of law. CP 1077. The trial court denied the request without prejudice. RP (3/4/13):154.

ACIC moved for judgment as a matter of law under CR 50(a) (a motion that ACIC continuously mislabels in its brief as a motion for a

[8] AAA and Taylor moved to summarily dismiss the Espinozas' breach of fiduciary duty claim. CP 286-97. The trial court granted the motion. CP 770-73.

directed verdict[9]) at the conclusion of the Espinozas' case. RP (3/11/13):956-58, 960-63, 965. The trial court denied the motion in all respects, except for the Espinozas' claim for additional living expenses/actual expenditures for rent. RP (3/11/13):960, 962, 964, 969.

Prior to closing arguments, the jury was instructed and provided with a six-page verdict form. CP 1588-93; RP (3/13/13):1363-89. The first section of the verdict form contained questions directed to the Espinozas' claims against ACIC. CP 1588-90. ACIC proposed the first six questions submitted to the jury. CP 1501-03. The second section of the form contained questions directed to the claims against Taylor and AAA and the third consisted of a special interrogatory. CP 1588-93. No party objected to the verdict form. CP 1755; RP (3/14/13):1423, 1426.

On March 14, 2013, the jury returned an internally inconsistent verdict. CP 1588-93. *See* Appendix. On the one hand, the jury determined the Espinozas were entitled to coverage under their insurance policy for the damage to their home and its contents and awarded damages.[10] CP 1588. The jury also found that the Espinozas had not

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[9] Motions for a directed verdict and motions for judgments notwithstanding the verdict were renamed "motions for judgment as a matter of law" in 1993. *Litho Color, Inc. v. Pac. Employers Ins. Co.*, 98 Wn. App. 286, 298 n.1, 991 P.2d 638 (1999).

[10] The jury also found AAA negligent and liable for structure and content damages. It determined that AAA and ACIC were 10% and 90% at fault, respectively. CP 1593.

made any material misrepresentations during the insurance application process, CP 1589, a fact which ACIC neglects to mention in its brief. On the other hand, the jury also found that Gabriel made a misrepresentation during the claim investigation process.[11] CP 1589.

After the verdict was read, the trial court polled each juror on each question contained in the verdict form. RP (3/14/13):1406-22. The jury's answer to every question was unanimous. RP (3/14/13):1407-22.

The trial court found the jury's verdict inconsistent and issued an oral ruling for a new trial. RP (3/14/13):1426-27, 1447. The Espinozas moved for a mistrial or for a new trial. RP (3/14/13):1422.

ACIC moved for reconsideration under CR 59 based on an alleged error of law and for judgment as a matter of law under CR 50(b), but *only* on the alleged misrepresentation made by Gabriel. CP 1602-08. The Espinozas presented a proposed order for new trial based on the trial court's oral ruling and alternatively moved for judgment as a matter of law on their breach of contract claim based on the jury's finding that ACIC wrongfully denied coverage. CP 1683-94.

On March 25, 2013, the trial court again concluded that the jury

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[11] The jury's verdict was inconsistent because Gabriel's alleged "material misrepresentation" during the claim investigation process was the same alleged misrepresentation made in the application process. Yet the jury found no misrepresentation in the application process. Moreover, the jury found AAA/Taylor and ACIC at fault.

verdict was inconsistent and ordered a new trial. CP 1755-61. ACIC appealed that order. CP 1783-85. It also sought discretionary review of a number of non-dispositive issues, including the trial court's failure to grant its motion in limine to instruct the jury that the Espinozas could not recover under the CPA or IFCA. This Court's Commissioner denied ACIC's motion for discretionary review on June 12, 2013. A copy of that ruling is in the Appendix.

The Espinozas settled with AAA and Taylor post-trial and both defendants were dismissed from the action. CP 1801-04.

D. SUMMARY OF ARGUMENT

The trial court did not abuse its discretion by granting a new trial where the jury's verdict was irreconcilably inconsistent because it contained contradictory answers, making its resolution of the ultimate issues impossible for the trial court to determine.

ACIC's attempt to surface issues apart from the new trial question is foreclosed by controlling precedent and the Commissioner's Ruling on ACIC's discretionary review motion. ACIC's argument that the trial court erred by refusing to enter judgment as a matter of law and instead grant a new trial is unavailing. ACIC has not suggested that the jury instructions are contrary to law or that the state of the verdict form would allow the trial court to enter judgment as a matter of law.

Well-established Washington law holds that an order denying summary judgment because a question of fact existed is not reviewable even after entry of the final judgment. That decision, in effect, merges into the final judgment. Similarly, a motion for judgment as a matter of law can only be reviewed in the context of all the evidence adduced at trial. This Court, however, should not review these issues, given the trial court's grant of a new trial; the Court need not examine ACIC's claim that it was entitled to summary judgment or judgment as a matter of law on the Espinozas' CPA, IFCA, and non-economic damages claims. Even if the Court considers ACIC's arguments, it should reject the challenge. The trial court did not err by refusing to direct judgment for ACIC on the Espinozas' extra-contractual claims because the Espinozas submitted substantial evidence or reasonable inferences to support those claims.

This appeal is frivolous. Its purpose is not to present a colorable legal argument, but to drive up the Espinozas' legal expenses. The trial court's order for a new trial should be affirmed and the Espinozas should be awarded attorney fees on appeal. RAP 18.9(a).

E. ARGUMENT

(1) The Trial Court Did Not Abuse Its Discretion by Granting a New Trial Where the Jury's Verdict Was Patently Inconsistent[12]

[12] ACIC improperly characterizes the applicable standards of review. Br. of Appellant at 24. This Court reviews for an abuse of discretion the grant or denial of a

ACIC argues that it was entitled to judgment as a matter of law when the jury found that Gabriel misrepresented a material fact during the claim investigation process and that the grant of a new trial was an abuse of discretion in light of that misrepresentation. Br. of Appellant at 25, 35-36. According to ACIC, it was entitled to a defense verdict because the jury's misrepresentation finding voided the insurance policy and barred all of the Espinozas' claims as a matter of law. *Id.* at 26. This Court should reject ACIC's attempt to focus exclusively on one part of the jury's verdict to decide the issue while ignoring the inconsistent portions that mandate a verdict for the Espinozas. RP (3/14/13):1434-35. Given the patent inconsistencies in the jury's verdict, the trial court did not abuse its discretion by ordering a new trial. *Gilmartin v. Stevens Inv. Co.*, 43 Wn.2d 289, 261 P.2d 73 (1953) (noting the courts will not hesitate to reverse a judgment when an irreconcilable inconsistency exists).

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motion for new trial predicated on an error of fact. *Cox v. General Motors Corp.*, 64 Wn. App. 823, 826, 827 P.2d 1052 (1992). *See also, Mitchell v. Rice*, 183 Wash. 402, 48 P.2d 949 (1935) (holding trial court did not abuse its discretion by granting a new trial where the jury's verdicts were inconsistent). It affords greater deference to a decision to grant a new trial than a decision to deny one. *State v. Cummings*, 31 Wn. App. 427, 430, 642 P.2d 415 (1982). *See also, Bunnell v. Barr*, 68 Wn.2d 771, 415 P.2d 640 (1966) (noting a trial court is invested with broad discretion in granting or denying motions for new trial, and the court's determination will not be disturbed on appeal absent abuse of discretion). Here, the trial court's decision to grant a new trial based on an irreconcilable jury verdict was based on an error of fact, not law.

The Court's review of a special verdict differs slightly from that of a general verdict.[13] *See* CR 49(a) (Special Verdict). In reviewing a special verdict, this Court must try to reconcile the jury's answers to special interrogatories. *Tincani v. Inland Empire Zoological Soc.*, 124 Wn.2d 121, 875 P.2d 621 (1994) (unable to harmonize jury's determinations, Supreme Court found "an irreconcilable conflict among the jury's answers which only a new trial can resolve."); *Myhres v. McDougall*, 42 Wn. App. 276, 278, 711 P.2d 1037 (1985) (holding verdicts were inconsistent since jury could not logically have found that one motorist's negligence was proximate cause of his own damages without finding that it was a cause of the other's damage as well). If the verdict contains contradictory answers to interrogatories making the jury's resolution of the ultimate issue impossible to determine, the trial court has no choice but to grant a new trial; this Court may not substitute its judgment for that which is within the province of the jury. *Myhres*, 42 Wn. App. at 278; *Blue Chelan, Inc. v. Dep't of Labor & Indus.*, 101 Wn.2d 512, 514-15, 681 P.2d 233 (1984).

In *Blue Chelan*, the jury was asked to decide whether a worker was totally and permanently disabled as a result of an industrial accident.

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[13] Even if the first six pages of the jury's verdict constitute a general verdict rather than a special verdict, "a special verdict controls over any inconsistent general verdict." *State Dep't of Highways v. Evans Engine & Equip. Co., Inc.*, 22 Wn. App. 202, 205, 589 P.2d 290 (1978), *review denied*, 92 Wn.2d 1010 (1979).

101 Wn.2d at 513. The jury instructions, read as a whole, equated total and permanent disability with inability to obtain and perform gainful employment on a reasonably continuous basis. The jury was given a special verdict form containing several interrogatories. The jury found the plaintiff (1) not totally and permanently disabled, (2) but incapable of finding gainful employment, and yet (3) permanently 50 percent disabled. *Id.* The Supreme Court held that these statements were inconsistent, reasoning that as the two interrogatories asked essentially the same question, they could not logically be answered differently. The *Blue Chelan* court therefore ordered a new trial. *Id.* at 515.

Blue Chelan controls here where the jury gave the following answers on the special verdict form:

> QUESTION 1: Did Gabriel and Irma Espinoza prove that a covered loss occurred?
>
> _X_ YES __ NO.
>
> If yes, Structure Value: $189,000.00
>
> If yes, Contents Value: $ 93,616.55
>
> *(INSTRUCTION: Answer Question 2)*
>
> QUESTION 2: Did Gabriel Espinoza make a material misrepresentation during the insurance application process?
>
> __ YES _X_ NO.

> *(INSTRUCTION: Answer Question 3)*
>
> QUESTION 3: Did Gabriel Espinoza make a material misrepresentation during the claim investigation Examination Under Oath?
>
> _X_ YES __ NO.
>
> *(INSTRUCTION: If you answered "yes" to either Questions 3 or 4, sign this verdict form. If you answered "no" to both Questions 2 and 4, answer Question 4.)*

CP 1588-89.

The jury's answers are irreconcilable. Although the jury found that the Espinozas' loss was covered by their insurance policy to the extent of their damages under Question 1 and that they had not made any material misrepresentations during the application process in Question 2, it found that Gabriel had made a material misrepresentation during his EUO in Question 3. The jury could not logically have found that Gabriel made a material misrepresentation during his EUO if he did not make a material misrepresentation during the application process as both alleged misrepresentations were the same.

The jury's misrepresentation finding in answer to Question 3 is also inconsistent with its determination that no fault attached to the Espinozas, CP 1592, and its answer to the special interrogatory:

SPECIAL INTERROGATORY

> If you find that both ACIC and AAA/Taylor are both responsible for Plaintiffs' damages, you must decide how much fault to allocate to ACIC and AAA/Taylor.
>
> * * *
>
> QUESTION 1: If you believe that both ACIC and AAA/Taylor are jointly responsible for any of the damage identified in this Special Interrogatory, please express what percentage of fault should be allocated to each defendant.
>
> 90% ACIC
> 10% AAA/Taylor
> _____ Not applicable.

CP 1593. The jury clearly awarded damages to the Espinozas and then allocated those damages between ACIC and AAA/Taylor despite its answer to Question 3. This answer creates an internal inconsistency because it conflicts with the jury's earlier finding that Gabriel made a material misrepresentation during the claim investigation process. CP 1589.

The jury's verdict is inconsistent because it contains contradictory answers, making the jury's resolution of the ultimate issues impossible to determine. Like the jury in *Blue Chelan*, the jury here answered both yes and no to the essential questions. Where the jury's verdict is internally inconsistent, the trial court did not abuse its discretion by ordering a new trial. *Alvarez v. Keyes*, 76 Wn. App. 741, 743, 887 P.2d 496 (1995)

(special verdicts were "patently inconsistent" and could not be reconciled; trial court's denial of new trial reversed).

ACIC cites *Mutual of Enumclaw Ins. Co. v. Cox*, 110 Wn.2d 643, 757 P.2d 499 (1988), to avoid dealing with the jury's inconsistent answers. Br. of Appellant at 27, 33. The fundamental flaw in ACIC's argument is that *Mutual of Enumclaw* is factually distinguishable and not controlling.

Cox purchased a homeowner's insurance policy from Mutual of Enumclaw Insurance Company ("MOE"), which covered, among other things, his home and unscheduled personal property. *Mutual of Enumclaw,* 110 Wn.2d at 645. A fire subsequently destroyed Cox's home and personal property; shortly thereafter, he submitted an itemized inventory of his unscheduled personal property. During its investigation, MOE found no trace of certain items claimed lost and, when confronted, Cox denied fraud but admitted making "mistakes" on the inventory list. Meanwhile, MOE had made partial payments on the policy. MOE filed a declaratory judgment action, claiming that the policy was void because Cox had violated the policy's anti-fraud provision. Cox counterclaimed that MOE had acted in bad faith and violated the CPA while processing his claim.

The trial court made a number of rulings on Cox's motion for partial summary judgment, including a ruling that there was no waiver or

estoppel resulting from interim payments by MOE. Following a trial, the jury returned a verdict for Cox after answering the relevant interrogatories.[14] On MOE's post-trial motion, the trial court granted a judgment n.o.v. to MOE. The court held that Cox's fraud precluded application of estoppel. Cox appealed, arguing in part that since MOE did

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[14] In *Mutual of Enumclaw*, the jury was asked:

> QUESTION NO. 1: Did the defendant commit fraud or false swearing regarding any matter relating to his insurance?
>
> ANSWER: X Yes No
>
> * * *
>
> QUESTION NO. 3: Did the insurance company waive its right to deny payment to the defendant by its acts or conduct?
>
> ANSWER: Yes X No
>
> QUESTION NO. 4: Is the insurance company estopped by its acts and conduct from voiding the insurance policies?
>
> ANSWER: X Yes No
>
> QUESTION NO. 5: Did the plaintiff insurance company act in bad faith in the handling of defendant's claim under the provisions of the Consumer Protection Act?
>
> ANSWER: X Yes No
>
> * * *
>
> QUESTION NO. 6: Was such a violation a proximate cause of any damage sustained by the defendant?
>
> ANSWER: X Yes No
>
> QUESTION NO. 7: Did the plaintiff violate the provisions of the Washington Administrative Code?
>
> ANSWER: X Yes No.

110 Wn.2d at 647-48.

not object to the jury instruction discussing estoppel, estoppel became the law of the case.

Our Supreme Court held that Cox's attempt to defraud MOE barred him from recovering for his claims of bad faith under the CPA because "it would be inequitable to penalize MOE for a harmless technical error; the estoppel instruction did not become the law of the case." *Id.* at 651-52. The Supreme Court's decision to uphold the judgment in MOE's favor was premised on its conclusion that MOE had preserved its objections to the proposed estoppel instruction allowing estoppel to be presented as a defense against an award of coverage under the facts. The trial court properly used the judgment n.o.v. to "correct the misstatement of law in the special interrogatories." *Id.* at 652.

This case bears little resemblance to *Mutual of Enumclaw.* First, ACIC has not suggested that any of the jury instructions are contrary to law or that the state of the verdict form would allow the trial court to enter judgment as a matter of law.[15] Second, the trial court in *Mutual of Enumclaw* was not faced with an inconsistent jury verdict as was the trial

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[15] In fact, ACIC argues that the verdict form was correct under the law because it instructed the jury to sign the form if it found in the first section that the Espinozas made a material misrepresentation. Br. of Appellant at 25. Even so, the form did not instruct the jury to refrain from answering the second set of questions pertaining to the liability of AAA and Taylor or to refrain from answering the special interrogatory apportioning fault between ACIC and AAA/Taylor. CP 1588-93. As the trial court found, it was reasonable for the jury to have answered each set of questions in each section as posed given the instructions, or lack thereof. CP 1758.

court here. The *Mutual of Enumclaw* jury unquestionably found for Cox. The question before the trial court here (whether the jury's answers were internally inconsistent) was not the same as the question before the trial court in *Mutual of Enumclaw* (whether the jury instructions were contrary to the law). *Mutual of Enumclaw* is inapplicable.

ACIC's reliance on *Johnson v. Allstate Ins. Co.*, 126 Wn. App. 510, 108 P.3d 1273 (2005) is similarly misplaced. Br. of Appellant at 29-30. In *Johnson*, the jury answered a special interrogatory asking it to determine if either plaintiff had intentionally misrepresented or concealed any material fact in connection with their claim under an insurance contract. The jury answered the question in the affirmative. As instructed, it then signed and returned the verdict form. Unlike the jury in this case, the *Johnson* jury did not answer the remaining questions about the plaintiffs' breach of contract and CPA claims or their damages. The trial court in *Johnson* was therefore not faced with an internally inconsistent jury verdict like the trial court here.

Here, the jury's verdict is patently inconsistent. The trial court did not abuse its discretion by granting a new trial where it was unable to reconcile the verdict's internal inconsistencies.

(2) <u>ACIC's Efforts to Secure Review of Matters Apart from the Trial Court's New Trial Order Are Baseless</u>

ACIC argues that this Court should review various issues on the merits if this Court affirms the trial court's new trial order. Br. of Appellant at 36-47. This argument is meritless.

ACIC's effort to secure review is predicated on RAP 2.2(a)(9), authorizing an appeal as of right from a trial court order granting a new trial. The *Cox* court determined that RAP 2.2(a)(9), like the common law rule addressing the scope of review from a new trial order, prevents review of collateral issues in an appeal relating to the grant of a new trial:

> The common law rule is that an appeal from an order granting a new trial is generally limited to the trial court's reasons for granting a new trial. However, the appellant may also raise additional issues provided they would be dispositive of the case: for example, lack of jurisdiction. A failure to raise a dispositive issue in the first instance is construed as a waiver in the second appeal.

64 Wn. App. at 826. *See also, Kimball v. Moore*, 18 Wn.2d 643, 140 P.2d 498 (1943) (Supreme Court declined to consider evidentiary issue as part of review of new trial order; only other issues that could be considered were those "fatal to any right of recovery.").

In sum, under *Cox*, a party like ACIC simply cannot raise issues apart from the core new trial issue on review unless those collateral issues are "dispositive to the case" in the sense of jurisdictional, statute of limitations, or other dispositive issues. The collateral issues it raises do not meet this requirement. ACIC asks this Court, in effect, to waste

judicial time combing through a record that is rendered inapplicable by the trial court's new trial order.

(a) The summary judgment order is not reviewable

ACIC contends the trial court erred by failing to grant its summary judgment motion seeking dismissal of the Espinozas' extra-contractual claims. Br. of Appellant at 43. But an order denying a motion for summary judgment is not reviewable after entry of the final judgment.

It has long been the rule in Washington that an order denying summary judgment based upon the presence of material, disputed facts will not be reviewed when raised after a trial on the merits. *Adcox v. Children's Orthopedic Hosp. & Med. Ctr.*, 123 Wn.2d 15, 35 n.9, 864 P.2d 921 (1993); *Hudson v. United Parcel Serv., Inc.*, 163 Wn. App. 254, 257 n.1, 258 P.3d 87 (2011); *Caulfield v. Kitsap County*, 108 Wn. App. 242, 249 n.1, 29 P.3d 738 (2001). *See also, Johnson v. Rothstein*, 52 Wn. App. 303, 307-08, 759 P.2d 471 (1988) (noting review after a trial on the merits of an order denying summary judgment does nothing to further the primary purpose of a summary judgment procedure, which is to avoid a useless trial.); *Ortiz v. Jordan*, ___ U.S. ___, 131 S. Ct. 884, 888-89, 178 L.Ed.2d 703 (2011) (a party may not appeal an order denying a motion for summary judgment after a trial on the merits).

Johnson is dispositive. There, Division I dismissed an appeal that challenged only the denial of a summary judgment motion based on questions of fact resolved at trial. In dismissing the appeal, that court noted that once the issues have been tried to a finder of fact, the summary judgment procedure to determine the presence of genuine, material issues of fact has no further relevance. *Johnson*, 52 Wn. App. at 307 (citations omitted). In effect, the result of denying summary judgment merged into the judgment on the verdict of the jury. *Id.*

Here, the trial court clearly determined that there were disputed material facts on ACIC's arguments that had to be resolved by the trier of fact. The subsequent trial on the merits rendered the earlier summary judgment motion irrelevant and moot. *Id.* at 304, 307-08. Accordingly, this Court need not examine ACIC's contention that it was entitled to summary judgment where the existence of fact questions precluded judgment as a matter of law. This is not an issue like jurisdiction that is legally "dispositive" of the case as the *Cox* court ruled.

Given the trial court's decision to grant a new trial, the Espinozas' CPA, IFCA, and non-economic damages claims remain for the trial court to consider on remand at a new trial. ACIC's effort to seek review of the order denying its motion for summary judgment is frivolous, given the unambiguous authority contrary to its position.

(b) ACIC's CR 50 motion is a collateral issue under Cox that should not be considered by this Court

ACIC also contends that it was entitled to judgment as a matter of law under CR 50(a). Br. of Appellant at 36-43.[16] The trial court denied its motion because fact questions existed. RP (1/16/13):31-33. Like its argument in connection with the denial of its summary judgment order, a denial of a CR 50(a) motion because fact questions existed is not the type of "dispositive" legal issue such as jurisdiction envisioned by *Cox* for review in conjunction with a new trial. This issue, too, can and should await a new trial on remand, and this Court should not reach it.

(c) The Espinozas submitted substantial evidence or reasonable inferences to support their extra-contractual claims[17]

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[16] ACIC insists on referring to a CR 50(a) motion as a motion for a directed verdict, even though the proper terminology is a motion for judgment as a matter of law. *See* CR 50.

[17] This Court reviews an order denying judgment as a matter of law *de novo*, engaging in the same inquiry as the trial court. *Schmidt v. Coogan,* 162 Wn.2d 488, 491, 173 P.3d 273 (2007); *Goodman v. Goodman*, 128 Wn.2d 366, 371, 907 P.2d 290 (1995). Judgment as a matter of law is not appropriate if, after viewing the evidence in the light most favorable to the nonmoving party and drawing all reasonable inferences, substantial evidence exists to sustain a verdict for the nonmoving party. *Harris v. Drake*, 152 Wn.2d 480, 493, 99 P.3d 872 (2004). The Court defers to the trier of fact on issues of credibility. *Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 108, 864 P.2d 937 (1994).

In reciting the standard of review applicable to the order denying judgment as a matter of law, ACIC overlooks an important principle. When reviewing a civil case in which the standard of proof is clear, cogent, and convincing evidence, this Court "must view the evidence presented through the prism of the substantive evidentiary burden." *Woody v. Stapp*, 146 Wn. App. 16, 22, 189 P.3d 807 (2008) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254, 106 S. Ct. 2505, 91 L.Ed.2d 202 (1986)). *See also, In re Melter*, 167 Wn. App. 285, 301, 273 P.3d 991 (2012)) (noting that when a challenged factual finding is required to be proved by clear, cogent, and convincing evidence, the courts incorporate that standard of proof in conducting substantial evidence review).

The trial court denied ACIC's motion seeking dismissal of the Espinozas' CPA, IFCA, and non-economic damages claims because questions of fact existed. RP (1/16/13):31-33. Even if the Court reaches the CPA, IFCA, and non-economic damages issues as ACIC requests, it should reject ACIC's challenge because the trial court was correct in denying ACIC's CR 50 motion.

ACIC disagrees with the trial court's decision to deny the motion for judgment as a matter of law on the Espinozas' CPA and IFCA claims, which were based on ACIC's violation of WAC 284-30-330(13). Br. of Appellant at 38-40. According to ACIC, the Espinozas failed to present sufficient evidence on three prongs of their CPA claim; namely, that ACIC committed an unfair or deceptive trade practice and that they were damaged as a result. *Id.* at 39-40. ACIC forgets that any violation of

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Misrepresentation in obtaining insurance must be proved by clear, cogent, and convincing evidence. *Queen City Farms v. Central Nat'l Ins.*, 126 Wn.2d 50, 97, 882 P.2d 703 (1995) (citing *Beckendorf v. Beckendorf*, 76 Wn.2d 457, 457 P.2d 603 (1969)). The more stringent standard of clear, cogent, and convincing evidence thus requires that the trier of fact be convinced that the ultimate fact in issue is "highly probable." *Colonial Imports, Inc. v. Carlton Northwest, Inc.*, 121 Wn.2d 726, 735, 853 P.2d 913 (1993); *In re Welfare of Sego*, 82 Wn.2d 736, 739, 513 P.2d 831 (1973). *See also, In re Riley's Estate*, 78 Wn.2d 623, 640, 479 P.2d 1 (1970) (recognizing that "[e]vidence which is 'substantial' to support a preponderance may not be sufficient to support the clear, cogent, and convincing" standard).

This Court may affirm the trial court's disposition of the motion on any ground supported by the record. *Mountain Park Homeowners Ass'n v. Tydings*, 125 Wn.2d 337, 344, 883 P.2d 1383 (1994); *Rawlins v. Nelson*, 38 Wn.2d 570, 578, 231 P.2d 281 (1951).

WAC 284-30[18] is a per se unfair trade practice under the CPA. In any event, the Espinozas submitted evidence to support their claim.

Any violation of WAC 284-30-330 constitutes a violation of the IFCA, which in turn constitutes a per se unfair trade practice under the CPA. *Leingang v. Pierce County Med. Bureau, Inc.*, 131 Wn.2d 133, 151, 930 P.2d 288 (1997); *Industrial Indem. Co. v. Kallevig*, 114 Wn.2d 907, 923, 792 P.2d 520 (1990). This per se unfair trade practice may result in CPA liability if the remaining elements of the 5-part test for a CPA action are established.[19] *Kallevig*, 114 Wn.2d at 923.

ACIC's argument that the Espinozas could not establish the first prong of their CPA claim because they failed to show a violation of WAC 284-30-330(13) is unpersuasive. Br. of Appellant at 39. The

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[18] The relevant subsection of WAC 284-30-330 is reprinted in the Appendix.

[19] To prevail on their CPA claim, the Espinozas were required to establish:

> (1) the defendant has engaged in an unfair or deceptive act or practice;
>
> (2) occurring in trade or commerce;
>
> (3) that impacts the public interest;
>
> (4) the plaintiff has suffered injury in his or her business or property; and
>
> (5) a causal link exists between the unfair or deceptive act and the injury suffered.

Hangman Ridge Training Stables, Inc. v. Safeco Title Insurance Co., 105 Wn.2d 778, 784-85, 719 P.2d 531 (1986)).

Espinozas' expert, Gary Williams, testified that ACIC's reasons for denying coverage were not reasonable and did not "make any sense." RP (3/7/13):428, 446, 511, 516. In particular, Williams testified that the paragraph in the declination letter addressing the Espinozas' alleged misrepresentation during the application process was "not a valid explanation of the denial." *Id.* at 512. When asked why, he elaborated:

> Because there is absolutely no debate about the fact that the home was heated with a built-in wall heater in the bathroom and a space heater in the living room, so it was not heated solely with space heaters. It ignores the facts.

Id. at 513. ACIC never explained to the Espinozas why their space heaters were not considered electric or how they could be accused of misrepresentation for describing their space heaters as electric. *Id.* at 515-16. According to Williams, the Espinozas' statement to Taylor that they had space heaters in their home was not a misrepresentation that they heated their home with electricity. *Id.* The Espinozas home was heated with electric space heaters and electric wall heaters. *Id.* at 513. Finally, Williams opined that ACIC did not objectively analyze the difference between what they learned from Taylor and what the Espinozas claimed they told her during the application process. *Id.* at 517-18. Williams' testimony supported the first prong of the Espinozas' CPA claim.

ACIC's argument that the Espinozas could not establish the final

two prongs of their CPA claim because they failed to establish that they were injured as a result of ACIC's unreasonable explanation is likewise unpersuasive. Br. of Appellant at 40. What ACIC overlooks is that the Espinozas' undisputed damages were not just the denial of their claim, but also their loss of insurance coverage. Based on the evidence presented and the reasonable inferences to be draw from it, the trial court correctly denied judgment to ACIC on the Espinozas' CPA claim.

ACIC also challenges the trial court's decision to deny it judgment as a matter of law on the Espinozas' non-economic damages claim. Br. of Appellant at 40-41. According to ACIC, the trial court erred because neither Gabriel nor Irma testified that they suffered any emotional distress damages. Br. of Appellant at 40-41. ACIC is mistaken.

Both Gabriel and Irma testified about their emotional states upon learning that ACIC had denied coverage for their loss. For example, Gabriel testified that Irma was crying when she called to tell him about ACIC's decision. RP (3/8/13):655. When he was asked how he felt when Irma read the declination letter to him, he testified: "I felt like our house burnt down again." *Id.* at 656.

Irma testified that she was so distraught upon learning of ACIC's decision that she "could not speak. The only thing I said to [Taylor] was, what's going on. I don't understand what's happening." *Id.* at 793. When

she visited Taylor to discuss ACIC's decision, she did not stay long because she felt that Taylor "didn't want [other people in the office] to see her." *Id.* at 794. Irma also testified that the family received assistance from the Red Cross for a few days immediately after the fire, but then had to move in with Gabriel's parents for approximately three months. *Id.* at 795. Their post-fire living arrangements were unsuitable because the grandparents' home was too small for the entire family. *Id.* Irma testified that the family is now renting a larger home. *Id.*

Taylor confirmed Irma's emotional state, testifying that when Irma came to see her after receiving ACIC's rejection letter, Irma was "crying so much" and kept asking "why, why." RP (3/6/13):355.

The most striking testimony from Irma came when she was asked how the loss of the family home that ACIC refused to rebuild had affected the family: "It's something horrible that I cannot explain. It hurts me more for my children, not for me. It feels like the end of the world, but the pain does subside." *Id.* at 799. She then clarified that her pain came from

> think[ing] you're insured and you're not. The pain is still there because of the memories lost, and I'm very thankful that my husband and my children and I were not hurt in the fire, but you think that you're insured and you think that you were going to have your house back but, as it turns out, you weren't, and that's where the pain lies.

Id.

Contrary to ACIC's assertion that the Espinozas' evidence was a mere scintilla, br. of appellant at 41, the Espinozas submitted substantial evidence to support their non-economic damages claim. ACIC's challenge fails.

(3) The Espinozas Are Entitled to their Reasonable Attorney Fees and Costs Because ACIC's Appeal Is Frivolous or Taken for Purposes of Delay

RAP 18.1(a) permits an award of attorney fees and costs on appeal if granted by applicable law. Under the American Rule on attorney fees, the parties bear their own legal expenses unless a statute, contract, or recognized equitable exception to that rule authorizes the recovery of fees. *State ex rel. Macri v. City of Bremerton*, 8 Wn.2d 93, 113-14, 111 P.2d 612 (1941). The Espinozas are entitled to their fees on appeal once they prevail in this case insofar as they have asserted claims upon which fees may be awarded. For example, they may recover fees for their breach of contract theory, *Olympic Steamship Co., Inc. v. Centennial Insurance Co.*, 117 Wn.2d 37, 811 P.2d 673 (1991), and in connection with their statutory claims. RCW 19.86.090 (CPA). An award of fees may abide the trial court's decision on the merits. RAP 18.1(i).

This Court may also award terms and compensatory damages for a frivolous appeal. RAP 18.9(a); RAP 18.1. *See also, In re Marriage of*

Healy, 35 Wn. App. 402, 406, 667 P.2d 114, *review denied*, 100 Wn.2d 1023 (1983) (noting an appeal may be so devoid of merit to warrant the imposition of sanctions and an award of attorney fees). An appeal is frivolous when it presents no debatable issues and is so devoid of merit that there is no possibility of reversal.[20] *Streater v. White*, 26 Wn. App. 430, 434, 613 P.2d 187, *review denied*, 94 Wn.2d 1014 (1980). "A lawsuit is frivolous when it cannot be supported by an[y] rational argument on the law or facts." *Forster v. Pierce County*, 99 Wn. App. 168, 183, 991 P.2d 687, *review denied*, 141 Wn.2d 1010 (2000). In the instance of a frivolous appeal, an award of attorney fees under RAP 18.9(a) is appropriate. *See Mahoney v. Shinpoch*, 107 Wn.2d 679, 692, 732 P.2d 510 (1987); *Watson v. Maier*, 64 Wn. App. 889, 901, 27 P.2d 311, *review denied*, 120 Wn.2d 1015 (1992).

In this case, there was no need for this appeal. ACIC's sole purpose in pursuing it is simply to overturn the reasoned *discretionary* decision of the trial court to grant a new trial in light of an inconsistent jury verdict and thereby *delay* a retrial, an illicit purpose for an appeal.

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[20] This Court considers the following factors when evaluating whether an appeal is frivolous: (1) A civil appellant has a right to appeal under RAP 2.2; (2) all doubts as to whether the appeal is frivolous should be resolved in favor of the appellant; (3) the record should be considered as a whole; (4) an appeal that is affirmed simply because the arguments are rejected is not frivolous; (5) an appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility of reversal. *Griffin v. Draper*, 32 Wn. App. 611, 649 P.2d 123 (1982).

ACIC brings this appeal despite ample, clear case law foreclosing its remaining arguments. It wastes this Court and the parties' time with meritless arguments. Even resolving all doubt in favor of ACIC, ACIC's appeal raises no debatable issues upon which reasonable minds could differ.

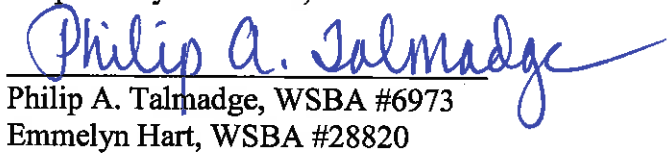
This Court has the authority to sanction ACIC and its counsel by awarding the Espinozas their reasonable attorney fees and costs on appeal. The Court should do so.

F. CONCLUSION

ACIC has failed to account for the inconsistency of the jury's responses to the verdict's interrogatories. This Court should affirm the trial court's new trial order and remand for trial. This Court should not reach the extraneous issues advanced by ACIC that should await a new trial. Costs on appeal, including reasonable attorney fees, should be awarded to the Espinozas.

DATED this 19th day of November, 2013.

Respectfully submitted,



Philip A. Talmadge, WSBA #6973
Emmelyn Hart, WSBA #28820
Talmadge/Fitzpatrick
18010 Southcenter Parkway
Tukwila, WA 98188
(206) 574-6661

Michael T. Watkins, WSBA #14070
Law Offices of Michael Watkins
2825 Eastlake Ave. E., Suite 115
Seattle, WA 98102
(206) 400-6640

George W. McLean, Jr., WSBA #14070
Law Offices of George W. McLean, Jr.
2825 Eastlake Ave. E., Suite 115
Seattle, WA 98102
(206) 310-7463
Attorneys for Respondents Espinoza

APPENDIX

CR 50(a) - Judgment as a Matter of Law.

> (1) *Nature and Effect of Motion.* If, during a trial by jury, a party has been fully heard with respect to an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find or have found for that party with respect to that issue, the court may grant a motion for judgment as a matter of law against the party on any claim, counterclaim, cross claim, or third party claim that cannot under the controlling law be maintained without a favorable finding on that issue. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment. A motion for judgment as a matter of law which is not granted is not a waiver of trial by jury even though all parties to the action have moved for judgment as a matter of law.
>
> (2) *When Made.* A motion for judgment as a matter of law may be made at any time before submission of the case to the jury.

RCW 19.86.020 - Unfair competition, practices, declared unlawful.

> Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful

RCW 48.30.015. Unreasonable denial of a claim for coverage or payment of benefits

> (1) Any first party claimant to a policy of insurance who is unreasonably denied a claim for coverage or payment of benefits by an insurer may bring an action in the superior court of this state to recover the actual damages sustained, together with the costs of the action, including reasonable attorneys' fees and litigation costs, as set forth in subsection (3) of this section.
>
> . . .
>
> (5) A violation of any of the following is a violation for the

purposes of subsections (2) and (3) of this section:

(a) WAC 284-30-330, captioned "specific unfair claims settlement practices defined";

(b) WAC 284-30-350, captioned "misrepresentation of policy provisions";

(c) WAC 284-30-360, captioned "failure to acknowledge pertinent communications";

(d) WAC 284-30-370, captioned "standards for prompt investigation of claims";

(e) WAC 284-30-380, captioned "standards for prompt, fair and equitable settlements applicable to all insurers"; or

(f) An unfair claims settlement practice rule adopted under RCW 48.30.010 by the insurance commissioner intending to implement this section. The rule must be codified in chapter 284-30 of the Washington Administrative Code.

WAC 284-30-330 - Specific unfair claims settlement practices defined.

The following are hereby defined as unfair methods of competition and unfair or deceptive acts or practices of the insurer in the business of insurance, specifically applicable to the settlement of claims:

* * *

(13) Failing to promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement.

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

GABRIEL ESPINOZA and IRMA EXPINOZA, husband and wife, Plaintiffs, vs. AMERICAN COMMERCE INSURANCE COMPANY, AAA INS. AGENCY, and PAMELA S. TAYLOR et al. Defendants.	NO. 11-2-02316-7 ORDER FOR NEW TRIAL

The Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. This case was tried to a twelve member jury beginning March 4, 2013 and ending with a verdict on March 14, 2013.

2. The jury was provided with one oral instruction at the beginning of the trial, and 34 written instructions (Instructions No.'s 2-35) prior to closing arguments. The jury was also provided with a six page verdict form attached as Exhibit A hereto. There were no exceptions or objections taken to the verdict form.

3. The verdict form was comprised of three separate sections. First there was a series of nine questions titled "Claims Against ACIC" followed by a series of eight questions titled "Claims Against AAA/Taylor" ending with a final question under the heading "Special Interrogatory." Each of the three separate sections began with

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question number one. At the very end was a place for the Presiding Juror to sign and date the form. The jury verdict used did not contain a "General Verdict" question or format. Instead, it employed three separate sections of specific questions.

4. After the jury verdict was read, the jury was polled on each separate question containing an answer, and the verdict was unanimous on each response.

5. The Court excused the jury back to the jury room at that point (but did not discharge the jury at that point) and raised the Court's concern out of the presence of the jury that the verdict was internally inconsistent; specifically, that the jury's answer to the Special Interrogatory question on page six found both Defendants responsible for Plaintiffs' damages as set forth on page one and allocated fault between them as juxtaposed against their prior answers to question three on page two and question one on page four which provided complete defenses to both sets of defendants.

6. The Court noted that it could not envision a way, sua sponte, that the Court could instruct the jury to resume deliberations without making an improper comment on the evidence in order to attempt to have the jury rectify the internal inconsistency.

7. The Court then invited counsel to propose a joint recommendation which would allow the jury to resume their deliberations to rectify the problem. However, counsel could not agree, and the jury was subsequently discharged.

8. After the jury was discharged, and the Court heard argument of counsel, the Court ruled that the verdict form was internally inconsistent and under the authority of RCW 4.44.440 the Court Ordered a new trial.

9. The Parties asked for permission to submit written briefs on the issue prior to the entry of a written Order, which was granted. [Some of the briefing is captioned in a fashion suggesting a motion for reconsideration although not technically accurate.]

10. In their briefing the Parties raised additional arguments specifically including but not limited to CR 59(a).

11. The Court did not take into account and ignored for purposes of this ruling the statements by Plaintiffs' Counsel purporting to relay the jurors' stated intent in rendering their verdict provided to counsel in post-verdict interviews.

12. After exhausting efforts to have an agreed method for having the jury resume deliberations in order to address the stated concerns, the Court attempted to harmonize the jury's answers in such a way as to reflect the intent of the jury. This attempt was unsuccessful. On the one hand, it appeared clear and unmistakable to the Court that the jury's answer to Special Interrogatory Number One on page six of the verdict form reflected the jury's intent to render a verdict in favor of the Plaintiffs in the amount of $282,616.55 (see answer to question number one on page one – structure value $189,000 and contents value of $93,616.55) against both sets of named defendants allocated 90% to ACIC and 10% allocated to AAA/Taylor. On the other hand, by answering question number three (against ACIC) on page two and question number one (against AAA/Taylor) on page four each set of defendants is entitled to a defense verdict. A careful review of the jury instructions and these conflicting answers precludes any reconciliation.

13. The jury was instructed on page two under question three as follows: "If you answered "yes" to either Questions 3 or 4, sign this verdict form. If you answered

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"no" to both Questions 2 and 3, answer Question 4." The Defendants argued that the jury "obviously" disregarded their instructions (including Jury Instruction No. 34) and that this Court should ignore any subsequent answers to any of the questions in the remaining verdict form. This Court rejects that argument for several reasons including but not limited to the following.

First, the jury was not instructed to refrain from answering the second set of questions pertaining to "Claims against AAA/Taylor" beginning on page four, nor were they instructed to refrain from answering Special Interrogatory Number One on page six of the verdict form. It was reasonable for the jury to have answered each set of questions in each section as posed to them. Secondly, this is unlike the majority of cases wherein a special interrogatory "trumps" a general verdict as there was no general verdict contained within this form. [At oral argument all counsel argued that the first five pages constituted a general verdict. This Court disagrees. Even if the Court is wrong and the first six pages did constitute a general verdict a "special verdict controls over any inconsistent general verdict." *Department of Highways v. Evans Engine and Equipment Co., Inc.*, 22 Wn.App. 202, 205, 589 P.2d 290 (1978).] In fact, the only question specifically labeled "Special Interrogatory" was the one on page six of the form in which the jury declared its desire to award damages against both defendants with an allocation of fault. Giving weight to the "Special Interrogatory" question leads this Court to conclude it cannot invent instructions that did not exist; i.e., not to answer the remaining two sections of questions each beginning with question number one. In fact, given the clear wording of the "Special Interrogatory" when compared with the apparently benign wording of the other questions under scrutiny, it is more likely in the

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eyes of this Court that the jury intended to render a verdict for money damages against the defendants than the reverse. However, given the inconsistent answers there is no way for this Court to direct a verdict in such a fashion in the same way that this Court cannot render a defense verdict.

14. The holding of *Mutual of Enumclaw Insurance Company v. Cox*, 110 Wn.2d 643, 757 P.2d 499 (1988) is neither on point nor persuasive. In that case, the Washington State Supreme Court held that "it would be inequitable to penalize MOE for a harmless technical error; the estoppel instruction did not become the law of the case." 110 Wn.2d at 651-652. The Supreme Court's decision to uphold the trial court's judgment n.o.v. in favor of MOE was premised upon its conclusion that MOE had preserved its objection to the proposed instruction allowing estoppel to be presented as a defense against an award of coverage under the facts of the case. The judgment n.o.v. was properly used "to correct the misstatement of law in the special interrogatories." *Id.* At 652. The dissent argued that the majority took liberties in extending and elevating MOE's prior actions during trial into a formal and qualifying objection to the proposed instruction as required by CR 51(f).

The facts of this case hold no similarities to the facts or holding in *Mutual of Enumclaw Insurance Company v. Cox*. Any language suggesting otherwise is in this Court's opinion taken out of context. There is no suggestion in this case that any of the jury instructions are contrary to law or that the state of the verdict form would allow this court to enter a judgment n.o.v. The question before this Court (i.e., whether the jury's answers are internally inconsistent warranting a new trial) is separate and distinct from the question before the trial court in *Mutual of Enumclaw Insurance Company v. Cox*.

Unlike the case of *Mutual of Enumclaw Insurance Company v. Cox*, there are no jury instructions which are alleged to be contrary to law.

Defendants also raised the holding of *Nania v. Pacific Northwest Bell*, 60 Wn.App. 706, 806 P.2d 787 (1991). In that case there was a series of questions marked one through eight establishing negligence and probable cause as to each of three different defendants. The answers indicated negligence and proximate cause to defendant Pacific Northwest Bell, but not to the other two defendants. Question eight then asked the jury to allocate what percentage of negligence was attributable to each of the three defendants, which they did in direct contradiction to specific instructions in the question indicating that they should not allocate fault to any defendant in which they did not find proximate cause. The question at issue in *Nania* is materially different from the Special Interrogatory in the case at hand. Not only is there an absence of direction to refrain from answering the question under certain conditions, the Special Interrogatory states: "If you find that both ACIC and AAA/Taylor are both responsible for Plaintiffs's Damages, you must decide how much fault to allocate to ACIC and AAA/Taylor. . . . If you believe that both ACIC and AAA/Taylor are jointly responsible for any of the damage identified in this Special Interrogatory, please express what percentage of fault should be allocated to each defendant." The premise of answering this Special Interrogatory is a finding by the jury that both defendants are responsible for the damages for the cost for replacing the Plaintiffs' home and the cost of replacing Plaintiffs' personal property as established in response to question number one, page one. Therefore, there is both a finding of fault and damages in the Special Interrogatory and a finding of defenses for both defendants which cannot be reconciled. The Special

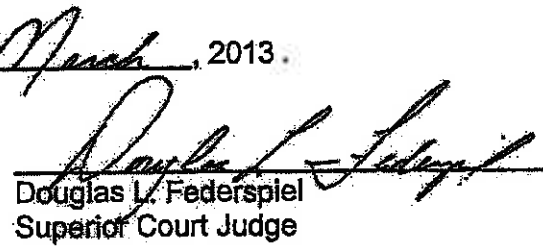
Interrogatory is not surplusage merely because of an allocation of responsibility where the defendants argue none exists. The Special Interrogatory goes further and states that the jury finds that both are responsible for Plaintiffs' damages – ignoring that clear pronouncement of the jury as "surplusage" would lead this Court to conclude that substantial justice has not been done under CR 59(a)(9).

Based on the foregoing FINDINGS OF FACT this Court makes the following CONCLUSIONS OF LAW:

1. The jury's verdict in this case is internally inconsistent. The jury's answers cannot be harmonized in such a fashion so as to reflect the jury's true intent, and this Court declines the invitation to enter a judgment as a matter of law for either side. Whether under RCW 4.44.440 and/or CR 59(a)(1) or CR 59(a)(9), a new trial is the only appropriate remedy.

Wherefore, based upon the foregoing FINDINGS OF FACT and CONCLUSIONS OF LAW, it is hereby ORDERED that the matter shall be set for a new trial.

Dated this 25 day of March, 2013.



Douglas L. Federspiel
Superior Court Judge

EXHIBIT A

6

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2013 MAR 14 P 4:39

KIM EATON
EX OFFICIO CLERK OF
SUPERIOR COURT

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON

FOR THE COUNTY OF YAKIMA

GABRIEL ESPINOZA and IRMA ESPINOZA, husband and wife, and the marital community composed thereof, Plaintiffs, vs. AMERICAN COMMERCE INSURANCE COMPANY, an Insurance company, AAA INSURANCE AGENCY, a Washington corporation, and PAMELA S. TAYLOR and JOHN DOE TAYLOR, husband and wife and the marital community composed thereof, Defendants.	Case No. 11-2-02316-7 **SPECIAL VERDICT FORM**

We, the jury, answer the questions submitted by the court as follows:

CLAIMS AGAINST ACIC

QUESTION 1: Did Gabriel and Irma Espinoza prove that a covered loss occurred?

X YES _____ NO

If yes, Structure Value: $ 189,000

If yes, Contents Value: $ 93,616.55

ORIGINAL

(INSTRUCTION: Answer Question 2.)

QUESTION 2: Did Gabriel Espinoza make a material misrepresentation during the insurance application process?

_____ YES X NO

(INSTRUCTION: Answer Question 3.)

QUESTION 3: Did Gabriel Espinoza make a material misrepresentation during the claim investigation Examination Under Oath?

X YES _____ NO

(INSTRUCTION: If you answered "yes" to either Questions 3 OR 4, sign this verdict form. If you answered "no" to both Questions 2 AND 3, answer Question 4.)

QUESTION 4: Did ACIC act in bad faith?

_____ YES _____ NO

(INSTRUCTION: If you answered "no" to Question 4, answer Question 7. If you answered "yes" to Question 4, answer Question 5.)

QUESTION 5: Did ACIC's failure to act in good faith proximately cause damage to Gabriel and Irma Espinoza?

_____ YES _____ NO

ORIGINAL

(INSTRUCTION: If you answered "no" to Question 5, answer Question 7. If you answered "yes" to Question 5, answer Question 6.)

QUESTION 6: What is the amount of Gabriel and Irma Espinoza damages due to American Commerce Insurance Company's failure to act in good faith?

$_____

QUESTION 7: Did ACIC violate Washington's Consumer Protection Act?

_____ YES _____ NO

(INSTRUCTION: If you answered "no" to Question 7, sign this verdict form. If you answered "yes" to Question 7, answer Question 8.)

QUESTION 8: Did Gabriel and Irma Espinoza suffer injury to their business or property because of an unfair or deceptive act by ACIC?

_____ YES _____ NO

(INSTRUCTION: If you answered "no" to Question 8, sign this verdict form. If you answered "yes" to Question 8, answer Question 9.)

QUESTION 9: What is the amount of Gabriel and Irma Espinoza's damages due to ACIC's unfair or deceptive act that caused injury to Gabriel and Irma Espinoza's business or property?

$_____

ORIGINAL

CLAIMS AGAINST AAA/TAYLOR

QUESTION 1. Do you find that there is coverage for this loss under the ACIC policy?

X Yes.

___ No.

(INSTRUCTION: If you answered "yes" to Question 1, sign the verdict form. If you answered "no" to Question 1, answer Question 2.)

QUESTION 2. Do you find that AAA/Taylor had a duty to accurately obtain and convey information regarding Plaintiffs' home to ACIC?

___ No.

___ Yes.

(INSTRUCTION: If you answered "no" to Question 2, sign the verdict form. If you answered "yes" to Question 2, answer Question 3.)

QUESTION 3. Do you find that AAA/Taylor breached a duty to accurately obtain and convey information regarding Plaintiffs' home to ACIC?

___ No.

___ Yes.

ORIGINAL

(INSTRUCTION: If you answered "no" to Question 3, sign the verdict form. If you answered "yes" to Question 3, answer Question 4.)

QUESTION 4. Do you find that AAA/Taylor's breach proximately caused damage to Plaintiffs?

____No.

____Yes.

(INSTRUCTION: If you answered "no" to Question 4, sign the verdict form. If you answered "yes" to Question 4, answer Question 5.)

QUESTION 5. If you find that AAA/Taylor breached a duty of care to Plaintiffs thereby proximately causing damages, then you must identify what damages were proximately caused by AAA/Taylor. What is the amount of Plaintiffs' damages proximately caused by AAA/Taylor's breach of a duty?

_____

QUESTION 7. Do you find that Plaintiffs were also negligent?

_____Yes.

_____No.

(INSTRUCTION: If you answered "yes" to Question 7, answer Question 8.)

QUESTION 8. If Plaintiffs were also negligent, what is there percentage of fault?

_____

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KIM EATON
EX OFFICIO CLERK OF
SUPERIOR COURT

SPECIAL INTERROGATORY

If you find that both ACIC and AAA/Taylor are both responsible for Plaintiffs' damages, you must decide how much fault to allocate to ACIC and AAA/Taylor.

This Special Interrogatory applies only to your determination of the cost for replacing Plaintiffs' home and the cost of replacing Plaintiffs' personal property.

QUESTION 1. If you believe that both ACIC and AAA/Taylor are jointly responsible for any of the damage identified in this Special Interrogatory, please express what percentage of fault should be allocated to each defendant.

90% ACIC

10% AAA/Taylor

_____ Not Applicable

(INSTRUCTION: Please sign this verdict form and return it to the bailiff.)

DATE: 03/14/2013

Presiding Juror (#9)

ORIGINAL

The Court of Appeals
of the
State of Washington
Division III

FILED
JUN 12 2013
COURT OF APPEALS
DIVISION III

GABRIEL ESPINOZA, et ux.,	)	No. 31569-0-III
Respondents,	)	
v.	)	COMMISSIONER'S RULING
AMERICAN COMMERCE INS. CO., et al.,	)	
Appellant.	)	

American Commerce Ins. Co. (American) has appealed the Yakima County Superior Court's March 25, 2013 "Order For New Trial." The superior court entered the Order on the ground that the jury's answers to the special verdict questions contained "both a finding of fault and damages . . . and a finding of defenses for both defendants which cannot be reconciled." Order at 6. American now seeks discretionary review of several rulings the superior court made on contested issues in the course of the original trial, which may arise again if this Court affirms the Order and remands for a new trial.

Specifically, American asserts that the superior court committed obvious or probable error sufficient to support discretionary review under RAP 2.3(b)(1) and (2),[1] when it made the following rulings:

1. The court refused to instruct the jury that American's conduct was reasonable as a matter of law and a complete defense to the Espinozas' extra-contractual claims that American exercised bad faith and violated a statute when it handled their insurance claim.
2. The court refused to instruct the jury that reasonableness is a complete defense to the Espinozas' claim under the consumer protection act.
3. Instruction 13, which advised the jury that American had the burden to prove *both* misrepresentation in the insurance application and in the handling of the claim, was error.
4. Instructions 17 and 18 misstate Washington law with regard to insurance bad faith and represent a comment on the evidence.
5. The court erred when it refused to admit into evidence the Espinozas' application for insurance.
6. The court erred when it refused to use American's proposed verdict form.

The Espinozas oppose American's motion for discretionary review of the additional issues. They also object to American's statement of arrangements on the basis that the record that American seeks to file is not needed to address the appeal of the Order for a new trial.

Under RAP 2.3(b)(1) and (2), this Court *may* accept discretionary review if the alleged error is obvious and renders further proceedings useless, or if the alleged error is

[1] American concedes that none of the superior court rulings are appealable as a matter of right in its appeal of the Order For New Trial, as set forth in *Cox v. General Motors Corp.*, 64 Wn. App. 823, 827 P.2d 1052 (1992).

probable and substantially alters the status quo or substantially limits the freedom of a party to act. Here, the alleged errors for which American seeks discretionary review do not satisfy the criteria of RAP 2.3(b). As with the evidentiary rulings that this Court declined to review in *Minehart v. Morning Star Boys Ranch, Inc.*, 156 Wn. App. 457, 467, 232 P.3d 591, *review denied,* 169 Wn.2d 1029 (2010), the rulings here are "tied to the ebb and flow of trial," and, therefore, the court's rulings may change in a new trial. Accordingly, American's motion for discretionary review is denied.

As for the Espinozas' objection to American's statement of arrangements, which requested preparation of a complete verbatim report of proceedings in superior court, including the 8-day trial, this Court observes that the only restriction in the rule with respect thereto is for verbatim reports provided at public expense. *See* RAP 9.2(b). Therefore, this Court overrules the Espinozas' objection to the statement of arrangements. However, if American prevails on appeal and the Espinozas are subject to costs, they may renew their argument that the full report was not needed for review.

IT IS ORDERED, the motion for discretionary review is denied. The Espinozas' objection to the statement of arrangements is overruled.

June 12, 2013

Monica Wasson
Commissioner

DECLARATION OF SERVICE

On said day below, I emailed a courtesy copy and deposited in the U.S. Mail for service a true and accurate copy of: Brief of Respondents in Court of Appeals Cause No. 31569-0-III to the following parties:

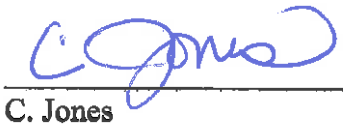
Daniel E. Thenell Jillian M. Hinman Thenell Law Group, P.C. 12909 SW 68th Parkway, Suite 320 Portland, OR 97223-8384	Thomas Lether Lether & Associates, PLLC 3316 Fuhrman Avenue E., Suite 250 Seattle, WA 98102-3800
Michael T. Watkins Law Offices of Michael T. Watkins 2825 Eastlake Avenue E., Suite 115 Seattle, WA 98102-3084	George W. McLean, Jr. Law Offices of George W. McLean, Jr. 2825 Eastlake Avenue E., Suite 115 Seattle, WA 98102-3084

Original efiled with:

Court of Appeals, Division III
Clerk's Office

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: November 19, 2013, at Tukwila, Washington.



C. Jones
Talmadge/Fitzpatrick