

64516-1

64514-1

NO. 64516-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

UNIGARD INSURANCE COMPANY, a Washington corporation,

Plaintiff/Respondent,

v.

MUTUAL OF ENUMCLAW INSURANCE COMPANY, a Washington
corporation,

Defendant/Appellant.

**SUPPLEMENT TO BRIEF OF RESPONDENT
AMENDING CITATIONS TO RECORD**

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FILED
COURT OF APPEALS
STATE OF WASHINGTON
2010 JUL -8 PM 2:19

ORIGINAL

I. INTRODUCTION

This supplement is submitted solely to amend references to the record on review to incorporate supplemental Clerk's Papers that were designated subsequent to the filing of the Brief of Respondent and to append key proposed jury instructions that are part of those supplemental Clerk's Papers. At the time the Brief of Respondent was filed, these documents were not part of the record on review so they could not be cited by Clerk's Papers number nor appended to the Brief of Respondent. No additional argument or legal authority is presented herein.

II. SUPPLEMENT

A. Additional Appendices to Brief of Respondent

Attached hereto as Appendices E and F are CP 688 and CP 695-96, respectively. CP 688 is the proposed Verdict Form that Unigard had submitted to the trial court as part of Plaintiff's Proposed Jury Instructions. CP 695-96 is the proposed jury instruction regarding damages that Unigard originally submitted to the trial court as part of Plaintiff's Proposed Jury Instructions. Neither of these proposed documents were given to the jury but they are relevant to the argument in the Brief of Respondent. Unigard respectfully requests these be treated as Appendices to the Brief of Respondent, filed on June 8, 2010.

B. Stipulated Citations

At CP 684-85, Unigard and Mutual of Enumclaw stipulated that Supplemental Clerk's Papers now in the record at CP 688-696, but not in the record at the time the Brief of Appellant and the Brief of Respondent were filed, were referred to in the Verbatim Report of Proceedings as follows (substituting bracketed CP citations for Exhibit citations contained in the stipulation):

“The parties agree that, at RP II: 79-81, the proposed jury instruction which was being discussed at that point by the trial court and counsel (described in that exchange as “instruction no. 6”) consisted of [CP 689].” CP 684, lines 21-23.

“The parties agree that, at RP II: 81, line 18, to RP II:82, line 1, the instruction described therein as ‘Instruction no. 3, summary of claims’ refers to [CP 694].” CP 685, lines 1-2.

“The parties agree that, at RP II: 82, line 2, to RP II: 86, line 5, the proposed jury instruction which was being discussed at that point by the trial court and counsel (described by the court at RP II: 82, line 3 as, ‘let’s call that Instruction No. 7’), consisted of [CP 695-96].” CP 685, lines 3-6.

C. Corrections to Record Citations in Brief of Respondent

The Brief of Respondent should be amended with the following corrected or additional citations to the record. All references are to Brief of Respondent, filed June 8, 2010:

Page ii, add: **Appendix D: CP 688 (Plaintiff’s Proposed Verdict Form)**
Appendix E: CP 695-96 (Plaintiff’s Proposed Jury Instruction re: Damages)

Page 9: For footnote 6, substitute “CP 695-96.”

Page 10: Between footnote 8 and citation to RP II: 82, insert “CP 695-96;”

Page 17, last paragraph: Following citation to RP II:82-84 on third/fourth line from bottom of page, add “ ; CP 695-96.”

Page 34, end of first (partial) paragraph: Following citation to CP 657, add: “*Compare*, CP 689 (plaintiff’s proposed jury instruction).”

Page 42, line 9: Following the citation to “lines 13-22.”, add “*Compare*, CP 688, lines 19-20 (Unigard’s original proposed Verdict Form, including general damages and CPA treble damages), with RP II:76, lines 9-24, RP II:79, lines 13-17 (withdrawing request for general damages and CPA treble damages as elements of verdict form).”

DATED this 8th day of July, 2010.

Respectfully submitted,

SOHA & LANG, P.S.

By: 
Karen Southworth Weaver, WSBA 11979
Attorneys for Plaintiff/Respondent
Unigard Insurance Company

APPENDIX E

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

UNIGARD INSURANCE COMPANY,

Plaintiff,

vs.

MUTUAL OF ENUMCLAW,

Defendant.

No. 07-2-30476-2 KNT

VERDICT FORM

We, the jury, award the following damages to plaintiff Unigard Insurance Company as
assignee of Charles and Helen Engelmann:

General damages for Charles and Helen Engelmann in the amount of \$ _____.

Past economic damages in the amount of \$ _____.

Future economic damages in the amount of \$ _____.

Treble damages of \$10,000.

DATE: _____

Presiding Juror

APPENDIX F

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PLAINTIFF'S PROPOSED INSTRUCTION NUMBER _____

Measure of Economic and Noneconomic Damages -- Personal Injury -- No Contributory Negligence (modified)

It is the duty of the court to instruct you as to the measure of damages.

You are instructed that the Court has already determined that the defendant is liable to plaintiff for damages. 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 defendant.

Your verdict must include the following items:

\$20,000 paid by Charles and Helen Engelmann to settle the NewMarket suit.

Treble damages of \$10,000 under the Consumer Protection Act.

All past economic costs incurred in the investigation and clean up of pollution at the Site.

All future economic costs reasonably expected to be incurred in the future in the investigation and defense and clean-up of pollution at the Site.

All attorney fees incurred by Charles and Helen Engelmann in defending the NewMarket suit.

All attorney fees incurred by plaintiff in pursuing contribution from the Engelmanns and MOE.

In addition you should consider the following noneconomic damages elements:

Emotional distress and pain and suffering of the Engelmanns as a result of defendant's bad faith

In this case it is the burden of the defendant to rebut the damages presented by the plaintiff. It is for you to determine, based upon the evidence, whether the defendant has rebutted, by a preponderance of the evidence, any particular element of damages described above.

Your award must be based upon evidence and not upon speculation, guess, or conjecture.

1 The law has not furnished us with any fixed standards by which to measure
2 noneconomic damages. With reference to these matters you must be governed by your own
3 judgment, by the evidence in the case, and by these instructions.
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