

65549-3

65549-3

No. 65549-3-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

ROBIN PARROTT-HORJES,

Appellant,

v.

MARNI G. RICE,

Respondent.

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BRIEF OF RESPONDENT

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I. INTRODUCTION

Marni Rice's life partner, Michele Parrott, died from a subdural hematoma on November 9, 2007. Ms. Parrott incurred this fatal head injury on either November 5 or 6, 2007 at the residence that she shared with Ms. Rice in the City of Shoreline. The Shoreline Police Department responded to the Shoreline residence three times on November 5th and 6th, but no arrests were made and no criminal charges have ever been filed.

Ms. Rice and Ms. Parrott both maintained life insurance policies that named the other as beneficiary. Ms. Parrott also designated Ms. Rice as the beneficiary of a savings plan she maintained through her employer.

Robin Parrott-Horjes is the decedent's aunt. She is the contingent beneficiary of the decedent's life insurance and also the personal representative of the decedent's estate. Ms. Parrott-Horjes, individually, sued Ms. Rice under a federal common law doctrine that disqualifies slayers of insureds from receiving insurance benefits. As personal representative of Michele Parrott's estate, Ms. Parrott-Horjes sued Ms. Rice for wrongful death, alleging that Ms. Rice committed an act of battery upon the decedent that proximately caused her death.

Ms. Parrott-Horjes also asserted a claim seeking to impose a constructive trust upon the life insurance proceeds such that Ms. Parrott-Horjes would hold and manage the funds for the benefit of the decedent's children, Alexandria Parrott and Andrew Duncan. The trial court dismissed this claim on Ms. Rice's CR 12(b)(6) motion prior to trial.

Divergent accounts of the events that led to Ms. Parrott's death were presented to the jury. Ms. Parrott-Horjes relied primarily upon the testimony of Alexandria Parrott, who had initially stated that her mother died in a "freak accident" when she fell in the beginning of night but later changed this story and claimed that Ms. Rice intentionally pushed her mother into a wall and killed her.

Ms. Rice denied that she pushed the decedent into the wall. She testified that Ms. Parrott was intoxicated, angry, confrontational and assaultive on November 5, 2007. Ms. Rice claimed that Ms. Parrott engaged in a pattern of behavior that included threats, door breaking, gun brandishing and a physical assault. Ms. Rice testified that when Ms. Parrott threatened to break through her locked bedroom doors for the second time on November 5th, she unsuccessfully tried to hold the doors closed. Ms. Parrott was able to splinter and partially break through the doors, but she stumbled

backwards and into a wall after meeting with the resisting force exerted by Rice from the inside of the bedroom doors. Ms. Rice does not know whether Ms. Parrott incurred her fatal head injury in this incident. She testified that she was trying to protect herself from further domestic violence and that she did not intend to harm, let alone kill, her life partner.

The jury returned defense verdicts on both claims. On the federal claim, the jury found that Rice did not intentionally or recklessly cause Parrott's death. On the battery claim, the jury found that Rice committed a battery that was a proximate cause of Parrott's death but also found that the battery was an act of self-defense.

The trial court denied Parrott-Horjes' motion for a new trial and this timely appeal followed.

II. STATEMENT OF ISSUES

A. Did the trial court err in ruling that evidence of Michele Parrott's prior acts of domestic violence were admissible under ER 404(b)?

B. Did the trial court abuse its discretion in its pretrial ruling permitting Marni Rice to present evidence of self-defense?

C. Was the evidence sufficient to support the jury's self-defense verdict?

D. Were the jury's verdicts on Parrott-Horjes' federal slayer's rule claim and state law battery claim consistent?

E. Did the trial court err by dismissing Robin Parrott-Horjes' constructive trust claim on federal preemption grounds and, if so, should the trial court be upheld on alternative grounds?

III. STATEMENT OF THE CASE

A. Michele Parrott and Marni Rice.

Michele Parrott died from a subdural hematoma on November 9, 2007. (RP 369). Marni Rice was Michele Parrott's life partner. (RP 663). Ms. Rice and Ms. Parrott were living together at their co-owned residence in Shoreline, Washington at the time of Ms. Parrott's death. (CP 34, 41).

B. Alexandria Parrott and Andrew Duncan.

Michele Parrott's adult daughter, Alexandria Parrott (then age 20), and son, Andrew Duncan (then age 16), were residing with Parrott and Rice at the time of their mother's death. (RP 287, 407).

C. Life insurance.

Shortly after purchasing their Shoreline home, Rice and Parrott designated each other as the beneficiaries on their life insurance policies. (RP 608-609). Rice designated Parrott during the spring of 2005. (RP 608-609). She intended this life insurance to provide the means for Parrott to pay off the mortgage on the Shoreline house in the event of Rice's demise. (RP 608-609).

Michele Parrott had life insurance coverage through her employment with the United States Postal Service under a group policy issued pursuant to the Federal Employees Group Life

Insurance Act (“FEGLIA”), 5 U.S.C. § 8701 *et seq.* (CP 10, 34, 41). Parrott reciprocally designated Rice as her beneficiary on May 2, 2006. (CP 10). She designated her aunt Robin Parrott-Horjes as the contingent beneficiary of her FEGLIA life insurance. (CP 10, 32-34, 41).

D. Parrott-Horjes’ claims against Rice.

Parrott-Horjes commenced this lawsuit against Rice on October 8, 2008.¹ (CP 1-13). The original complaint included two claims: (1) that Ms. Rice had “willfully and unlawfully assaulted and killed” Ms. Parrott and was thereby disqualified from receiving life insurance proceeds pursuant to Washington’s Inheritance Rights of Slayers Act, RCW chapter 11.84; and (2) that Ms. Rice’s “tortious conduct” caused Ms. Parrott’s death. (CP 5-8).

Parrott-Horjes withdrew her RCW chapter 11.84 claim and substituted a claim under a federal common law doctrine prohibiting slayers from profiting from their wrongdoing. (CP 23-29). Still later, she added a claim requesting the imposition of a constructive trust based on an allegation that Parrott named Rice as the

¹ Parrott-Horjes sued both in her individual capacity, seeking to recover the life insurance proceeds as the contingent beneficiary thereof, and as personal representative of Michele Parrott’s estate, seeking to recover \$4,451,751.13 in damages for wrongful death. (CP 3-13, 23-29, 32-39, 224).

beneficiary of her life insurance so that she could convey the proceeds to Parrott-Horjes to administer for the benefit of Alexandria Parrott and Andrew Duncan. (CP 36-37, 39).

Rice denied Parrott-Horjes' allegations and asserted the affirmative defense of self-defense. (CP 41-42).

E. The trial court granted Rice's pretrial motion to dismiss Parrott-Horjes' constructive trust claim.

Rice's pretrial CR 12(b)(6) motion to dismiss Parrott-Horjes' constructive trust claim based on federal preemption grounds was granted by the trial court's order dated December 2, 2009. (CP 52-58, 117-18).

F. Rice's third party claims against MetLife and MetLife's interpleader claims against Rice, Parrott-Horjes, Alexandria Parrott and Andrew Duncan.

Rice sued Metropolitan Life Insurance Company ("MetLife"), the company that issued and administered the FEGLIA insurance policy that insured Michele Parrott's life, as a third party defendant, for breach of contract and unjust enrichment. (CP 3-10).

MetLife responded, filing an interpleader claim against Rice and Parrott-Horjes, and also against Alexandria Parrott and Andrew Duncan as third party defendants in interpleader.² (CP 1041).

² MetLife was dismissed from the case by an agreed order on March 4, 2010. (CP 206-07, 281).

G. Rice's cross claims against Alexandria Parrott and Andrew Duncan.

Rice asserted cross claims for declaratory relief against Alexandria Parrott and Andrew Duncan. (CP 1040-1048). Rice's cross claims sought, *inter alia*, a declaration that "Marni Rice has committed no acts or omissions that disqualify her from receiving the MetLife life insurance and accidental death benefit payable as a result of Michele L. Parrott's death." (CP 47).

H. The trial court granted Parrott's and Duncan's motion to dismiss Rice's cross claims against them.

Alexandria Parrott and Andrew Duncan moved to dismiss Rice's cross claims. (CP 1040-48). Their motion pleadings made repeated assertions that Ms. Parrott and Mr. Duncan were "expressly disclaiming" their right and entitlement to the FEGLIA life insurance proceeds. (CP 1043, 1043-44, 1046-47, 1065-66). The trial court granted the motion, dismissed Parrott and Duncan from the lawsuit and found that the motion resolved the issue of any claims to the life insurance by them. (RP 86-87; CP 380).

I. The trial court denied Parrott-Horjes' pretrial motion to exclude evidence of decedent's past acts of domestic violence.

Parrott-Horjes moved for a pretrial order excluding evidence of all prior acts of domestic violence committed by Michele Parrott.

(CP 232-238). Rice submitted an offer of proof regarding the domestic violence she alleged to have occurred during the 6 months preceding Parrott's death. (CP 1076-1084). The trial court held a pretrial hearing with live testimony from Marni Rice, Laurie Delma and Andrew Duncan (RP 234-253, 253-265, 265-268).

The court denied Parrott-Horjes' motion in part and permitted several incidents of prior domestic violence to be presented to the jury. (CP 380, 384, 388; RP 36-55, 94-98, 159-165, 225-231, 234, 268-272, 277-283).

J. The trial court denied Parrott-Horjes' pretrial motion to exclude evidence pertaining to Rice's affirmative defense of self defense.

On Saturday, April 3, 2010, two days before trial, Parrott-Horjes filed and served a written brief and declaration arguing that Rice "should not be permitted to claim self-defense ... or offer any attendant evidence related to [self-defense]." (CP 339-342, 343-353). There was no formal motion or other explanation of the purpose of this brief.

On April 5, 2010, counsel for Parrott-Horjes orally moved "to exclude evidence of self defense, arguing that Rice "is not entitled to assert self-defense because she denies she did anything to cause Michele Parrott's death." The motion was based on a portion

of Rice's deposition testimony and Rice's answers to three requests for admissions. (RP 36, 47; CP 339, 346-353). Rice's argument was as follows:

Marni Rice's anticipated testimony at trial has been disclosed to the defense by way of a letter to the police and 2 depositions and is also summarized in her trial brief. Ms. Rice has repeatedly stated that she did not push Michele Parrott. She did exert force on the locked double doors leading into her bedroom in an effort to fend off the assault of what was the intoxicated and out of control decedent. Between Ms. Rice's exertion of force on the doors from the inside of the bedroom and Ms. Parrott's exertion of force on the doors from the outside of the bedroom while trying to break in, Ms. Parrott was repelled backwards and may have hit her head on the wall.

(CP 334).

The trial court denied Parrott-Horjes' motion, ruling as follows:

I don't think that [the requests for admissions] are really as definitively clear as you would want them to be for your case. That the circumstances that the defendant in this case would say I did nothing to hurt her, I didn't push her down, I wasn't intending to hurt her in any way, I pushed on the door, I don't think that door hurt her, or that she had that injury as a result of my pushing and knocking it down, I don't even know if it knocked her down, but what I did in terms of pushing that door and whatever the consequence was, was because I was afraid of her, because of what she had done in the past, I think that's admissible. I think the jury should get the whole story, and I think that's the whole story. (RP 53, 54).

K. Marni Rice's trial testimony and evidence pertaining to the evening of November 5 and 6, 2007.

Marni Rice testified regarding her interactions with Michele Parrott on November 5 and 6, 2007. (RP 349-361, 622-663, 681-703). Parrott came home from work and began drinking vodka at 5:00 p.m. (RP 588). She continued drinking vodka throughout the evening and became intoxicated.³ (RP 635, 646). She drank a quart of vodka between 5:00 p.m. on November 5th and 3:00 a.m. on November 6th. (RP 648, 654-655).

By 8:00 p.m., Parrott was upset and angry due to her failed attempt to borrow money from her grandfather and because Rice had accessed a website on the internet for gay singles. (RP 622-623, 625-626). Parrott and Rice argued in the master bedroom. (RP 626). Parrott slapped Rice with her open hand, acted aggressively toward Rice's dog, and left the bedroom. (RP 626-627). Rice closed and locked the bedroom doors. (RP 629).

At approximately 10:00 p.m., Parrott returned and was angry over being locked out. (RP 630). Rice told Parrott to leave her alone, but Parrott broke through the locked doors. (RP 630).

³ King County Medical Examiner Richard Harruff, MD testified that there may have been alcohol in Parrott's blood on November 5, 2007 because it is not known how many hours elapsed before the blood sample that tested negative for ethanol was taken at the hospital. (RP 380, 393, 403, 406; Ex 3).

Parrott removed a gun from the bedroom closet and brandished it in a dangerous manner. (RP 631). Rice, frightened, yelled at Parrott to put the gun down. (RP 631). When Parrott left the bedroom, Rice hid the gun in another room, repaired and relocked the broken bedroom doors and went back to bed. (RP 631-632).

At approximately 11:00 or 11:30 p.m., Parrott returned to the master bedroom and unsuccessfully tried the door knob. (RP 633, 636). She started yelling at Rice to let her in or she would break the doors down. (RP 634, 636). Parrott began to count. (RP 634, 636). Rice jumped up off the bed and placed her hands on the doors to try and keep the intoxicated, angry and confrontational Parrott out of the bedroom. (RP 351, 634-635, 682, 690). Rice, aware of Parrott's prior domestic violence perpetrated when she became intoxicated, feared that Parrott would hit her again if she broke her way into the bedroom again. (RP 636-637).

Parrott broke through the doors for the second time and one of the partially opened doors was stopped by Rice's foot. (RP 634). Parrott stumbled backwards into the wall on the other side of the hallway. (RP 635, 637). She turned and stepped toward the living room, then fell to the floor on her left side. (RP 352, 353, 635).

The left side of Parrott's head hit the floor.⁴ (RP 360). Rice does not know for certain whether Parrott's head hit the wall or whether the dent in the wall⁵ was caused by Parrott's head. (RP 350, 637).

L. Alexandria Parrott and Andrew Duncan both admitted that their mother's death was an accident.

On November 11, 2007, Alexandria Parrott made a statement on the internet about her mother's death. (RP 342-345). She said her mother "fell in the beginning of the night and hit her head." (RP 344-345). She also stated that her mother's death was "a freak accident." (RP 307, 344-345). Alexandria Parrott claimed that the statements, made 2 days following her mother's death, were a joke for her friends. (RP 342).

Andrew Duncan testified at the trial that his mother's death was an accident. (RP 431).

⁴ The subdural hematoma was on the right side of the brain. (RP 358). Dr. Harruff testified that such an injury could be caused by a fall to a carpeted floor or by an impact with a wall. (RP 375, 384). Dr. Harruff could not determine a location where blunt force was applied to the decedent's head because there were no external injuries. (RP 394). He could not determine whether the fatal injury was caused by a single impact or by multiple impacts nor the time or times at which the fatal injury or injuries occurred. (RP 380, 384). Dr. Harruff noted that, following a blunt force injury to the head, a subdural hematoma may develop either on the side of the head where the impact occurred or on the opposite side of the head. (RP 397).

⁵ According to Mr. Mohler, the dent was situated between the studs and was approximately 2½" wide and ¼" deep, 4'11" above the floor and 2'1" up the hallway from the master bedroom doors. (RP 562-563, 565-566; Ex. 103). The decedent was 5'8". (RP 289). The dent and the (repaired) master bedroom doors and door frame were later photographed by Mr. Mohler. (RP 549; Ex. 104).

M. There were no objections or exceptions taken to the court's jury instructions.

Both parties proposed jury instructions. (Parrott-Horjes: CP 300-324, 632-37; Rice: CP 252-273, 1068-1072). The court prepared its instructions. (CP 609-629, 630-31). Neither party objected or excepted to the court's instructions. (CP 394). The jury was instructed and, following summation, retired for deliberations on April 15, 2010. (CP 394-95).

N. The jury returned verdicts for Rice on both claims and Parrott-Horjes appeals.

The jury returned verdicts for Marni Rice on both claims. (CP 399). On the battery claim, the jury found that Rice committed battery, that the battery was a proximate cause of decedent's death, and that Rice was acting in self-defense when she committed the battery. (CP 648-49). On the federal common law claim that Rice was precluded from receiving the life insurance proceeds because she intentionally or recklessly caused the decedent's death, the jury found that Rice did not "intentionally or recklessly cause the death of Michele Parrott." (CP 650).

Judgment was entered for Rice on May 9, 2010. (CP 711-16). The trial court denied Parrott-Horjes' motion for a new trial. (CP 780-81). Parrott-Horjes appeals. (CP 782-798).

III. ARGUMENT

A. THE TRIAL COURT PROPERLY ADMITTED EVIDENCE OF THE DECEDENT'S PRIOR ACTS OF DOMESTIC VIOLENCE.

1. A trial court's decision to admit evidence is reviewed under an abuse of discretion standard.

A trial court's decision to admit evidence of other wrongful acts under ER 404(b) is reviewed for abuse of discretion.⁶ State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002). A trial court abuses its discretion when its exercise "is manifestly unreasonable or based upon untenable grounds or reasons." State v. Stenson, 132 Wash.2d 668, 701, 940 P.2d 1239 (1997).

2. ER 404(b) permits evidence of other wrongful acts to prove intent, state of mind and the res gestae.

Trial courts are generally prohibited by ER 404(b) from admitting "[e]vidence of other crimes, wrongs, or acts ... to prove the character of a person in order to show action in conformity therewith." ER 404(b). However, evidence of prior wrongful acts may be admitted for other limited purposes, including "proof of motive, opportunity, intent, preparation, plan, knowledge, identity,

⁶ Parrott-Horjes notes that a "[f]ailure to enforce the requirements of rules can constitute an abuse of discretion," citing State v. Neal, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001). However, she does not identify any requirement of ER 404(b) that she claims the trial court failed to enforce.

or absence of mistake or accident." State v. Cook, 131 Wn. App. 845, 849, 129 P.3d 834 (2006).

The list of permitted purposes for other wrongful act evidence set forth in ER 404(b) itself is not exhaustive. State v. Brown, 132 Wn.2d 529, 570, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007, 118 S.Ct. 1192, 140 L.Ed.2d 322 (1998). One permitted purpose, not listed in ER 404(b), recognizes the admissibility of evidence of other wrongful acts to prove "state of mind." State v. Cook, 131 Wn. App. 845, 851-52, 129 P.3d 834 (2006). In Cook, defendant Cook was charged with criminal assaulting his girlfriend. Id., at 845. Cook's girlfriend initially reported that he kicked her hand and broke her finger, but at trial she testified that her finger was broken in an accident. Id. The trial court permitted the State to examine the girlfriend about six prior episodes of domestic violence between her and Cook over Cook's objection that the evidence was unfairly prejudicial and inadmissible under ER 404(b). Id., at 848.

The Court of Appeals affirmed, holding that a defendant's prior acts of domestic abuse against the alleged victim may be admissible under ER 404(b) to show the victim's state of mind.

Cook, 131 Wn. App. at 851 (citing State v. Grant, 83 Wn. App. 98, 920 P.2d 609 (1996)). The Cook court held as follows:

When an alleged victim acts inconsistently with a disclosure of abuse, such as by failing to timely report the abuse or by recanting or minimizing the accusations, evidence of prior abuse is relevant and potentially admissible under ER 404(b) to illuminate the victim's state of mind at the time of the inconsistent act.

Cook, 131 Wn. App. at 851-52 (citing State v. Powell, 126 Wn.2d 244, 261, 893 P.2d 616 (1995) ("Evidence of previous disputes or quarrels between the accused and the [accuser] ... tends to show the relationship of the parties and their feelings one toward the other, and often bears directly upon the state of mind."))).

Another permitted purpose of other wrongful act evidence is the so-called *res gestae* exception to ER 404(b). Under this exception, evidence of other wrongful acts "is admissible to complete the story of a crime or to provide the immediate context for events close in both time and place to the charged crime." State v. Lillard, 122 Wn. App. 422, 431-32, 93 P.3d 969 (2004).

3. The trial court properly analyzed the admissibility of the domestic violence evidence pursuant to ER 404(b).

Rice submitted an offer of proof that included the following incidents where an intoxicated and angry Parrott assaulted other members of her household:

1. Spring of 2007: Rice alleged that Parrott got confrontational with her mother Laurie Delma and that Parrott struck and blackened Rice's eye when Rice tried to intervene to protect Delma (CP 1076-1077);⁷
2. Summer of 2007: Rice alleged that Parrott pushed then 15 year old Andrew Duncan backwards and into the wall outside Alexandria Parrott's former bedroom at the Shoreline house, making a 1' x 2.5' hole in the wall (CP 1077);⁸
3. September 2007: Rice alleged that Parrott broke the locked door to the downstairs apartment where Delma then resided and punched a hole in Delma's bedroom wall with her fist (CP 1078, 1079-1084).⁹
4. November 5, 2007: Rice alleged that Parrott assaulted her twice during the evening of November 5, 2007 (CP 1078).¹⁰

Before a trial court may admit evidence of other wrongful acts, it must:

⁷ Rice testified at trial regarding this domestic violence that occurred during spring 2007. (RP 571-76). Defense witness Angela Severance, the decedent's half-sister, provided corroborative testimony at trial. (RP 672).

⁸ Rice testified at trial regarding this domestic violence that occurred during summer 2007. (RP 571-576).

⁹ Rice testified at trial regarding this domestic violence that occurred in September 2007. (RP 580-82). Angela Severance provided corroborative testimony. (RP 674-675). Defense witness Richard Mohler, an architect, testified regarding his photographs of the damaged downstairs doors and door frames (RP 550-60). His photographs were admitted into evidence at trial. (Ex 126).

¹⁰ Parrott-Horjes did not object to Rice's evidence pertaining to the two assaults alleged to have occurred on November 5, 2007. (RP 160-161; CP 384).

(1) find by a preponderance of the evidence that the misconduct occurred; (2) determine whether the evidence is relevant to a material issue; (3) state on the record the purpose for which the evidence is being introduced; and (4) balance the probative value of the evidence against the danger of unfair prejudice.

State v. Burkins, 94 Wn.App. 677, 687, 973 P.2d 15 (1999) (citing State v. Brown, 132 Wash.2d at 571).

The trial court conducted a preliminary evidentiary hearing at which it heard the testimony of Marni Rice, Laurie Delma and Andrew Duncan (RP 234-253, 253-265, 265-268). Based on this testimony and the arguments of counsel, the trial court considered each of the 4 factors required for ER 404(b) analysis. First, the court found that the first 3 acts of domestic violence set forth in Rice's offer of proof were established by a preponderance of the evidence. (RP 277-79).

Second, the court determined that the evidence of the 3 acts of domestic violence was relevant to material issues in the case – issues pertaining to Marni Rice's state of mind and to the context of the domestic violence that occurred on November 5, 2007 under the *res gestae* exception to ER 404(b). (RP 226-27, 279-80).

Third, the court stated on the record that the prior domestic violence evidence was not going to be introduced as propensity

evidence prohibited by ER 404(b), but rather for the permitted purposes of showing Marni Rice's intent, Marni Rice's state of mind, and a description of the events that surrounded what happened during on November 5-6, 2007.¹¹ (RP 44-55; 279-80).

Finally, the court balanced the probative value of the prior domestic violence evidence against the danger of unfair prejudice as follows:

There are a number of cases that we could look at, but (I do think that perhaps State v. Cook, 131 Wn. App. [845], in relevance to Ms. Rice's state of mind, I think that's the primary part that this is in the proposed instructions on self-defense.

I also give context to the whole circumstances. I think the ... appellate courts have particularly recognized in cases of domestic violence the probative value of having some understanding of the relationship between the parties to explain one or another party's conduct, particularly those cases focusing on someone who has assaulted another.... And the courts have found that it is important, and in those kinds of circumstances of domestic violence to give the jury some understanding of the context.

Sometimes they describe that as the *res gestae* exception, to allow that to be brought in. But, either of those ways, I think that is evidence that has probative value.

¹¹ The court also noted that the incidents of domestic violence proffered by Rice were "a reasonably recent history of events that are going on in that house, that involved circumstances that are sufficiently similar to what happened that night, and that have a reasonable basis to have the kind of impact that would cause the defendant to push on her door...." (RP 55).

My task is to balance that, to assure the prejudice does not outweigh the probative value. In that, a couple of matters. I don't know how else one would prove. There is no alternative easy way of proving, establishing what is probative in these incidents. So, that's part of the analysis. And I don't think that this testimony is going to the unfair prejudice part of it.

I don't think the evidence is of a nature that the probative value would be outweighed by unfair prejudice. It's not the kind of evidence that is likely to arouse an emotional response, or as one of the courts described it, the Supreme Court decision in State v. Tharp ... talking about what the nature of unfair prejudice is. And it's described in that case as "When a trial court is convinced that its effect would [be] to generate heat instead of light, or as is said in one of the law review articles above referred to, where the minute peg of relevancy will be entirely obscured by the dirty linen hung upon it."

I think that there is no element of the unfair prejudice. I think the unfair prejudice does not substantially outweigh the probative value at all.

Finally, the admissibility of this evidence will be subject to a limiting instruction, if one is requested. And a limiting instruction would be along the line of considering a prior act of violence to assess Marni Rice's state of mind at the time of the incident that occurred the night before Ms. Parrott died.

(RP 279-280).

When Rice presented the evidence of decedent's prior acts of domestic violence at trial, Parrott-Horjes requested, and the trial court gave, an appropriate limiting instruction. (RP 577-78).

4. The trial court did not abuse its discretion by admitting evidence of decedent's prior acts of domestic violence.

"A trial court's ruling under ER 404(b) will not be disturbed absent a manifest abuse of discretion such that no reasonable judge would have ruled as the trial judge did." State v. Mason, 160 Wn.2d 910, 933-34, 162 P.3d 396 (2007). It is not an abuse of discretion to admit evidence on the basis of "other purposes" pursuant to ER 404(b). Id. The evidence of Michele's Parrott's acts of domestic violence was relevant to the state of mind component of Rice's affirmative defense of self-defense and this "other purpose" was "adequate to render the trial court's decision to admit the evidence within the scope of a 'reasonable judge.'" Id.

B. THE TRIAL COURT PROPERLY PERMITTED RICE TO PRESENT EVIDENCE OF SELF-DEFENSE.

1. Parrott-Horjes failed to file a timely motion for partial summary judgment.

Marni Rice asserted the affirmative defense of self-defense in her September 9, 2009 answer to the second amended complaint. (CP 42). On the eve of trial, Parrott-Horjes filed a dispositive motion to strike Rice's claim of self-defense and to

exclude any evidence or argument relating to self-defense. (CP 339-342).

Parrott-Horjes failed to file a timely motion for partial summary judgment to dismiss Rice's self-defense claim. She instead filed a motion asking the trial court to issue a pretrial ruling that there was insufficient evidence to support Rice's claim of self-defense *before* the court could hear all of the evidence relevant to this affirmative defense that would be adduced at trial.

2. The cases relied upon by Parrott-Horjes are distinguishable because they did not involve pretrial rulings precluding the introduction of self-defense evidence at trial.

The criminal cases relied upon by Parrott-Horjes are all distinguishable from the instant case because they did not involve *pretrial* rulings precluding the introduction of self-defense evidence at trial. In both State v. Aleshire, 89 Wn.2d 67, 568 P.2d 799 (1977) and State v. Gogolin, 45 Wn. App. 640, 727 P.2d 683 (1986), the trial courts' refusals to instruct the jury on self-defense were affirmed because in both cases the instruction was not warranted by the evidence adduced at trial. In State v. Pottorff, 138 Wn. App. 343, 156 P.3d 955 (2007), no issue was raised on appeal with respect to the trial court's self-defense instruction, which was

supported by the defendant's trial testimony that he struck the assault victim with a cane in self-defense because he thought the victim might have a knife. In State v. Dyson, 90 Wn. App. 433, 438, 952 P.2d 1097 (1997), the trial court was reversed for refusing to give a self-defense instruction after the defendant offered evidence at trial "tending to prove self-defense." The appellate court in State v. Barragan, 102 Wn. App. 754, 9 P.3d 942 (2000) rejected the defendant's argument that he received ineffective assistance of counsel due to his attorney's failure to propose a self-defense instruction because the instruction was not warranted by the evidence adduced at the trial.

3. The trial court did not err by denying Parrott-Horjes' pretrial motion to exclude evidence and argument of self defense because the question of whether Rice acted in self-defense was for the jury to decide.

"The use of force is lawful when used by a person about to be injured." McBride v. Walla Walla County, 95 Wn. App. 33, 975 P.2d 1029, 1032 (1999), rev. denied, 138 Wn.2d 1015, 989 P.2d 1137 (1999). A person has a right to stand her ground and it is not necessary for her to retreat when there is the threat of bodily harm. D. DeWolf & K. Allen, 16 Washington Practice, Tort Law and Practice § 13.42, at 414.

The proponent of self-defense bears the burden of proving: (1) that she subjectively believed she was in danger of bodily harm; and (2) that a reasonably cautious and prudent person in her situation would have used similar force. McBride, 975 P.2d at 1032-33. “Whether an individual acted in self-defense is typically a question for the trier of fact.” McBride, 975 P.2d at 1032-33.

In Robison v. La Forge, 175 Wash. 384, 386, 27 P.2d 585 (1933), the Supreme Court affirmed the trial judge’s finding in favor of the defendant in a civil assault case. The Robison Court held:

When attacked, one has the right to defend himself, to resist force with force, to the extent of what then appeared to be the apparent danger to the one attacked. State v. Miller, 141 Wash. 104, 250 P. 645. *In other words, the law is indifferent to the exact extent of the force used to repel or resist an attack by another upon his person, if there is apprehension, on the part of the one assaulted, of immediate bodily harm. The one attacked need not have been in actual danger of great bodily harm, but he was entitled to act on appearances. If he believed in good faith and on reasonable grounds that there was danger of great bodily harm and acted as a reasonable and ordinarily cautious and prudent man would have acted under the circumstances as they then appeared to the one assaulted, he was justified in defending himself.*

Robison, 175 Wash. at 387 (emphasis supplied).

“In its common usage [the term ‘attack’] is not limited in its meaning to an actual physical accosting, but may be used to

describe an offensive or antagonistic action of any kind.” State v. Alexander, 7 Wn. App. 329, 335, 499 P.2d 264 (1972). When Marni Rice perceived that she was going to be attacked by Michele Parrott, she had the right to defend herself by standing her ground and exerting force on the inside of the locked bedroom doors to resist the force being exerted by Parrott on the opposite side of the doors in her effort to break through them. (RP 351, 634-637, 682, 690). Rice testified that she took this defensive action because, based on her past experience with Parrott’s domestic violence, she feared that Parrott would hit her again if she gained entry to the bedroom. (RP 636-37).

Parrott-Horjes argues that the trial court’s denial of her pretrial motion to exclude self-defense evidence and argument “is inconsistent with the truth seeking function of a trial” because it permitted Rice “to argue two completely opposite factual positions.” (Opening Brief of Appellant, p. 28-31). Rice disagrees. Her acts of moving from the bed to the doors, standing her ground and exerting force on the inside of the bedroom doors were intentional acts of self-defense employed by Rice to repel or resist what she reasonably apprehended to be another assault upon her person by Parrott. (RP 351, 634-637, 682, 690).

Rice also disagrees with Parrott-Horjes' argument that she should have been precluded from presenting self-defense evidence because she "denies that she did anything to cause the death of Michele Parrott" and that she "denied committing any volitional act." (Opening Brief of Appellant, pp. 13-16, 28-31). Rice testified that *she does not know for certain* whether the decedent hit her head on the hallway wall after stumbling backwards from the unexpected force being intentionally and volitionally exerted by Rice on the inside of the bedroom doors. (RP 350, 635, 637). Rice also testified that she does not know how Parrott incurred her fatal head injury (or injuries) during the evening of November 5-6, 2007 – it may have been from her head striking the wall, it may have been from her head striking the floor in the hallway and it may have been from some other accidental fall by the intoxicated Parrott that no one observed. (CP 96-98, RP 349-53, 360, 634-638, 681-82). It is instructive that the King County Medical Examiner was unable to determine the physical cause or instrumentality that caused Michele Parrott's fatal injury. (RP 375, 384).

The question of whether Marni Rice acted in self-defense was for the jury. McBride, 975 P.2d at 1032-33. The trial court did not abuse its discretion by denying Parrott-Horjes' pretrial motion to

exclude evidence and argument pertaining to self-defense.

C. THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE JURY'S SELF-DEFENSE VERDICT

Parrott-Horjes contends that there was insufficient evidence to support the jury's verdict that Rice acted in self defense.¹² "Overturning a jury verdict is appropriate only when it is clearly unsupported by substantial evidence." Burnside v. Simpson Paper Co., 123 Wn.2d 93, 107-08, 864 P.2d 937 (1994). The Burnside Court explained the review process as follows:

This court will not willingly assume that the jury did not fairly and objectively consider the evidence and the contentions of the parties relative to the issues before it. Phelps v. Wescott, 68 Wn.2d 11, 410, P.2d 611 (1966). The inferences to be drawn from the evidence are for the jury and not for this court. The credibility of witnesses and the weight to be given to the evidence are matters within the province of the jury and even if convinced that a wrong verdict has been rendered, the reviewing court will not substitute its judgment for that of the jury, so long as there was evidence which, if believed, would support the verdict rendered. Burke v. Pepsi-Cola Bottling Co., 64 Wn.2d 244, 391 P.2d 194 (1964).

Burnside, 123 Wn.2d at 108 (quoting State v. O'Connell, 83 Wn.2d 797, 839, 523 P.2d 872 (1974)).

¹² This argument was rejected by the trial court in its rulings on Parrott-Horjes' pretrial motions and on her post-trial motion for a new trial. (RP 279-80; CP 740-42, 780-81).

“To establish self-defense, a defendant must produce evidence showing that he or she had a good faith belief in the necessity of force and that that belief was objectively reasonable.” State v. Dyson, 90 Wn. App. 433, 438-39, 952 P.2d 1097 (1997). In considering Parrott-Horjes’ challenge to the sufficiency of Rice’s self-defense evidence, the evidence must be viewed in the light most favorable to Rice. Sommer v. Dept. of Social & Health Services, 104 Wn. App. 160, 171, 15 P.3d 664 (2001). A new trial is permitted only when “there is no evidence or reasonable inference from the evidence to justify the verdict.” Id.

Rice’s self-defense evidence was similar to the self-defense evidence at issue in Dyson, *supra.*, where the defendant testified that during an argument at his lawyer’s office a paralegal put him in a “sleeper hold” during which he exercised “passive resistance, was losing consciousness, and ‘rised up’ to try to get air.” The paralegal ended up going through the glass of an office door. The trial court refused to give a self-defense instruction.

On appeal, the State argued that the defendant was not entitled to a self-defense instruction because the defendant denied that he caused the paralegal to fall through the door. Id., at 439.

The Court of Appeals reversed, finding that the evidence did not show that the defendant denied causing the paralegal to fall through the door, but rather that the defendant “could not describe the specifics of what happened because he was starting to lose consciousness.” Id., at 439. The Dyson court held:

Explicit evidence that a defendant intended to assault a victim is not necessary in order to provide the evidentiary basis for a self-defense instruction. What is necessary is evidence that the action that caused the victim's injury was not accidental, but rather made in order to protect the defendant. Here Richard Dyson testified that after the victim put him in a choke hold, he engaged in passive resistance by rising up to get air. By doing this he caused the victim to be injured. This evidence that Dyson acted to protect himself supports a self-defense instruction.

Id., at 434.

Like the defendant in Dyson, Marni Rice did not testify that Michele Parrott's death was an accident. She also did not testify that she did not do anything to cause Parrott's death. Rice's testimony was that she acted volitionally to protect herself and that she does not know whether her actions were a cause of Parrott's death.

To prove self-defense, Marni Rice had the burden of proving: (1) that she had a reasonable belief that she was in danger of bodily harm; and (2) that she used a degree of force reasonably

necessary to protect herself. Jury Instruction No. 7 (CP 619); see also, McBride, 975 P.2d at 1033 (discussing the elements of self-defense). The jury was properly instructed that Rice claimed that she “acted in self defense by attempting to resist the decedent’s use of force against [her.]” Jury Instruction No. 2 (CP 2).

The jury was presented with two divergent theories of how Michele Parrott stumbled backwards into the wall (and possibly incurred her fatal injury). Marni Rice’s testimony, if believed, was alone sufficient to support the jury’s self-defense verdict. Even if the jury can be said to have found that Rice shoved Parrott into the wall as Parrott-Horjes argued at trial, the evidence and the reasonable inferences from the evidence justified the verdict.

It is not within the competency of either the trial court or an appellate court “to invade the province of the jury and substitute its judgment for that of the jury in weighing the evidence.” Johnson v. Dept. of Labor & Industries, 46 Wn.2d 463, 466, 281 P.2d 994 (1955). The self-defense verdict in this case was supported by substantial evidence and should not be disturbed on appeal.

D. THE JURY’S VERDICTS ON THE TWO CLAIMS ARE ENTIRELY CONSISTENT.

1. The reviewing court must try to reconcile the answers to special interrogatories with all reasonable inferences given to Rice.

In reviewing a verdict claimed to be inconsistent, the court must try to reconcile the jury's answers to special interrogatories and the answers "should, if possible, be read harmoniously." Alvarez v. Keyes, 76 Wn. App. 741, 743, 877 P.2d 496 (1995). "[A]nswers to special interrogatories should, if possible, be read harmoniously." Van Cleve v. Betts, 16 Wn. App. 748, 757, 559 P.2d 1006 (1997). The party in whose favor the jury found "is entitled to all reasonable inferences." Brashear v. Puget Sound Power & Light Co., 100 Wn.2d 204, 209, 667 P.2d 78 (1983). If the evidence and reasonable inferences from the evidence would permit the jury to find as it did, and the jury was properly instructed, then the jury's verdict must be upheld. Id.

2. The jury's verdicts on Parrott-Horjes' claims are consistent because a tortfeasor can commit a battery that proximately results in death without intending to cause the death and without having acted with criminal recklessness.

The federal common law "Slayer's Rule" is derived from New York Mutual Life Insurance Co. v. Armstrong, 177 U.S. 591, 600 S. Ct. 877, 29 L.Ed. 997 (1886), where the Supreme Court held that a

wrongdoer should not “recover insurance money payable on the death of the party whose life he has feloniously taken.” To prevail on a Slayer’s Rule claim, the plaintiff must prove that the killing was “both intentional and felonious.” California-Western States Life Insurance Co. v. Sanford, 515 F. Supp. 524, 526 (E.D. La. 1981).

Since there is no federal law that definitively delineates the “intentional and felonious” acts that disqualify a person from receiving FEGLIA life insurance benefits, courts look to state criminal statutes for the applicable standards. See, e.g., Mounts v. United States, 838 F. Supp. 1187, 1194 (E.D. Ky. 1993) (held on summary judgment that reckless homicide conviction under Kentucky law forfeited right to FEGLIA benefits under federal law).

In the instant case, the trial court looked to Washington criminal law for guidance in instructing the jury with respect to the federal Slayer’s Rule claim. In order to “intentionally and feloniously” kill a person in Washington, one must commit either first degree murder or second degree murder. RCW 9A.32.030 (premeditated intent to cause the death of another person); RCW 9A.32.050 (intent to cause the death of another person without premeditation). In some Slayer’s Rule cases, including Mounts, *supra.*, courts have expanded the meaning of “intentionally and

someone for purposes of the Slayer's Rule to include manslaughter. In order to "recklessly and feloniously" kill a person in Washington, he must commit first degree manslaughter.¹³ RCW 9A.32.070. The trial court gave an instruction based on RCW 9A.32.060, for use in first degree manslaughter cases, to define "reckless or acts recklessly" for purposes of the Slayers Rule claim:

A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur and this disregard is a gross deviation from conduct that a reasonable person would exercise in the same situation.

(CP 631, 1070).

The trial court's Instruction No. 2 described Parrott-Horjes' Slayer's Rule claim as follows:

2. Plaintiff individually claims that Marni Rice is precluded from taking under Michele Parrott's life insurance policy or the proceeds of other federal benefits of Michele Parrott because Marni Rice *intentionally or recklessly caused the death of Michele Parrott*. [emphasis supplied].

(CP 614; 650).

In order to prevail on her Slayer's Rule claim, Parrott-Horjes had the burden in this civil case of proving by a preponderance of

¹³ Manslaughter in the second degree requires criminal negligence. RCW 9A.32.070. Parrott-Horjes made no claim that a "negligent and felonious" act would disqualify Rice from receiving FEGLIA life insurance benefits under the federal Slayer's Rule.

the evidence that Marni Rice committed first or second degree murder or first degree manslaughter under Washington law. Parrott-Horjes did not produce even a scintilla of evidence from which the jury could infer that Marni Rice “intentionally ... caused the death of Michele Parrott.”

There was also sufficient evidence for the jury to find that Marni Rice did not “recklessly ... caus[e] the death of Michele Parrott.” The jury could have found that Rice, through any of her actions on November 5, 2007, did not “disregard substantial risk that a wrongful act may occur” or that any such disregard was “a gross deviation from conduct that a reasonable person would exercise in the same situation.” The evidence included the decedent’s children’s testimony that their mother’s death was an accident. (RP 342-45, 431).

Battery is the intentional infliction of harmful bodily contact upon another. Garratt v. Dailey, 46 Wn.2d 197, 200, 279 P.2d 1091 (1955). In Garratt, a 5 year old boy named Brian picked up and moved a lawn chair several feet at about the time Ruth Garratt tied to sit down where the chair had formerly been. Brian unsuccessfully attempted to move the chair toward Ruth as Ruth sat down at the place where the chair had formerly been. Ruth fell

to the ground, was seriously injured and sued Brian for battery. There was no allegation that Brian had physically contacted Ruth's person.

The trial court found that Brian did not have intent to bring about any harmful or offensive contact "with Ruth's person or any objects appurtenant thereto." The Supreme Court reversed and adopted the following standard:

In order that an act may be done with the intention of bringing about a harmful ... contact to a particular person ... the act must be done for the purpose of causing the contact ... or with knowledge on the part of the actor that such contact ... is substantially certain to be produced.

Garratt, 46 Wn.2d at 201.

The Garratt Court held that moving the chair was a volitional act and that if Brian was found to have moved the chair while Ruth was in the act of sitting down, then his act would have been "with the intent of causing the plaintiff's body contact with the ground" and he would be liable for her damages. Id. The Court then held:

A battery would be established if, in addition to plaintiff's fall, it was proved that, when Brian moved the chair, he knew with substantial certainty that the plaintiff would attempt to sit down where the chair had been. [....] The mere absence of any intent to injure the plaintiff ... or to commit an assault and battery would not absolve him from liability if he had such knowledge. [citation omitted] Without such

knowledge, there would be nothing wrong about Brian's act in moving the chair....

Id., at 202.

In the instant case, the jury could have found that Marni Rice was acting in self defense when she committed a battery that was a proximate cause of Michele Parrott's death. This is true whether the jury chose to credit Marni Rice's testimony or Alexandria Parrott's testimony (or portions of both women's testimony). If the jury believed Rice's testimony, then it could have found that her act of holding the doors shut was an intentional act that was a proximate cause of Parrott falling back into the wall and incurring a head injury that later proved fatal. However, the jury also could have found from Rice's testimony that she had a "reasonable belief that she was in danger of bodily harm" and "used a degree of force reasonably necessary to protect herself" and therefore reach the verdict that Rice acted in self-defense. If the jury believed Alexandria Parrott's testimony that Rice pushed Parrott into the wall with her bare hands, the jury could have reached the same verdict. This is particularly true if the jury considered the evidence of Parrott's intoxication and assaultive behavior during the evening of November 5th.

The jury's verdicts on Parrott-Horjes' two claims are consistent because a tortfeasor can commit a battery that proximately results in death without "intentionally or recklessly causing the death" of the decedent.

3. If the jury's verdicts are inconsistent and cannot be reconciled, Parrott-Horjes should not benefit because she invited any error.

Parrott-Horjes proposed a jury instruction directing the jury to decide her federal common law claim separately from the Michele Parrott estate's battery claim. The proposed instruction stated:

You should decide the case of each plaintiff separately as if it were a separate lawsuit. The instructions apply to both plaintiffs unless a specific instruction states that it applies only to a specific plaintiff.

(CP 321).

The trial court modified the instruction to reflect the fact that there was a single plaintiff with two separate claim and gave the following version as its Instruction 14 to the jury:

You should decide each claim [of] the plaintiff as if it were a separate lawsuit. The instructions apply to all claims unless a specific instruction states that it applies only to a specific claim. [omission of word "of" in original].

(CP 627).

Parrott-Horjes did not except to this instruction. (CP 394).

Instruction 14 directed the jury to treat both of Parrott-Horjes' claims as separate lawsuits, with no interdependence. If there is an irreconcilable inconsistency in the jury's verdicts, then the error was invited by Parrott-Horjes and she should be precluded from complaining about it on this appeal. State v. Boyer, 91 Wn.2d 342, 588 P.2d 1151 (1979) (holding that party may not request an instruction and later complain on appeal that the requested instruction was given).

E. THE TRIAL COURT PROPERLY DISMISSED PARROTT-HORJES' CLAIM SEEKING THE IMPOSITION OF A CONSTRUCTIVE TRUST.

1. A trial court's dismissal of a claim under CR 12(b)(6) is reviewed de novo.

A trial court may properly dismiss a claim under CR 12(b)(6) if the pleading fails to state a claim upon which relief can be granted. Yurtis v. Phipps, 143 Wn. App. 680, 689, 181 P.3d 849 (2008). A dismissal under CR 12(b)(6) "weeds out complaints where, even if what the plaintiff alleges is true, the law does not provide a remedy." McCurry v. Chevy Chase Bank, FSB, 169 Wn.2d 96, 101, 233 P.3d 861 (2010).

"On a 12(b)(6) motion, a challenge to the legal sufficiency of the plaintiff's allegations must be denied unless no state of facts

which plaintiff could prove, consistent with the complaint, would entitle the plaintiff to relief on the claim.” Dave Robbins Construction, LLC v. First American Title Co., 158 Wn. App. 895, 899, 249 P.3d 625 (2010) (quoting Halvorson v. Dahl, 89 Wn.2d 673, 674, 574 P.2d 1190 (1978)). A CR 12(b)(6) motion must be denied if “it is possible that facts could be established to support the allegations in the complaint.” McCurry, 169 Wn.2d at 101.

A trial court’s dismissal of a claim under CR 12(b)(6) is reviewed *de novo*. Dave Robbins, 158 Wn. App. at 899.

2. The Court of Appeals should consider only the allegations set forth in the Second Amended Complaint.

Under a CR 12(b)(6) motion, the plaintiff’s allegations as set forth in the complaint “are presumed to be true.” Yurtis, 143 Wn. App. at 689. A CR 12(b)(6) motion “is a motion on the pleadings, and extraneous evidence is not considered.” Id., at 692. This Court’s review of the trial court’s dismissal of the Appellant’s constructive trust claim is therefore limited to the allegations pertaining to said claim as set forth in her Second Amended Complaint. (CP 32-39). The extraneous evidence submitted by both Parrott-Horjes in her responsive pleadings and by Rice in her

reply pleadings (CP 105-106) should not be considered by this Court in conjunction with its review of the preemption issue.¹⁴

3. The trial court properly granted Rice's CR 12(b)(6) motion to dismiss Parrott-Horjes' claim for imposition of a constructive trust because it is preempted by federal law.

a. Judicial determinations of whether a particular federal law preempts state law depend upon Congressional intent.

The supremacy clause of the United States Constitution provides in pertinent part that "the laws of the United States ... shall be the supreme law of the land; ... any thing in the Constitution or laws of any state to the contrary notwithstanding." U.S. Const. art. VI, cl. 2. "By force of the supremacy clause ... federal law can preempt state law." Ameriquest Mortg. Co. v. Washington State Office of Atty. Gen., ___ Wn. App. ___, 241 P.3d 1245,1255 (2010). Under the federal preemption doctrine, state law that is incompatible with federal law is nullified. State v. Norris, 157 Wn. App. 50, 73, 236 P.3d 225 (2010). "Federal regulations have the same preemptive effect as federal statutes." Wutzke v. Schwaegler, 86 Wn.App. 898, 903, 940 P.2d 1386 (1997) (citing Berger v. Personal Prods., Inc., 115 Wn.2d 267, 270, 797 P.2d

¹⁴ In considering Rice's CR 12(b)(6) motion, the trial court properly declined to "conside[r] affidavits containing facts beyond the pleadings." (CP 117-118).

1148 (1990), cert. denied, 499 U.S. 961, 111 S.Ct. 1584, 113 L.Ed.2d 649 (1991)).

The Washington Supreme Court has identified three means by which state law may be preempted by federal law:

Federal preemption of state law may occur if Congress passes a statute that expressly preempts state law, if Congress preempts state law by occupation of the entire field of regulation or if the state law conflicts with federal law due to impossibility of compliance with state and federal law or when state law acts as an obstacle to the accomplishment of the federal purpose.

Progressive Animal Welfare Soc. v. University of Washington, 125 Wn.2d 243, 265, 884 P.2d 592 (1994) (citing Washington State Physicians Ins. Exch. v. Fisons Corp., 122 Wn.2d 299, 326-26, 858 P.2d 1054 (1993) and Wisconsin Pub. Intervenor v. Mortier, 501 U.S. 597, 604-05, 111 S.Ct. 2476, 2481-82, 115 L.Ed.2d 532 (1991)).

“State laws are not superseded by federal law unless that is the clear and manifest purpose of Congress.” Progressive Animal Welfare Society, 125 Wn.2d at 265. “[P]reemption analysis begins ‘with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.’” Metropolitan Life Insurance Co. v. Christ, 979 F.2d 575, 576 (7th Cir. 1992).

“The goal in a preemption analysis is to determine congressional intent.” Stevedoring Services of America, Inc. v. Eggert, 129 Wn.2d 17, 24, 914 P.2d 737 (1996) (citing Cipollone v. Liggett Group, Inc., 505 U.S. 504, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992)). A court engaging in preemption analysis “must focus on the plain wording of the [relevant federal statute], which necessarily contains the best evidence of Congress’ pre-emptive intent.” Hue v. Farmboy Spray Co., Inc., 127 Wn.2d 67, 79, 896 P.2d 682 (1995); citing CSX Transportation, Inc. v. Easterwood, 507 U.S. 658, 113 S.Ct 1732, 123 L.Ed.2d 387, 396 (1993).

b. Federal court decisions uniformly hold that FEGLIA preempts the imposition of constructive trusts over insurance proceeds payable under FEGLIA.

The federal circuit courts of appeal that have considered the issue have uniformly held that federal law preempts competing state law claims that directly conflict with FEGLIA’s distribution statute, 5 U.S.C. § 8705(a).¹⁵ Metropolitan Life Insurance Co. v.

¹⁵ The federal district courts are in accord. Metropolitan Life Ins. Co. v. Holland, 134 F. Supp.2d 1197, 1200 (D. Or. 2001) (FEGLIA preempts unjust enrichment claim); Metropolitan Life Ins. Co. v. Armstrong-Lofton, 19 F. Supp.2d 1134 (C.D. Cal. 1998) (community property law preempted); Metropolitan Life Ins. Co. v. Pearson, 6 F. Supp.2d 469 (D. Md. 1998) (FEGLIA preempts imposition of constructive trust based on property settlement agreement); Matthews v. Matthews, 926 F.Supp. 650 (N.D. Ohio 1996) (FEGLIA preempts divorce

Zaldivar, 413 F.3d 119, 120 (1st Cir. 2005) (held FEGLIA preempts claim arising out of divorce decree); O'Neal v. Gonzalez, 839 F.2d 1437, 1440 (11th Cir. 1988) (held FEGLIA preempts state law claim for imposition of constructive trust on FEGLIA proceeds); Metropolitan Life Insurance Co. v. Christ, 979 F.2d 575, 576 (7th Cir. 1992) (held FEGLIA preempts claim of constructive trust based on divorce decree); McDaniel v. McDaniel, 911 F.2d 723 (4th Cir. 1990) (held FEGLIA preempts claim arising out of divorce decree); Dean v. Johnson, 881 F.2d 948, 949 (10th Cir 1989) (held FEGLIA preempts divorce decree), *cert. denied*, 493 U.S. 1011, 110 S. Ct. 574, 107 L.Ed.2d 569 (1989).

In O'Neal, The 11th Circuit held:

Congress intended to establish ... an inflexible rule that the beneficiary designated in accordance with the [FEGLIA distribution] statute would receive the policy proceeds, regardless of other documents *or the equities in a particular case*.

O'Neal, 839 F.2d at 1440 (emphasis supplied).

decree); Metropolitan Life Ins. Co. v. Bell, 924 F. Supp. 63 (E.D.Tex.1995) (constructive trust imposed pursuant to community property law); Metropolitan Life Ins. Co. v. Browning, 839 F.Supp. 1508 (W.D. Okl. 1993) (rights of so-called "illegitimate" children) Lewkowicz v. Lewkowicz, 761 F.Supp. 48 (E.D. Mich. 1991) (divorce decree); Mercier v. Mercier, 721 F.Supp. 1124 (D. N.D. 1989) (constructive trust claim arising out of divorce decree); Metropolitan Life Ins. Co. v. McShan, 577 F. Supp. 165 (N.D. Cal.1983) (divorce decree); Knowles v. Metropolitan Life Ins. Co., 514 F. Supp. 515 (N.D. Ga.1981) (divorce decree).

“[T]he language of the [FEGLIA distribution] statute is unambiguous; it expressly dictates to whom the insurance proceeds should be paid....” Mutual Life Ins. v. Zaldivar, 337 F. Supp. 343, 346 (D. Mass. 2004) (citing Christ, 979 F.2d at 579). Ms. Parrot-Horjes’s constructive trust claim is preempted by FEGLIA’s “distribution statute,” 5 U.S.C. § 8705(a) and its related federal regulation, 5 C.F.R. § 870.802,¹⁶ because it conflicts with and purports to direct proceeds to someone other than the¹⁷ beneficiary designated under FEGLIA.

c. Under Washington state law, FEGLIA’s distribution statute and related federal regulations were held to preempt state law rights arising out of a divorce decree.

¹⁶ The provisions of the distribution statute and the related regulation are attached to the Brief of Respondent at **Appendix A**.

¹⁷ Kidd v. Pritzel, 821 S.W.2d 566 (Mo. 1991) is to be distinguished from the instant case. In Kidd, the insured’s divorce decree required him to maintain his children as the beneficiaries of his FEGLIA life insurance policy. A month or so after the divorce, the insured designated his sisters as beneficiaries. Several months later, the insured executed a will that appointed his sisters as trustees and provided that the proceeds from the FEGLIA policy were to pour into a trust for his children. *After the FEGLIA proceeds were paid to the sisters in accordance with the beneficiary designation*, the sisters retained the proceeds for their own benefit instead of placing them into the trust for the children pursuant to the will. The children sued, alleging that the sisters “violated a confidence which might warrant the imposition of a constructive trust.” Id., at 567-68, 575. Kidd reversed the trial court’s ruling that the children’s claim was preempted by FEGLIA and remanded the case to determine whether to proceeds were taken by the sisters in trust. *There was no federal preemption because the insurance proceeds had been paid to the named beneficiaries and there was no conflict with FEGLIA’s distribution statute.* In the instant case, Parrott-Horjes’ claim requested imposition of a constructive trust on the FEGLIA proceeds before they were paid to Rice (and before Rice can be said to have done anything wrong).

There is a single Washington precedent bearing on FEGLIA preemption, Estate of Hanley v. Andresen, 39 Wn. App. 377, 693 P.2d 198 (1984). Hanley was a United States Postal Service employee from 1969 to 1978, married Andresen in 1977, executed the beneficiary designation for his FEGLIA policy in 1979 and divorced Andresen in 1980. The divorce decree awarded Hanley “[a]ll right title and interest of the Husband in ... group life insurance acquired by virtue of his employment.” Estate of Hanley, at 377-79. When Hanley died, an action for declaratory relief was commenced wherein the trial court issued a declaratory judgment awarding the FEGLIA insurance proceeds to Andresen as the designated beneficiary. Hanley’s estate appealed.

The Court of Appeals identified the issue as “whether a Washington divorce decree governs the disposition of proceeds from a federal employees group life insurance policy, the terms of which are controlled by 5 U.S.C. §§ 8701-8716 and 5 C.F.R. § 870.¹⁸ Id., at 379.

¹⁸ The regulations considered by the Estate of Hanley court in 1984 were then codified at 5 C.F.R. § 870.901(a), (b), (d) and (e). These regulatory provisions were modified in 1997 and 1999 with no substantial changes and are now recodified as 5 C.F.R. § 870.802(b), (c), (e) and (f), respectively. The regulations considered in Hanley are attached to the Brief of Respondent at **Appendix B**.

The Estate of Hanley Court relied upon its interpretation of the statute and federal case law, not the case law of Washington's sister states, in its FEGLIA preemption analysis. The Court noted that "the designated beneficiary is legally entitled to the proceeds as against other competing claimants" under federal case law. The Court then held that there was a "twofold" federal policy requiring strict adherence to FEGLIA's distribution scheme. First, it was intended to promote administrative convenience in processing claims. Second, it was intended to grant the insured unrestricted freedom in designating a beneficiary. Estate of Hanley, at 380.

In support of its holding that Congress intended to grant FEGLIA insureds unrestricted freedom in designating beneficiaries, the Estate of Hanley court cited Ridgway v. Ridgway, 454 U.S. 46, 55-56, 102 S.Ct. 70, 70 L.Ed.2d 39 (1981) for its holding that "the purpose of similar life insurance for military personnel was to give servicemen such freedom." Estate of Hanley, at 380.¹⁹

¹⁹ Contrary to Parrott-Horjes' contention, Estate of Hanley did not discuss or mention Ridgway's holding with respect to SGLIA's anti-attachment statute. Ridgway did hold that the divorce decree and constructive trust in that case conflicted with SGLIA's anti-attachment provision. Ridgway, 454 U.S. at 60-61. But this was a second ground for holding that SGLIA preempted the divorce decree. Christ, 979 F.2d at 581. The first ground for preemption in Ridgway was that the conflict with SGLIA's order of precedence and the insured's absolute right to change beneficiaries justified holding that SGLIA preempted the divorce decree." Christ, *supra*.

4. **The trial court's dismissal of the constructive trust claim should be upheld on alternative grounds even if FEGLIA does not preempt the claim.**

a. **An appellate court may affirm a trial court on any correct ground.**

An appellate court may affirm a lower court's ruling on any correct ground adequately supported in the record, even though that ground was not considered by the trial court. State v. Costich, 152 Wn.2d 463, 477, 98 P.3d 795 (2004); Nast v. Michels, 107 Wn.2d 300, 308, 730 P.2d 54 (1986).

b. **Parrott-Horjes' request for imposition of a constructive trust fails to state a claim because she did not assert a cause of action that would permit such a remedy.**

Parrott-Horjes correctly states that a constructive trust is an equitable *remedy* that a court may impose where there has been a claim of fraud, misrepresentation, bad faith or unjust enrichment. But her complaint failed to allege that Rice had engaged in any such misconduct or that she had been unjustly enriched. (CP 32-39). The trial court's dismissal of the constructive trust claim should be upheld on this alternative ground.

c. **Parrott-Horjes's request for a constructive trust remedy fails to state a claim because there was no allegation that Rice had begun to hold the FEGLIA funds.**

In order to prove a constructive trust, the plaintiff must allege that the defendant “has been under an equitable duty to give the complainant the benefit of the property *ever since the defendant began to hold unjustly.*” City of Lakewood v. Pierce County, 144 Wn.2d 118, 30 P.3d 446 (2001). Parrott-Horjes’ made no allegation in her complaint that Rice had begun to hold the FEGLIA insurance proceeds – her lawsuit has prevented Rice from holding the funds to this day. (CP 32-39). Accordingly, the trial court’s dismissal of the constructive trust claim should be upheld because the claim is no longer justiciable. Id., at 128-29.

d. Parrott-Horjes’s request for a constructive trust remedy fails to state a claim because her proposed beneficiaries are judicially stopped from receiving the FEGLIA proceeds.

Parrott-Horjes’ complaint alleged that the court should order creation of a constructive trust over the FEGLIA insurance proceeds to be held by Parrott-Horjes for the benefit of Alexandria Parrott and Andrew Duncan. (CP 37). However, as a tactical move in this litigation, both Alexandria Parrott and Andrew Duncan disclaimed their right and entitlement to the FEGLIA life insurance proceeds. (CP 1043, 1043-44, 1046-47, 1065-66). Alexandria and

Parrott-Horjes seeks to procure for their benefit. Miller v. Campbell, 164 Wash.2d 529, 539, 192 P.2d 352 (2008) (judicial estoppel precludes party from asserting one position in court proceeding and later seeking an advantage by taking clearly inconsistent position). This estoppel defeated any claim that Parrott-Horjes may have had to support the imposition of a constructive trust over the FEGLIA proceeds.

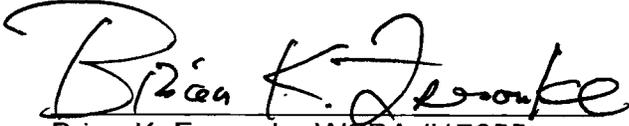
F. RICE SHOULD BE AWARDED COSTS ON APPEAL PURSUANT TO RAP 14.3 AND RAP 18.1

Respondent requests an award of costs on appeal pursuant to RAP 14.3 and RAP 18.1.

V. CONCLUSION

For all of the foregoing reasons, the trial court's rulings should be affirmed and the jury verdict should be upheld.

DATED this 12th day of May, 2011.


Brian K. Fresonke WSBA #17655
Attorney for Responent Marni G. Rice

APPENDIX A

5 U.S.C. § 8705(a).

§ 8705. Death Claims; Order of Precedence; Escheat

(a) Except as provided in subsection (e), the amount of group life insurance and group accidental death insurance in force on an employee at the date of his death shall be paid, on the establishment of a valid claim, to the person or persons surviving at the date of his death, in the following order of precedence:

First, to the beneficiary or beneficiaries designated by the employee in a signed and witnessed writing received before death in the employing office.... For this purpose, a designation, change, or cancellation of beneficiary in a will or other document not so executed and filed has no force or effect.

[. . . .]

5 C.F.R. § 870.802(b), (c), (e) and (f)

§ 870.802 Designation of Beneficiary

(a) Except as provided in paragraph (i) of this section, if an insured individual wants benefits paid differently from the order of precedence, he/she must file a designation of beneficiary. A designation of beneficiary cannot be filed by anyone other than the insured individual. Exception: If the insurance has been assigned under subpart I of this part, the insured individual cannot designate a beneficiary, only the assignee(s) can designate beneficiaries.

(b) A designation of a beneficiary must be in writing, signed by the insured individual, and witnessed and signed by 2 people. The appropriate office must receive the designation before the death of the insured.

(1) For employees, the appropriate office is the employing office.

[. . . .]

(c) A designation, change or cancellation of beneficiary in a will or any other document not witnessed and filed as required by this section has no legal effect with respect to benefits under this chapter.

[. . . .]

(e) Any individual, firm, corporation, or legal entity can be named as a beneficiary, except an agency of the Federal or District of Columbia Government.

(f) An insured individual (or an assignee) may change his/her beneficiary at any time without the knowledge or consent of the previous beneficiary. This right cannot be waived or restricted.

APPENDIX B

(Estate of Hanley v. Andresen, 39 Wn. App. 377, 381 fn 1, 693 P.2d 198 (1984))

5 C.F.R. § 870.901(a), (b), (d) and (e)

- (a) The designation of beneficiary shall be in writing, signed, and witnessed, and received in the employing office ... before the death of the designator.
- (b) A change or cancellation of beneficiary in a last will or testament, or in any other document not witnessed and filed as required by this part, shall not have any force or effect.
[. . . .]
- (d) Any person, firm, corporation, or legal entity (except an agency of the Federal or District of Columbia governments) may be named a beneficiary.
- (e) A change of beneficiary may be made at any time and without the knowledge or consent of the previous beneficiary, and this right cannot be waived or restricted.