NO. 315215
COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

RICHARD J. MILLIES, as trustee of the Richard J. Millies Trust, and SUSAN P. MILLIES, as trustee of the Susan P. Millies Trust,

Appellants,

v.

LANDAMERICA TRANSNATION d.b.a. TRANSNATION TITLE INSURANCE COMPANY, a corporation conducting business in Washington,

Respondent.

APPELLANTS' REPLY BRIEF

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I. Argument

a) LandAmerica's briefing is disobedient, vexatious and prejudicial.

By Commissioner's Ruling dated February 4, 2014, this court allowed defendant LandAmerica to file its Response Brief more than ten days after its due date but disallowed its untimely and prejudicial motion to supplement the record of this case. *See, Commissioner's Ruling @ 1.* Nevertheless, LandAmerica has, throughout its Response Brief, cited to and argued repeatedly to a supplemental record it was prohibited from introducing, and which forms no part of the record of this case. Needless to say, defendant's briefing is disobedient and vexatious for the court and appellant -- as the Millies are prejudiced by its citation (and argument) to a record which doesn't exist. For example, no trial exhibits form a part of the record on this appeal, just the exhibit list. *CP-500-508.* But, at least 31 times in defendant's 41-page Response Brief, citation is made to, and argument predicated on, trial exhibits alleged to be part of the record. *Brief of Respondent LandAmerica, passim.* Further, at least 10 times in the defendant's briefing, citation is made to, and argument predicated upon, a "Supplemental Verbatim Transcript of Proceedings ("STP")." *Respondent's Brief @ 10, passim.* No Supplemental Verbatim Transcript of Proceedings exists in this record; it was disallowed by the court. Appellant

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is unable to scrutinize a non-existent record or respond to argument predicated thereon. It's unfair to the Millies, and prejudicial.

Further, respondent repeatedly makes citation to Clerk's Papers ("CP") which either do not exist or are in error. For example, LandAmerica's assertion of pretrial motions being filed, including summary judgment and bifurcation, are cited respectively as CP-520 and STP 4-5. *Respondent's Brief @ 13.* CP-520 is page 1 of a declaration of a juror and has nothing to do with any pretrial motion; STP 4-5 does not exist in the record. The Millies cannot follow or track LandAmerica's defense of this appeal, or make response, where citation to the record of the case is non-existent, or in error.[1]

Further, LandAmerica refers throughout its briefing to the "Original Verbatim Transcript of Proceedings ("TP")". *Id. @ 11, passim.* These citations are usually in error. For example, LandAmerica asserts that the general public's right-of-way over the roadway bisecting the Millies' property was a matter "contentiously debated both before and during trial." *Id. @ 17, citing TP-213 and STP-71, 72, 100-01.* As mentioned, there is no supplemental records (STP) in this case on which to make this argument and RP-213 (improperly identified as TP-213) in no way supports

[1] In violation of RAP 9.5(a)(1), defendant has also failed to return the copy of the Report of Proceedings to the Plaintiffs, who paid for it. *RAP 9.5(a)(1).*

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LandAmerica's argument. In fact, at RP-213, LandAmerica's own witness (and counsel) established unequivocally that the Millies' property was bisected by a roadway which expressly granted the general public the privilege to use it. *RP-213 (witness reading from recorded document: "general public shall have privilege.")* Not only did the recorded instrument say so expressly in black letters, LandAmerica's expert witness testified to it. *CP-239 (instrument says that the general public had rights-of-way over the Millies' property). CP-79 (Deed Record No. 155, Stevens County).* LandAmerica calls this ineluctable fact "argumentative" and asks this court to disregard it, but will not explain why its own citation to the record establishes the exact opposite of what it's arguing. There was no debate at all, much less contentious debate, that the general public had a right-of-way over the bisecting roadway. The document said so. *CP-79.* It's vexatious of LandAmerica to assert a debated issue and then cite to part of the legitimate record establishing just the opposite of what it's arguing.

Similarly, LandAmerica asks this court to disregard the Millies' statement of facts, claiming that breach of its contract of indemnity (its title insurance policy) was never admitted by LandAmerica. *Brief of Respondent @ 17.* For this false assertion, LandAmerica refers the court and opposing counsel to CP-26. *Id.* CP-26 is page one of LandAmerica's Answer to the Complaint and in no way denies the breach of its contract. In

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truth, LandAmerica admitted ¶ 2.5 of the plaintiffs' Complaint that it committed to issue and did issue a policy of title insurance in favor of the plaintiffs. *CP-5 (Complaint); CP-28 (Answer).* It also admitted, in writing, that the Millies' policy of title insurance was a "contract of indemnity", *CP-255;* admitted that "there was, in fact, an additional easement across the insured property that did not show on their policy", *CP-249;* admitted that the record easement bisecting the Millies' property was not disclosed to the Millies, *CP-245;* admitted that "plaintiffs are entitled to the loss as described in the policy", *Id.,* and then sent a check in order to "compensate the Millies for the loss incurred as a result of the 1955 recorded easement over their property that was not excluded on the title insurance policy issued to them." *CP-274.* In closing argument, defense counsel also declared: "This was an accepted claim." *RP-319.* Yet, LandAmerica now falsely says breach of its contract was not admitted. Instead, they claim there is a "difference" between the tendered (and accepted) titled insurance claim and a legal cause of action for breach of contract. *Defendant's Brief @ 17.* They now say that an accepted claim and loss (breach of its contract) are "mutually exclusive." *Id.* This is nonsense, and dishonest.

Defendant is unable to honestly assert that its contract of indemnity was not breached. It missed an easement and public right-of-way over the Millies' land. That's what it contractually indemnified against. If the claim

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was accepted, it breached its contract of indemnity with the Millies. Period. Any argument to the contrary by LandAmerica is vagrant, vexatious and should be sanctionable. It is also unsupported by the legitimate record in this case.

Finally, LandAmerica makes contentions by citation to decisional law which have nothing to do with the proposition contended. For example, arguing that its actions before securing a DIV appraisal constituted an "attempt to settle" which the jury could consider, it cites to *State v. Hoffman, 64 Wn.2d 445, 392 P.2d 237 (1964). Id. @ 18-19.* The cited case has nothing to do with this contention; *Hoffman* was a non-jury trial in a criminal appeal for unlawful search. And, again, citing to *Sebers v. Curry, 73 Wn.2d 358, 438 P.2d 616 (1968),* LandAmerica argues the trial court's instructions become the law of the case when no exceptions are taken. *Id. @ 21.* The *Sebers* decision has nothing to do with LandAmerica's contention because, unlike this case, no other instructions were offered there and the only assignment of error in the *Sebers* case was for denial of a new trial, not a challenge to the instructions given. *Sebers, supra @ 359.* Also, LandAmerica cites *Keller v. City of Spokane, 146 Wn.2d 237, 249, 484 P.3d 845 (2002)* for the proposition that a misleading jury instruction is "not sufficient grounds for reversal." *Id. @ 20.* The *Keller* opinion is curious authority for LandAmerica to rely on as it unequivocally held that a

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misleading and erroneous instruction is sufficient grounds for reversal and new trial, ruled that a "clear misstatement of law is presumed to be prejudicial," and did so reverse and order new trial. *Keller, supra, @ 249-250. Keller* is authority that the Millies were prejudiced by an erroneous instruction of the court to the jury, discussed below.

Appellants respectfully request the court to pay attention to the absence of record citations upon which defendants rely, the error of those citations and the impertinence of the authority for the contentions and argument it makes.[2]

b) There was no waiver of the objection to Final Jury Instruction No. 7.

LandAmerica's principal argument in response is that no formal exception to erroneous Final Jury Instruction No. 7 was made at the trial court and, therefore, objection was waived. *Defendant's Brief @ 20.*

The standard for review of jury instructions is *de novo. Cox v.*

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[2] In *Keller*, this court considered a jury instruction that arguably allowed the jury to determine that the City of Spokane had no duty at all if it found that a motorist was negligent despite an acknowledged statutory duty of ordinary care to provide safe streets. The instruction given by the trial court was determined by this court, and our State Supreme Court, as "a clear misstatement of the law" and was presumed to be prejudicial, warranting a new trial." *Keller, supra, @ 249.* The error of the instruction given in *Keller* is closely analogous to the error of the trial court in this case. As discussed herein, Instruction No. 7 not only permitted the jury to reduce or avoid LandAmerica's liability for breach of its contract, it required them to do so. And, clearly, the jury did when it awarded no damages whatsoever to the Millies. Like *Keller*, an instruction that requires a jury in a breach of contract case to deny recovery altogether to the non-breaching party must be considered a clear misstatement of the law, legally erroneous and presumptively prejudicial.

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Spangler, 141 Wn.2d 431, 442, 5 P.3d 1265, 22 P.3d 791 (2000). An erroneous instruction or one that clearly misstates the law is presumed prejudicial. *Keller, supra @ 249.* An instruction that erroneously states the law constitutes reversible error if the party is prejudiced by the error. *Joyce v. Dep't of Corr., 155 Wn.2d 306, 119 P.3d 825 (2005).*

While it is true, as LandAmerica admits, that the parties spent three hours arguing over proposed jury instructions on the night of January 30, 2012, *Brief of Respondent @ 21,* and that no formal record was being made at the time, it is not true that the Millies failed to sufficiently preserve their objection to Jury Instruction No. 7, or waived it.

First, as mentioned, final Jury Instruction No. 7 had previously been denominated as LandAmerica's Proposed Jury Instruction No. 11, to which the Millies objected during the late night instructions conference. *RP-368.* Second, the Millies offered and filed their own proposed breach of contract instruction, being the unmodified WPI 300.02. *CP-463.* Third, the court was made aware of the Millies' insistence on a separate instruction and that no tort defenses be set up in the jury's breach of contract charge. *CP-355 @ f.n. 2 ("a breach of contract action against an insurer is a separate cause of action and the jury in this case should be instructed separately on this claim."), citing Coventry v. American States Insurance Company, 136 Wn.2d 269, 278, 961 P.2d 933 (1988) (simultaneous actions for breach of*

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contract and insurance bad faith). Fourth, LandAmerica concedes that the parties' separate breach of contract instructions were "crafted" for the very purpose of separating the tort claims from the breach of contract claim. *Brief of Respondent @ 26, ("it was never disputed, nor it is now, that the jury should have been instructed separately on the causes of action for breach of contract and bad faith, which is exactly why separate instructions were crafted for each").* The Millies made the court aware that separate breach of contract instructions were required; LandAmerica concedes its instruction should not have been used; the Millies offered a separate, unadulterated instruction from the WPI, 300.02, and Final Instruction, No. 7, was objected to in its proposed form as No. 11. The Millies did not waive objection at trial to a jury instruction which is presumptively prejudicial and clearly prejudiced them.[3] Our Supreme Court acknowledges that "of course, under CR 46, it is no longer necessary for counsel to take formal exception to the giving or refusing of instructions..." so long as he makes known the action he desires taken. *Moore v. Mayfair Tavern, 75 Wn.2d 401, 407, 451 P.2d 669 (1969); and see, Wood v. Postelwhaite, 82*

[3] And, the Millies submit, it is important to understand that the trial court hadn't afforded the parties adequate opportunity to take exceptions to jury instructions in an orderly manner at the late-night conference. It attempted to do so after the jury had been retired to deliberate. *RP-341 ("I hadn't given you a chance").* Of course, the opportunity to make objections to jury instructions seems futile and useless when the jury has already retired to deliberate with those instructions.

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Wn.2d 382, 510 P.2d 1109(1973) (same).

But, as mentioned, even if all this had not occurred, this court properly reviews Final Jury Instruction No. 7 as presumptively prejudicial and a clear misstatement of law, requiring reversal and new trial.

Moreover, LandAmerica's assertions that parties are bound at law to erroneous instructions to which no formal record exceptions are made does not apply if the record or evidence conclusively shows that the party obtaining a verdict in his favor is not entitled to recover. *Bellah v. Brown, 71 Wn.2d 603, 430, P.2d 542 (1967).* Thus, even though no formal record was being made of the three-hour late night jury conference, even if it could be said that the Millies did not insist upon and propose a separate breach of contract instruction, even if it could be said that the court was not aware of the Millies' objections to LandAmerica's proposed Jury Instruction No. 11 (and final Jury Instruction No. 7), if this record conclusively shows that LandAmerica is not entitled to its defense verdict, a remand for a new trial is required. It does. As the *Bellah* court said: "No man should be allowed to recover in any cause unless there is evidence to support his contention." *Bella, supra, @ 605, citing Greenwood v. Olympic, Inc., 51 Wn.2d 18, 315 P.2d 295 (1957); Tonkovich v. Dept. of Labor and Industries, 31 Wn.2d 220, 195 P.2d 638 (1948); Walsh v. West Coast Coal Mines, Inc., 31 Wn.2d 396, 197 P.2d 233 (1948); and see, Roberson v. Perez, 156 Wn.2d 33, 43,*

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____P.3d___ (2005) ("even failure to object to jury instructions is of no consequence..."), citing Tonkovich, supra.

As explained in the appellants' opening brief, every party is entitled to jury instructions sufficient to allow counsel to argue their theories of the case, which do not mislead the jury and properly inform the jury of the law to be applied. *Keller, supra, @ 249.* Here, clearly, final Jury Instruction No. 7 prevented the jury from considering evidence supporting the Millies' breach of contract theory of the case as it simply instructed them to find there was no breach of the contract and to rule in LandAmerica's favor on its so-called affirmative defense of "fulfillment", i.e., that it investigated the insurance claim and tendered payment based on a reasonable appraisal. *CP-476.* This was an erroneous, misleading and incorrect statement of the law, an instruction which prevented the Millies from arguing their separate breach of contract theory to the jury and which also prevented the jury from considering the Millies' breach of contract claim separately, as both sides of this dispute concede would have been correct. It's presumed prejudicial and requires reversal. *Crittenden v. Fibreboard Corp., 58 Wn. App. 649, 659, 794 P.2d 554 (1990) (an erroneous instruction given on behalf of a party who received a favorable verdict is presumed prejudicial and is grounds for reversal unless harmless).*

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The trial court here was made aware of the Millies' objection to final Jury Instruction No. 7 by their repeated insistence that the jury be instructed separately on their breach of contract claim. LandAmerica concedes the jury should have been so instructed, as if to say, it concedes final Jury Instruction No. 7 was a clear misstatement of the law, presumptively prejudicial and legally erroneous. There was no waiver by the Millies, who proposed their own separate instruction (without qualifying affirmative tort defenses), *CP-463,* which would have allowed it to find the (admitted) breach of contract it wanted to find, as reflected in their inquiry to the court beseeching it to award an amount "separate from the verdict form," *CP-497,* and in their post-trial declarations. *CP-520, CP-524, and CP-526.* The result was a recovery of nothing for an admitted breach and loss. Even if the court could determine that the Millies did not sufficiently preserve an exception to final Jury Instruction No. 7, this court properly reviews it for a clear misstatement of the law and its presumptively prejudicial effect on the jury (and the Millies) when no damages are awarded and the range of evidence at the trial was between $37,500 and $125,000, where even opposing counsel in closing argument urged the jury to "stick" a number on the verdict form consistent with one of its two appraisals. *RP-335.*

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The instructional error in this case, presumptively prejudicial, is closely analogized to cases which illuminate prejudice and reversible error. Like *Keller, supra,* the case of *Falk v. Keene Corp., 113 Wn.2d 645, 782 P.2d 974 (1989),* our Supreme Court considered the error of a jury instruction in a product liability case. The *Falk* court held a jury instruction that confounded strict liability (as the proper standard for harm caused by design defects) with an ordinary negligence standard, misstated the law and confused the jury "by leading it to believe that common law negligence principles apply to a design defect claim..." *Falk, supra, @ 646.* Because the term "negligence" appeared in the design defect instruction, and in the general negligence instructions, the jury "may have considered the general negligence instructions when attempting to apply the design defect instruction in the case." *Id. @ 655.* In this case, it is abundantly clear that Final Instruction No. 7 required the jury to consider the reasonableness of LandAmerica's claims investigation and loss determination a complete defense against the Millies' breach of contract cause of action. A breach of contract cannot be excused by instructing a jury that administering to the breach of promise was done reasonably. That's a tort defense to a breach of contract claim. Like *Falk* and *Keller*, it misstated the law, confused the jury and prohibited the Millies from arguing their theory of the case. A breach of contract does not generally give rise to an action in tort. *Dexheimer v.*

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CDS, Inc., 104 Wn. App. 464, 474, ___P.2d___ (Div. III 2001). The converse is that a breach of contract action cannot give rise to an affirmative defense of "fulfillment" by the exercise of reasonable care. *And see, In Re Adler, Coleman Clearing Corp., 247 B.R. 51, 123 (Bkrtcy. S.D.N.Y. 1999) (assumption of risk not available as a defense in a contract action); Underwriters @ Lloyd's v. Peerless Storage Co., 404 F. Supp. 492, 495 (1975) (contributory negligence not available as a defense in a contracts action); Ogilvy Group Sweden, AB. V. Tiger Telematics, 2006 U.S. Dist. Lexis 54581 (U.S. So. D.N.Y. 2006) ("a tort defense may not be used to reduce or avoid the entry of judgment on a breach of contract claim").*

In this case, the court correctly concludes that final Jury Instruction No. 7 misstated the law, prevented the Millies from arguing their theory of breach of contract, that the instruction was presumptively prejudicial to the Millies and is reversible error requiring new trial because the jury awarded the Millies nothing, where actual loss was admitted by LandAmerica, and the evidence ranged from $37,500 to $125,000 in damages.[4]

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[4] In *Falk, supra,* it was evident that the appellant did not state on the record a specific exception to the challenged instruction, but the court recognized that appellant's own proposed instruction correctly stating the law was sufficient to bring the issue properly before it. *Falk, supra, @ 658.* That is the case here. *CP-463 (Millies' proposed instruction). And see, Berry v. Dumdai, 6 Wn. App. 861, 864, 496 P.2d 975 (Div. III, 1972) (instructions which affect the jury in deciding the distinctly separate issue of damages constitute reversible error).*

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c) There is no substantial evidence to support the jury's verdict.

As mentioned, regardless of the sufficiency of any formal record exception, misleading jury instructions require reversal for new trial if erroneous and prejudicial. *Keller, supra*

Similarly, reversal and new trial are required if no substantial evidence exists to support a jury's verdict. *Hojem v. Kelly, 93 Wn.2d 143, 145, 606 P.2d 275 (1980) (verdict cannot be founded on theory or speculation); Samuelsen v. Merry Mfg. Co., 50 Wn.2d 819, 822, 314 P.2d 634 (1957) (evidence to support a verdict must be substantial); Helman v. Sacred Heart Hospital, 62 Wn.2d 136, 148, 381 P.2d 605 (1963); Bellah, supra, @ 605 (no verdict may stand without evidence).*

LandAmerica's defense verdict here excusing its contractual obligation to pay the Millies for their loss, lacks evidence altogether. The contract existed. *CP-17; CP-342.* It indemnified the Millies against defects in title. *CP-350; CP-255.* A defect was admitted. *CP-255 (easement not found in title examination).* The claim was accepted. *RP-319; RP-334.* The Millies' loss, by conflicting expert testimony, was pegged between $37,500 and $125,000. *CP-295; CP-90.* Opposing counsel even implored the jury to "stick" his expert's number on the Special Verdict Form. *CP-335.* But for an erroneous, misleading, prejudicial final jury instruction, the jury would have done so; but its "hands were tied." *CP-522; CP-528.* It

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even asked the court to allow it to award an amount "separate from the verdict form." *CP-497.* Under the circumstances, it cannot honestly be contended that any evidence supported LandAmerica's defense verdict. As the court said in *Bella, supra:* "No man should be allowed to recover in any cause unless there is evidence to support his contention," *Id. @ 605,* regardless of the sufficiency of any exception.

The long established rule in Washington is that evidence sufficient to support a verdict must be substantial. *Samuelsen, supra @ 824.* Substantial evidence means evidence which would convince an unprejudiced thinking mind of the truth of the fact to which the evidence is directed. *Hojem, supra, @ 145.* A verdict cannot be founded on mere theory or speculation. *Id, citing Arnold v. Sanstol, 43 Wn.2d 94, 98, 260 P.2d 327.*

No unprejudiced thinking mind could be convinced of the truth that the Millies sustained no damages as a result of their insurer's breach of its contract of indemnity. And particularly, where the expert witnesses who testified at the trial as to the diminution in value of their property as a result of the unrecorded public right-of-way was between $37,500 and $125,000. All of the jurors on the case agreed the Millies were entitled to have something in the way of damages. *CP-520; CP-524; CP-526 (jurors' declarations).* They begged the court by inquiry to let them award damages

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"separate from the verdict form." *CP-497.* It is plain that no substantial evidence supports the defense verdict rendered in favor of defendant LandAmerica awarding the plaintiffs nothing. It's just as clear that the instructions misled the jury and confused them, even after sending out a question. *CP-497.* Afterward, being told to just follow the court's instructions again, it is clear that no damages could be awarded under any of the plaintiffs' theories in the case because of erroneous Final Jury Instruction No. 7 excusing LandAmerica's admitted breach of contract based on its affirmative (tort) defense of "fulfillment" by reasonable investigation and tender of payment. *CP-476.*

It should be remembered, on review of trial proceedings that the erroneous jury instruction resulting in a damage award of nothing was magnified and compounded by the misconduct of counsel during closing argument, and the jury, as discussed below.

d) Misconduct of counsel.

During closing argument, counsel for the defendant insurer acknowledged to the jury that the Millies' title claim "was an accepted claim." *RP-319.* It was "accepted immediately." *RP-325.* But he also told the jury falsely that all of the Millies' claims made in the case "fall within the same umbrella: was LandAmerica reasonable?" *RP-330.* And then, despite the court's valid final Jury Instruction No. 9, *CP-478-480,* setting

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forth the "laundry list" of unfair and deceptive acts and practices in the business of insurance (tracking verbatim the language of applicable statutes and governing WAC regulations), defense counsel told the jury, "I don't want you to look at it." He told the jury to ignore the court's Final Instruction No. 9 and then, he told them that every single state law violation enumerated verbatim in Final Jury Instruction No. 9 "hinges on reasonableness." *RP-333-334.*

There are 15 separate code or regulatory violations on Final Instruction No. 9. None of them hinge on reasonableness. They are all statutorily – or regulatorily – designated unfair acts in the business of insurance. *CP-478.* They're the law. It is abundantly clear, however, by the jurors' declarations following trial of the case, that they did exactly what defense counsel told them to do -- ignore Final Jury Instruction No. 9, even though they thought the defendant had violated at least one provision of state law or its implementing regulations. *CP-521; CP-530.* In fact, the majority of jurors, following defense counsel's admonition to ignore state law and its implementing regulations, openly declared that it was a "stupid law" or otherwise, that it didn't make sense or "wasn't right." *CP-521; CP-530.*

No party has a right to tell a jury to ignore the law or the court's instructions for the purpose of causing them to rebel against it and refuse to

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follow it. This is misconduct of counsel. It should be considered in conjunction with an erroneous jury instruction, the jury's inquiry to the judge and the court's response, the failure of the jury to award anything to the Millies despite an admitted breach and loss, the jury's own misconduct in believing defense counsel, making its own independent legal determination and injecting personal opinion into the verdict.

Juror's declarations are probative of the existence of misconduct. *Byerly v. Matsen, 41 Wn. App. 495, 499, 704 P.2d 1236 (Div. III 1985).* Statements by prosecution or defense to the jury upon the law must be confined to the law as set forth in the instructions given by the court. *State v. Davenport, 100 Wn.2d 757, 760, 675 P.2d 1213 (1984).* It is obvious that defense counsel's admonition to the jury to ignore the court's Final Jury Instruction No. 9 also misled and confused the jury and, unfortunately, prompted them to agree with defense counsel to deny the Millies' damages which they otherwise wanted to give and would have given. Defense counsel's direction to the jury in closing arguments to ignore the law (and the jury's acceptance and acquiescence in it) rise to the level of a deprivation of the Millies' constitutional right to fair trial in this case. It constitutes jury nullification.

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e) Jury misconduct.

In addition to an erroneous instruction and the misconduct of counsel, the jury itself prejudiced the Millies' fair trial. The record discloses that Juror #21 injected her personal experience into the deliberations by telling the jurors that she "knew the trial court judge," knew him to be fair and that he would "pencil in" something for the Millies in the way of a fair settlement of their claims. Juror #5, the foreperson, reinforced that understanding. *CP-522 (juror Rick Horton); CP-528 (juror Tom Hale).* It must be clear that the jury was so hopelessly confused and misled at this point, they had nothing more to underpin a verdict than to follow defense counsel's admonition to ignore the law and to follow the erroneous instruction itself. They had to inject personal experience and opinion into the proceeding and leave it to the trial judge to pencil something in. This is jury misconduct prejudicing the Millies. *Gates v. Jensen, 20 Wn. App. 81, 87, 579 P.2d 374 (1978), rev'd on other grounds, 92 Wn.2d 246, 595 P.2d 219 (1979).* This kind of misconduct cannot be excused as inhering in the verdict. *Id.*

f) A new trial is required.

Where the proponent of a new trial argues the verdict was not based upon the evidence, appellate courts look to the record to determine whether there was sufficient evidence to support the verdict. *Palmer v. Jensen, 132*

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Wn.2d 193, 197, 937 P.2d 597 (1997). It is an abuse of discretion to deny a motion for a new trial where the verdict is contrary to the evidence. *Id. @ 198.* The *Palmer* court, remarking that the adequacy of a verdict turns on the evidence, remanded for new trial where the plaintiffs were awarded no damages for pain and suffering as being contrary to the evidence. Here, despite LandAmerica's protestations otherwise, the main reason the jury awarded nothing to the Millies was because of erroneous and misleading Final Jury Instruction No. 7. In fact, the jury asked the court if it could award something separate from the verdict form but, being denied, felt its hands were tied by the erroneous language in Final Jury Instruction No. 7 regarding the defendant's affirmative defense of "fulfillment". The evidence at trial established the range of damages as between $37,500 and $125,000. The jury's verdict is contrary to the evidence. The trial court abused its discretion denying the Millies' motion for new trial (and for judgment as a matter of law).[5]

Multiple other grounds support this court's reversal and remand for new trial as well -- an erroneous jury instruction which actually prejudiced the Millies, the misconduct of counsel admonishing the jury in closing arguments not to look at Final Jury Instruction No. 9 and asserting that

[5] Even the trial court was confused by the verdict. It called the issue of diminution damages "unusual, even unique." *RP-349.* It directed the parties to brief the question of whether or not "the diminution claim/determination remains." *CP-533.*

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statutory and regulatory dictates should be ignored and the act and process by which the jury acquiesced to opposing counsel's admonitions and made its own independent examination of the law, applied it, and left it to the judge to do what they knew the evidence established, i.e., "pencil something in" as an award of damages for the Millies.[6]

A juror's introduction of intrinsic evidence into deliberations is misconduct entitling a party to new trial if there are reasonable grounds to believe that the party was prejudiced as a result. *Kuhn v. Schnall, 155 Wn. App. 560, 575, ____P.3d____ (2010).* Intrinsic evidence is information that is outside all the evidence admitted at trial, either orally or by document. *Id.* Here, that would include the jury's determination (from however many jurors) that the judge was known to them to be a fair man and would "pencil something in" for the Millies despite the evidence they heard about the range of damages.

II. Conclusion

It must be obvious that the jury got no further in its deliberations than consideration of Jury Instruction No. 7, the breach of contract instruction. Had the trial court properly instructed the jury, as proposed by

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[6] A majority of the jury, at opposing counsel's wrongful insistence, refused to follow Final Jury Instruction No. 9, and went so far as to call it "stupid". This might be viewed as a form of jury nullification akin to what happened in *State v. Elmore, 155 Wn.2d 758, ___P.3d____ (2005),* where only one juror refused to follow the law no matter what it said prompting our Supreme Court to uphold the Court of Appeals and remand for new trial.

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the Millies in their separate breach of contract instruction, the WPI form, there can be no doubt they would have awarded the plaintiff damages for breach of the contract, an amount somewhere between $37,500 and $125,000, as this was the range of damages evidence at the trial and as breach of the Millies' title policy was admitted (despite what LandAmerica now says in its briefing). The Millies had a contract right to recover damages. The jurors knew this. It prompted their question. Final Jury Instruction No. 7 did not accurately state the law. A contract of indemnity against defects or encumbrances of title cannot be excused or eliminated by an insurer, with a fiduciary responsibility to its insured, on the grounds that it acted reasonably in processing the claim. Reasonableness is not a defense to a breach of contract. Reasonableness is a tort defense which cannot be used to reduce or avoid contract liability. The jury clearly stumbled over Final Instruction No. 7. Confused, it asked the court to clarify by submitting a question. It knew the contract had been breached and knew the Millies were entitled to an award of damages but couldn't reach that determination because of the erroneous instruction regarding the alleged "fulfillment" of the contract. Being erroneous and misleading, it is presumed prejudicial. As prejudice is actual (no damages award at all), reversal is required.

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No evidence supports the Millies' award of zero damages. Importantly, had the erroneous portion of Instruction No. 7 been omitted, the jury would have entered an amount within the range of evidence, and from there, gone on to determine LandAmerica's liability under the Millies' other claims because, clearly, that liability depended in part on what the amount was. Had the jury awarded the low end of the damages range, $37,500, its next determination under the instructions would have been to consider Instruction No. 9 asking, in part, if they thought that was a lowball amount in violation of the Insurance Fair Conduct Act, *CP-478 (#7: compelling litigation by offering substantially less), Id. (#15),* or if LandAmerica had really attempted to settle before exercising a contract right to appraisal, among other things. It becomes obvious that being handcuffed by Instruction No. 7, then being told to ignore Instruction No. 9, the entirety of the jury's deliberations on all of the Millies' causes of actions was tainted, warranting a new trial altogether.

The trial court erred in denying the Millies' post-trial motion therefore and for Judgment as a Matter of Law.

RESPECTFULLY SUBMITTED this 15th day of April 2014.

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