No. 315215

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

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.

BRIEF OF RESPONDENT LANDAMERICA TRANSNATION

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I. INTRODUCTION

This case involves an appeal from a jury verdict in favor of LandAmerica Transnation ("LandAmerica" or "Respondent") where no damages were awarded to Richard and Susan Millies ("Millies" or "Appellants") for their claims of breach of contract, negligence, and alleged violations of the Consumer Protection Act ("CPA") and Insurance Fair Conduct Act ("IFCA"). The lawsuit involved the primary question of whether LandAmerica reasonably handled the title insurance claim filed by the Appellants in response to the discovery of an undisclosed easement road on their property, and a secondary question of what dimiunition in value should be attributed to the property because of the road.

II. NO ASSIGNMENT OF ERROR

A. No Assignments Of Error

LandAmerica does not assign error to any of the following decisions by the trial court:

(1) The inclusion of Jury Instruction Number 7, instead of Appellants' proposed jury instruction for breach of contract;

(2) The denial of Appellants' Motion for Judgment as a Matter of Law;

(3) The denial of Appellants' Motion for New Trial.

B. Issues Pertaining To The Assignment Of Error

(1) Whether Appellants waived the right to argue for exclusion of Jury Instruction Number 7 where no objection was raised at trial? *Appellants' Assignments of Error 1 and 2*

(2) Even if there had been an objection raised to Jury Instruction Number 7, is it proper for a Court to include a breach of contract instruction with an affirmative defense of fullfillment where it is plead in the Answer? *Appellants' Assignments of Error 1 and 2*

(3) Did the affirmative defense used in Jury Instruction Number 7 prejudice Appellants' case? *Appellants' Assignments of Error 1 and 2*

(4) Was the jury's verdict supported by substantial evidence? *Appellants' Assignments of Error 3 and 4*

(5) Was there any misconduct by the jury? *Appellants' Assignments of Error 3 and 4*

III. STATEMENT OF THE CASE

On or about August 8, 2006, the Millies purchased (the "Sale") the real property commonly known as 4629 East Deer Lake Road, Loon Lake, Washington (the "Property"). **Exh. 133**. LandAmerica issued an owner's title policy to the Millies under Number A52-0110790 on or about the same date (the "Policy"). *Id.*

On March 30, 2007, LandAmerica received a letter from Columbia Title Company in Stevens County indicating the Millies were concerned about a roadway and easement (the "Bisecting Road") on their property they claimed to be unaware of at the time of purchase. **Exh. 202.** No claim was actually filed at that time. **Supplemental Verbatim Transcript of Proceedings ("STP") 190.**

As a courtesy, LandAmerica claims representative Donna LaRocca ("LaRocca") sent an email to the Milles on April 24, 2007, to make sure they knew the process for filing a claim. **Exh. 203.** On July 19, 2007, the Millies formally made a claim on the Policy, alleging that an easement of record was missed in the Sale and that coverage should be provided under the Policy. **Exh. 204.** The July 19 letter asked for damages of $125,000.00, 50% of the purchase price of the Property. *Id.*

Also on July 19, 2007, LaRocca sent an email to the Millies acknowledging receipt of the claim letter, and providing assurances that a coverage decision and options for resolution would be sent within the 30 day time limit imposed under the insurance rules. **Exh. 205.** On August 17, 2007, LaRocca sent a follow up letter to the Millies, indicating the claim was covered under the policy. **Exh. 206.** The letter further acknowledged that the Millies were demanding $125,000.00 in damages. *Id.* The letter referenced Section 7(a) in the Policy to establish a method

to calculate a potential loss, by comparing the value of the Property as insured to the value of the Property subject to the alleged defect. *Id.* In that regard, LandAmerica agreed in that initial letter to hire an MAI appraiser to conduct a formal dimunition-in-value ("DIV") appraisal. *Id.*

LaRocca initially contacted the MAI appraisal firm Auble, Joliquer and Gentry ("AJG") in Spokane, Washington on or about the beginning of September 2007. **Original Verbatim Transcript of Proceedings ("TP") 196.** A formal letter was mailed to AJG on September 18, 2007, asking for the appraisal, and was followed by the signed formal engagement letter from AJG on the same day. **Exh. 207.** A site visit was conducted on October 12, 2007, by AJG, and a report completed on November 9, 2007 (the "AJG Appraisal"). **Exh. 134.** The AJG Appraisal concluded the DIV after the easement was $25,000.00. *Id.*

On November 13, 2007, LaRocca sent a letter to the Millies extending an offer for the full amount of the DIV as expressed by the AJG Appraisal, $25,000.00. **Exh. 210.** The letter included the AJG Appraisal and asked for an initial response by the first week of December 2007. *Id.* Appellants responded to the offer three (3) months later on February 4, 2008. **Exh. 211.** In that letter, the Millies rejected the offer of $25,000.00 and again alleged the DIV was $125,000.00, but make a reduced demand for $100,000.00. *Id.* No appraisal of any kind, formal or informal, was

attached to the February 2008 letter suggesting a professional basis for the claimed loss in value. *Id.* The letter referenced an opinion of an appraiser, Skip Sherwood, but no report from Mr. Sherwood was included. *Id.* Mr. Sherwood never completed a professional appraisal report for a potential DIV in this matter. **STP 20; TP 208.**

On March 7, 2008, LaRocca sent the Millies February 2008 letter to AJG so that the professional MAI could review the claims made by the Millies in relation to the AJG Appraisal. **Exh. 213.** She asked for a response by March 21, 2008. *Id.* AJG issued a supplemental report on April 2, 2008, to LandAmerica indicating no change in the initial AJG Appraisal was warranted based on the claims made in the Millies' February 2008 letter. **Exh. 215.**

On May 13, 2008, LandAmerica sent the response letter to the Millies by email and hard copy, again offering $25,000.00 on the Policy to settle the claim. **Exh. 216.** Appellants responded four (4) months later on September 25, 2008, still demanding $100,000.00 for the alleged DIV loss. **Exh. 217.** A Summons and Complaint was attached for suit against LandAmerica for the present lawsuit. *Id.*

After the September 25, 2008, letter from the Millies communications between the parties halted while LandAmerica waited for service and filing of the summons and lawsuit. **TP 208.** On June 30,

2009, the Millies sent written notice to LandAmerica of their intent to file an action under RCW 48.30.015(8)(a). **Exh. 218**. LandAmerica claims representative Tabitha Campbell ("Campbell") responded less than a week later on July 7, 2009. **Exh. 219**. On July 20, 2009, Campbell sent an email to the Millies following up on the prior letter, and again offering to resolve the matter with a DIV payment. **Exh. 220**.

When it was still unclear whether the lawsuit was going to be filed or not, LandAmerica tendered a check to the Appellants for $25,000.00 on July 31, 2009. **Exh. 221**. The Millies returned the check to LandAmerica on or about August 4, 2009. Appellants filed the underlying lawsuit on August 11, 2009. **CP 1**.

LandAmerica filed a motion for partial summary judgment on December 3, 2012, solely on the negligence claim and alleged violations of the CPA and IFCA. **CP 520**. The trial court denied the motion on January 22, 2013.

A jury trial began on January 28, 2013. At the inception of the trial, LandAmerica moved to bifurcate the trial, so the jury might first be presented with the breach of contract claim, and then presented with the remaining causes of action. **STP 4-5**. Appellants objected to the bifurcation of the trial, and the trial court denied the motion. *Id.*

The trial lasted four (4) days, and the jury verdict was for LandAmerica, finding that no cause of action was sustained by the admitted evidence. **CP 498-99**. No damages were awarded to the Appellants. *Id.* Appellants moved for a New Trial and for a Judgment as a Matter of Law on February 7, 2013. **CP 509, 511**. The trial court denied the motions. **CP 532**. The Appellants filed a Second Amended Notice of Appeal on May 16, 2013. **CP 540**.

IV. ARGUMENT

A. Standard Of Review

Since none was provided by Appellants, Respondent sets forth the relevant standards of review for each of the alleged Assignments of Error. RAP 10.3.

i. Standard Of Review For Motion For Judgment As A Matter Of Law

A motion for judgment as a matter of law is properly granted when, viewing the evidence in the light most favorable to the nonmoving party, the court can say there is no substantial evidence or reasonable inference to support a verdict for the nonmoving party. *Sing v John L. Scott, Inc.*, 134 Wash. 2d 24, 29, 948 P.2d 816 (1997). "The motion should be granted only if the court can say, as a matter of law, that no reasonable person could have found in favor of the nonmoving party." *Ayers v. Johnson & Johnson Baby Prods. Co.*, 117 Wash. 2d 747, 753,

818 P.2d 1337 (1991) (judgment notwithstanding the verdict). The Court of Appeals applies the same standard when reviewing a decision of the trial court. *Hollmann v. Corcoran,* 89 Wash. App. 323, 331, 949 P.2d 386 (1997).

ii. Standard Of Review For Motion For New Trial

The denial of a motion for a new trial is particularly within the discretion of the trial court and "will not be disturbed absent a manifest abuse of discretion." *Palmer v. Jensen,* 81 Wn. App. 148, 151, 913 P.2d 413 (1996). A trial court abuses its discretion only when it acts with obvious unreasonableness or when its exercise of discretion is based on untenable grounds. *Allard v. First Interstate Bank of Wash., N.A.,* 112 Wn. 2d 145, 148, 768 P.2d 998, 773 P.2d 420 (1989). The finding of the jury, upon substantial, conflicting evidence properly submitted to it, is final. *Rettinger v. Bresnahan*, 42 Wash. 2d 631, 633-34, 257 P.2d 633 (1953), *quoted in Bunnell v. Barr*, 68 Wash. 2d 771, 777, 415 P.2d 640 (1966).

iii. Standard Of Review For Jury Instructions

The Court of Appeals reviews jury instructions de novo. *Cox v. Spangler,* 141 Wash. 2d 431, 442, 5 P.3d 1265, 22 P.3d 791 (2000). Jury instructions are sufficient when they allow counsel to argue their case

theories, do not mislead the jury, and, when taken as a whole, properly inform the jury of the law to be applied. *Blaney v. Int'l Ass'n of Machinists & Aerospace Workers, Dist. No. 160,* 151 Wn. 2d 203, 210, 87 P.3d 757 (2004). Instructions that are merely misleading are not grounds for reversal unless they cause prejudice. *Keller v. City of Spokane,* 146 Wash. 2d 237, 249, 44 P.3d 845 (2002).

B. Appellants' Statement Of The Case Should Be Disregarded Because It Is Argumentative And Without Basis In Fact

As a preliminary matter, large sections of the Appellants' Statement of the Case fail to meet the simple criteria of RAP 10.3. RAP 10.3 dictates the "Content of Brief", and states in pertinent part,

> (a) Brief of Appellant or Petitioner. The brief of the appellant or petitioner should contain under appropriate headings and in the order here indicated:
> ...
> (5) Statement of the Case. A *fair statement* of the facts and procedure relevant to the issues presented for review, *without argument*. Reference to the record must be included for each factual statement.
> ....

Wash. R. App. P. 10.3 [Emphasis added]

The following arguments and mistatements are made in Appellants' Statement of the Case:

(1) That the general public had easement rights to the Bisecting Road. Appellants' Brief, p. 5. The issue of whether the general public (or

anybody else) had access to the Bisecting Road was contentiously debated both before and during trial. **TP 213; STP 71-72, 100-01.** Appellants' glib citations to the record do not at all conclusively establish this as fact. It is argumentative and should be disregarded.

(2) That a breach of contract was admitted by LandAmerica concerning the Policy. Appellants' Brief, p. 3 (Issues Pertaining to Assignments of Error, No. 3), 5, 9, 11, 16. It was not admitted. *See* **CP 26.** Certainly this is the strangest assertion Appellants make in their appeal of this case, since an entire four-day jury trial was committed to a determination of that very issue. Jury instructions were prepared on breach of contract by *both parties*. **CP 358-467.**

Appellants have never fully understood the difference between the tendered title insurance claim, and the legal cause of action for breach of contract. Appellants' theory of this case has been, all along, that the title claim was inseparable from the asserted causes of action, and that LandAmerica admitted a breach of contract in accepting the claim as tendered. *See* Appellants Brief, throughout, and **TP 354-55.** Appellants are mistaken. The title claim and causes of action in the lawsuit are mutually exclusive - acceptance of the Appellants' title claim does not equate to an admitted breach of contract in a direct lawsuit against the title

company. Any reference to an admitted breach of contract is argumentative and should be disregarded.

(3) That damages are admitted. Appellants Brief, p. 4 (Issues Pertaining to the Assignments of Error, No. 3). As argued directly above concerning no admitted breach of contract, the issue of damages for a legal cause of action was highly contested in this case. Appellants have again mingled the accepted title insurance claim with a cause of action for breach of the Policy. Damages are in no way admitted with relation to any of the asserted causes of action in Appellants' complaint (breach of contract, negligence, CPA and IFCA claims). *See* **CP 26**. The Appellants' claim was accepted, and an offer was made by LandAmerica *pursuant to* the Policy's clause pertaining to determination of "liability" for an encumbrance on a property (in this case the Bisecting Road). **Exh. 206, 210**. Any reference to admitted damages is argumentative and should be disregarded.

(4) That LandAmerica made no attempt to settle the Appellants' claim before obtaining an appraisal. Appellants' Brief, p. 6. At no time prior to or during trial did LandAmerica concede that argument. Nor it is a question of law for the court to rule upon (why else would there be a WPI (320.06) for such a specific question?). Whether LandAmerica's actions before securing an appraisal pursuant to the Policy

terms constituted an attempt to settle was a question entirely for the jury to consider. *State v. Hoffman*, 64 Wash. 2d 445, 392 P.2d 237 (1964). Any such reference is argumentative and should be disregarded.

(5) That LandAmerica's appraisal by Auble, Joliquer and Gentry was based on an unreasonable investigation. Appellants' Brief, p. 8. The credibility and weight of witness testimony is solely for the jury to consider, and Appellants cannot simply argue it now as certainty from an appeal of a rendered verdict. *See* WPI 1.02, and *State v. Hoffman*, 64 Wash. 2d 445, *supra*. Any reference to such assertion is argumentative and should be disregarded.

(6) That the jury was confused. Appellants' Brief, pp. 10-14. Appellants' entire discussion in the Statement of the Case about the jurors deliberations is not undisputed or admitted evidence. It is immaterial and inheres in the verdict (as argued below in section D(i)). The entire discussion from page 10-14 in Appellants' Brief is argumentative and should be disregarded.

C. The Inclusion Of Jury Instruction Number 7 Was Neither Erroneous Nor Prejudicial

Jury Instruction Number 7 permitted Appellants every opportunity to argue their case theories, did not mislead the jury, and properly informed the jury of the law concerning breach of contract. Appellants

were not prejudiced by the inclusion of the instruction and their argument the instruction was misleading is not sufficient grounds for reversal. *Keller v. City of Spokane,* 146 Wash. 2d 237, *supra* at 249.

i. Appellants Waived Objection To Jury Instruction Number 7 On Appeal Because They Failed To Object At Trial

Even though given the opportunity to object to the inclusion of Jury Instruction Number 7 throughout deliberation on the instructions, Appellants did not do so. The record reflects the trial court giving both parties an opportunity to object to the proposed instructions and verdict form on January 31. **TP 341-48.** Appellants were silent as to Jury Instruction Number 7. *Id.* Appellants cite portions of the record to support the contention they did voice objection to the instruction, but the record does not support these attempts. Appellants cite, in the Statement of the Case, TP 463 and CP-368 for the supposition that they "expressly objected" to Instruction Number 7. Appellants Brief, pp. 9-10, footnote 1. This citation does not represent a moment when Appellants objected to Jury Instruction Number 7, but rather the Appellants request "the jury … be instructed separately on [the breach of contract] claim in their *trial brief.*"[1] **CP 355.** An issue not raised in the trial court may not be considered for the first time on appeal. *State v. Tradewell,* 9 Wash. App.

[1] This trial brief footnote reference is also discussed *infra* at p. 26-27.

821, 515 P.2d 172, *cert den* 416 U.S. 985, 40 L.Ed.2d 762, 94 S.Ct. 2388 (1973). When no exceptions are taken to trial court's instructions, they become law of the case. *Sebers v. Curry*, 73 Wash. 2d 358, 438 P.2d 616 (1968).

After dismissing the jury for the night on January 30, the parties argued for three (3) hours over the proposed jury instructions. **TP 359-71**. The verbatim report of proceedings does not capture these deliberations, however, because the record was not active throughout that evening. *Id.* What the record does shows is that, just before both parties delivered closing arguments to the jury, the trial judge gave both sides an opportunity to make a record of the exceptions they took to admitted and rejected instructions. *Id.* During this opportunity, it is undisputed that Appellants made no objection to Jury Instruction Number 7. *Id.* Considering the measures Appellants have taken now, appealing an unfavorable verdict on the basis of one single jury instruction, it would seem unfathomable that they would not have raised an objection on the record to that same instruction at trial at every opportunity. Absent that objection, Appellants waived their right to appeal the inclusion of Instruction Number 7, and the Court should exclude all Assignments of Error premised on this argument.

ii. Even If Appellants Had Timely Objected To Jury Instruction Number 7 At Trial, The Court Properly Included It In The Jury Instructions Because It Accurately States The Law Of The Case

Jury Instruction Number 7 was proper because the affirmative defense of fulfillment of the contract was raised in Respondent's Answer. **CP 26.** There is no record of appellants making an objection to the inclusion of this affirmative defense before appeal.[2]

Appellants' attempt to commingle this affirmative defense with some tort defense has no basis in law, which is why no legal authority is cited in their brief to support its assertion. The only reference Appellants make to this assertion in the Argument section in their Brief is one sentence: "Final Jury Instruction No. 7 confounded a tort defense with a straight forward (and admitted) breach of contract claims". Appellants' Brief, p. 16. Without legal authority to support their assertion, the argument must fail here on appeal. *In re Marriage of Fahey*, 164 Wash.

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[2] Washington Superior Court Rule 12 permits a motion to strike a defensive pleading as follows:

> (f) Motion to Strike. Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon him or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

WA R SUPER CT CIV CR 12

The record is absent any objection from Appellants to the affirmative defense at issue.

App. 42, 262 P.3d 128, *review denied* 173 Wash.2d 1019, 272 P.3d 850 (2011).

Even Appellants' alleged alternate jury instruction on breach of contract does not demonstrate an express objection, but rather their failure to acknowledge a properly pled affirmative defense.[3] Appellants allege to have offered WPI 300.02 for the jury to consider on the breach of contract claim. Appellants' Brief, P. 10, footnote 1. But the trial court properly included Defendant's proposed WPI 300.03 because fulfillment of the terms of a contract is an affirmative defense to a suit for breach of contract. Washington Superior Court Civil Rule 8 addresses the "General Rules of Pleading", and states as to affirmative defenses the following:

> (c) Affirmative Defenses. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fault of a nonparty, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitation, waiver, *and any other matter constituting an avoidance or affirmative defense....*

WA R SUPER CT CIV CR 8 [Emphasis added]

[3] Appellants also adamantly opposed Respondent's pre-trial motion to bifurcate the trial and hear the breach of contract cause of action first. **STP 4-5.**

Here, fulfillment of the contract terms clearly falls under "any other matter constituting an ... affirmative defense".

But most importantly, it is impossible that this particular affirmative defense prejudiced Appellants. While a prejudicial jury instruction can be grounds for an appeal, such is not the case here. Appellants cite *Crittenden v. Fibreboard Corp.* for support of the prejudice argument, but then fail to include the entire citation relevant to Division 1 in that case. Appellants' Brief, p. 15. The *Crittendon* court states, "'an erroneous instruction given on behalf of the party who received a favorable verdict is presumed prejudicial and is grounds for reversal *unless it is harmless*'. A harmless error is a trivial error which in no way affected the outcome" of the case. *Crittenden v. Fibreboard Corp.*, 58 Wash. App. 649, 659, 794 P.2d 554, 559-60 (1990), *amended*, 803 P.2d 1329 (Wash. Ct. App. 1991) [Emphasis added], *citing State v. Wanrow,* 88 Wash. 2d 221, 237, 559 P.2d 548 (1977). The harmless error language was omitted from Appellants' argument. Appellants' Brief, p. 15.

Here, the additional language of the affirmative defense is harmless, and cannot be said to have prejudiced Appellants in any way, since it is a complete restatement of the basic breach of contract instruction at WPI 300.02. Simply put, it neither adds nor subtracts

anything for the jury to consider – it is superfluous.[4] It is clear from the instruction itself the jury has to go through the Plaintiffs' burden analysis in subparts (1) through (4) of whether the Policy was breached because of LandAmerica's reliance and offer based on the initial AJG Appraisal, before they ever get to the affirmative defense subpart (1) of the instruction. Paragraph (3) of the Plaintiff's burden specifically instructs the jury to evaluate whether the contract was breached "as claimed by the Plaintiffs", which in this case was the contention that the initial AJG Appraisal and offer from LandAmerica was unreasonable. **CP 1.** Appellants shoulder that burden irrespective of the included affirmative defense, and the use of WPI 300.03 by the trial court over WPI 300.02 did

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[4] Jury Instruction Number 7, states in its entirety:

Plaintiffs have the burden of proving each of the following propositions on their claim of breach of contract:

(1) That Plaintiffs entered into a contract with Defendant, containing the following terms:
This policy is a contract of indemnity against actual monetary loss or damage sustained or incurred by the insured claimant who has suffered loss or damage by reason of matters insured against by this policy and only to the extent herein described.
The difference between the value of the insured estate or interest as insured and the value of the insured estate or interest subject to the defect, lien or encumbrance insured against by this policy.

(3) That Defendant breached the contract as claimed by Plaintiffs;

(4) That Plaintiffs were damaged as a result of Defendant's breach.

If you find from your consideration of all the evidence that any of these propositions has not been proved, your verdict should be for the Defendant. On the other hand, if each of these propositions has been proved, then you must also consider the affirmative defense claimed by the Defendant.

Defendant has the burden of proving the following affirmative defense:

(1) That Defendant fulfilled the terms of the contract with Plaintiffs by investigating the claim and tendering payment in a timely manner based on a reasonable fair market appraisal.

If you find from your consideration of all the evidence that this affirmative defense has been proved, your verdict should be for Defendant on this claim. On the other hand, if this affirmative defense has not been proved, then your verdict should be for Plaintiffs on this claim.

CP 468-96.

not prejudice Appellants in any way. In the most elementary sense, the affirmative defense just restates Appellants' burden.

Appellants also strangely contend they asked the trial court to "instruct the jury separately" on the breach of contract claim, by citing a footnote in their trial brief. Appellants' Brief, p. 16. A footnote in a trial brief does not constitute a request on the record during a jury trial for a particular instruction to be given to the jury. *Seattle v. Rainwater*, 86 Wash. 2d 567, 571, 546 P.2d 450 (1976). More to the point, Appellants' cited case in the trial brief, *Coventry,* only stands for the proposition that a plaintiff can *bring* a contract claim simultaneously with a bad faith claim. *Coventry Associates v. Am. States Ins. Co.*, 136 Wash. 2d 269, 278, 961 P.2d 933, 936 (1998). The case has nothing to do with jury instructions, and Appellants' attempt to squeeze this obscure reference into a formal request of the trial court makes no sense. Finally, it was never disputed (nor is it 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.

Instruction 7 accurately states the law, permitted Appellants to argue their case theory, and did not mislead the jury. Appellants wanted the jury to consider whether LandAmerica breached the Policy by relying

on the initial AJG Appraisal to make an offer according to the Policy terms. Instruction Number 7 is not an obstacle to that task and the trial court's decision to include it should not be overturned.

D. There Was No Manifest Abuse Of Discretion By The Trial Judge In Denying Appellants' Motion For New Trial

The denial of a new trial on grounds of alleged misconduct of the jury is only possible where it clearly appears that the trial court's discretion has been abused, or that there was palpable error. *Mathisen v. Norton*, 187 Wash. 240, 60 P.2d 1 (1936). The mere possibility of prejudice is not sufficient. *Spratt v. Davidson*, 1 Wash. App. 523, 463 P.2d 179 (1969).

i. The Jury Did Not Commit Misconduct In Reaching Its Verdict

The breach of contract was not admitted in this case. Before a jury can decide an appropriate measure of damages for a breach of contract cause of action, it must find the contract was actually breached. "A breach of contract is actionable only if the contract imposes a duty, the duty is breached, and the breach proximately causes damage to the claimant." *C 1031 Properties, Inc. v. First Am. Title Ins. Co.*, 175 Wash. App. 27, 33-34, 301 P.3d 500, 503 (2013). Here, the jury did not find LandAmerica breached its contract, and thus did not have to entertain damages pursuant

to the alleged breach. **CP 498-99.** Appellants seek to put the cart before the horse.

There is no citation to the record of proceedings in Appellants' argument that points to specific claims of alleged "misconduct, irregularity, inadequate damages ... [or] verdict contrary to the evidence at trial." Appellants Brief, p. 18. What can be gleaned from the argument, however, is that it somehow hinges on the affidavits secreted from jurors Burlington, Hale and Horton. Appellants' Brief, pp.12-13. And while it is impossible to sort out from Appellants' Brief which allegations correspond with which CR 59 criteria, they mostly hover around alleged juror misconduct and an alleged verdict contrary to the evidence at trial. What is clear from the record is the jury was polled following the reading of the verdict and the decision was unanimous in favor of LandAmerica. **CP 498-99.**

In considering a motion for new trial on grounds of "misconduct of the jury," a trial court may not consider affidavits in support of or against the motion as to those things which inhere in the verdict. *State v. McKenzie*, 56 Wash. 2d 897, 355 P.2d 834 (1960) (improper of trial court to consider affidavit of juror who misinterpreted instruction and law when discussing case with other jurors); *See also Hafner v. United States Fidelity & Guaranty Co.*, 126 Wash. 670, 219 P. 16. (1923) (An improper

statement of fact made by juror about damages did not cause prejudice, and was no grounds for reversal). When considering juror affidavits, the trial court must entirely discard the portions which may tend to impeach the verdict of the jurors, and considers only those facts "... stated in relation to misconduct of the juror, and which in no way *inhere in the verdict itself. State v McKenzie,* 56 Wash. 2d 897, *supra,* at 836 [Emphasis added]. Here, the only potential facts that were alleged in the juror affidavits were that (1) their "hands were tied" and (2) and that the "trial court judge was a fair man and would pencil something in as damages". Appellants' Brief, p. 19.

Appellants have somehow confused or coerced these three jurors into submitting affidavits that discuss some level of pressure they felt from an alleged statement made by another juror concerning damages. Appellate courts will generally not inquire into the internal process by which the jury reaches its verdict. *Breckenridge v. Valley Gen. Hosp.*, 150 Wash. 2d 197, 204-05, 75 P.3d 944, 949 (2003), citing *Gardner v. Malone,* 60 Wash.2d 836, 840, 376 P.2d 651 (1962); *Richards,* 59 Wash.App. at 270, 796 P.2d 737. "The individual or collective thought processes leading to a verdict inhere in the verdict and cannot be used to impeach a jury verdict." *State v. Ng,* 110 Wash.2d 32, 43, 750 P.2d 632 (1988). It was not incorrect or an abuse of discretion by the trial court

judge in this case to conclude every alleged fact in the offered affidavits inhered in the verdict.

ii. The Admitted Evidence Supports The Jury's Conclusion LandAmerica Did Not Breach The Policy, Act Negligently Or Violate The CPA Or The IFCA

The jury was well-informed in this case of the facts and law concerning each of Appellants' causes of action. Inexplicably, Appellants' arguments in their brief do not mention any particular cite to the record concerning admitted or rejected evidence during the trial. Instead, the argument just contains a boiler plate reference that "... no evidence at the trial supported an award of zero damages for breach of the Millies' title contract." Appellants' Brief, p. 19. In the absence of any indication in the argument about what facts of record the Appellants believe support an alternate finding on their asserted causes of action, Respondent can only throw darts at speculative theories to which to respond.

Here, the jury deliberated the following admitted evidence relating to the enumerated causes of action against LandAmerica:

(1) Appellants tendered a claim to LandAmerica for a non-disclosed easement on their Property on July 19, 2007. **Exh. 204.**
(2) LandAmerica responded the same day, and then accepted the claim less than one (1) month later on August 17, 2007. **Exh. 205, 206.**

(3) LandAmerica claims representative Donna LaRocca hired an appraiser, AJG, on September 18, 2007 to conduct an appraisal to determine the DIV to Appellants' Property because of the Bisecting Road. She advised the Appellants of this process. **Exh. 207.**

(4) The AJG Appraisal indicated a DIV of $25,000.00 because of the Bisecting Road. **Exh. 209**.

(5) Ms. LaRocca offered $25,000.00 to Appellants on November 13, 2007. **Exh. 210**.

(6) Appellants did not obtain their own professional appraisal until after the lawsuit against LandAmerica was already filed. **Exh. 223**. Appellants' initial demand for $125,000.00 was based on an informal opinion letter by an appraiser who never submitted an appraisal in the case. **Exh. 211**. The opinion letter was never sent to LandAmerica prior to the lawsuit being filed. **STP 20; TP 208.**

(7) LaRocca would have offered whatever DIV was determined by the AJG Appraisal, and relied on the appraisal for a value of loss pursuant to paragraph 7 of the Policy. **TP 200**. There was no prior relationship between LandAmerica and AJG. **TP 196.**

It is by no means unreasonable under this evidence that the jury here concluded there was no breach of contract, and no breach of any duty (negligence and CPA claims), and no violation of the IFCA.

In denying Appellants' motion for a new trial, the trial judge properly assessed the admitted evidence and rightly concluded the jury followed the instructions given by the court, and applied the law to the facts of the case. A court first presumes jurors follow the provided instructions. *Raum v. City of Bellevue*, 171 Wash. App. 124, 148-49, 286 P.3d 695, 708 (2012) *review denied*, 176 Wash. 2d 1024, 301 P.3d 1047

(2013). Juries have considerable latitude in assessing damages, and a jury verdict will not be lightly overturned. *Herriman v. May*, 142 Wash. App. 226, 174 P.3d 156 (2007). There is no abuse of discretion in denying a motion for new trial on the ground that a verdict was contrary to evidence *if there was case for the jury. Rettinger v. Bresnahan*, 42 Wash. 2d 631, *supra.*

There was most certainly a case for the jury to consider here. Appellants got nearly every piece of evidence they sought to have admitted at trial into evidence for consideration by the jury. Where the evidence at trial is conflicting so that a jury can decide in favor of either defendant or plaintiff, it is proper to refuse a motion for new trial. *Oliver v. Polson,* 117 Wash. 385, 201 P. 289 (1921). In this instance, the jury had sufficient evidence to find either for or against Appellants, and their verdict was unanimous in favor of LandAmerica.

The jury was not presented on the verdict form the question of what damages, if any, to which the Appellants might be entitled *pursuant to* the Policy. **CP 498-99**. Nor did Appellants offer an alternate verdict form that included such an inquiry. **TP 365** ("inadequate" form, singularly addressing just breach of contract claim). Instead, it was always Appellants' theory of the case that the jury would automatically find a breach of contract (or that it was already admitted), and thus have to

award damages for the breach. Respondent had no obligation to request an inquiry on the verdict form in this vein. Nor is a trial court responsible to alter instructions, if no objection is made. *State v. Dent*, 67 Wash. App. 656, 840 P.2d 202 (1992), *review granted* 121 Wash. 2d 1001, 848 P.2d 1264, *affirmed* 123 Wash. 2d 467, 869 P.2d 392, *reconsideration denied.* Granting or denying a new trial because of inadequacy of damages is peculiarly within discretion of the trial court. *Mullin v. Builders Development & Finance Service, Inc.*, 62 Wash. 2d 202, 381 P.2d 970 (1963).

The rules for properly objecting to special verdict forms are, by analogy, governed by CR 51(f), which governs jury instructions. *Queen City Farms, Inc. v. Cent. Nat'l Ins. Co. of Omaha,* 126 Wash. 2d 50, 63, 882 P.2d 703 (1994). If a party is dissatisfied with a special verdict form, then that party has a duty to propose an appropriate alternative. *Wickswa v. Safeco Ins. Co.,* 78 Wash. App. 958, 966-67, 904 P.2d 767 (1995). In one case, the city of Bellevue claimed a defendant waived his challenge to the special verdict form by failing to provide a legally sufficient alternative special verdict form. *Raum v. City of Bellevue*, 171 Wash. App. 124, *supra,* at 144-45. The *Raum* court concluded since the verdict form he offered at trial omitted the very language he requested on appeal, he "invited any claimed error". *Id.*, at 148. Like the defendant in *Raum*,

Appellants' failure to object to Respondent's proposed verdict form, and simultaneous failure to offer an alternate verdict form to the trial court preclude any objection now on appeal that they wanted the jury to consider damages *pursuant to* the Policy.[5] Appellants just thought they would win one of the causes of action, and never considered a jury having to decide damages outside of their claims for breach of contract, negligence, and alleged violations of the CPA and IFCA. Appellants can't unhitch their burden of proof on their pled causes of action and skip to the

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[5] Also, CR 49 governs both general and special verdicts. CR 49(a) states, in relevant part, as follows:

> The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, *each party waives his rights to a trial by jury of the issue so omitted* unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

CR 49(a) (Emphasis added); *and see Engstrom v. Merriam*, 25 Wash. 73, 64 P. 914 (1901) (holding modified on other grounds by, *Larsen v. Walton Plywood Co.*, 65 Wash. 2d 1, 390 P.2d 677 (1964)).

Essentially, the rule provides that if any issue is omitted from the special verdict form and counsel fails to call the court's attention to the omission, the affected party waives the right to have that issue submitted to the jury, and consents to have the issue decided by the court. 4 Wash. Prac., Rules Practice CR 49 (6th ed.). What's more, in the event that the issue is *not* submitted to the jury and the court fails to make a special finding of fact on the issue omitted from the verdict form, and proceeds to enter judgment on the special verdict as rendered, the court will be deemed to have found the issue in harmony with the judgment as entered. CR 49(a); *Eagle Group, Inc. v. Pullen*, 114 Wash. App. 409, 58 P.3d 292 (Div. 2 2002). Special verdicts are to be construed, if possible, so as to harmonize them, inconsistent parts may be disregarded, and if a finding is not specific and certain and a jury is discharged without objection, it will be construed against the party in whose favor it is found. *State ex rel. Upper v. Hanna*, 87 Wash. 29, 151 P. 83, 1087 (1915). Here, Appellants did not ask the trial court, post-verdict, to decide the issue. It is thus waived and merged with the finding of no damages for asserted causes of action.

damages phase of a trial. The trial court did not abuse its discretion in denying Appellants' motion for a new trial.

iii. There Is No Evidence Or Argument That Counsel For LandAmerica Committed Misconduct, And No New Trial Can Be Granted On These Grounds

Appellants incorrectly assert, without cite to the record or legal authority, that LandAmerica's counsel committed misconduct during the trial. Appellants' Brief, p. 4 (Issues Pertaining to Assignments of Error, No. 7), 15. It is unclear on what basis this claim is made, since Appellants do nothing more than assert the argument in their brief. First, Respondents vehemently deny any misconduct occurred by its counsel in trial. Second, and most importantly, Appellants did not raise this issue at all during trial or post trial in their motion for new trial. **CP 509, 517.** As argued at length above, an issue not raised in the trial court may not be considered for the first time on appeal. *State v. Tradewell,* 9 Wash. App. 821, *supra.* This argument should be ignored.

E. The Trial Court Properly Denied Appellants' Motion For Judgment As A Matter Of Law Because There Was Substantial Evidence To Support A Verdict In Favor Of LandAmerica

Appellants have a two pronged argument for why their post-trial motion for a judgment as a matter of law should have been granted: they allege (1) the evidence supported a finding that the Policy was breached and (2) that Jury Instruction Number 9 allegedly included a provision

mandating the jury to find a violation of the IFCA. Appellants Brief, pp. 17-18. Both arguments fail.

First, there is no admitted a breach of contract in this case. It is fully illogical that Appellants are arguing for the inclusion of WPI 300.02 while simultaneously asserting that LandAmerica has somehow admitted a breach. The remaining arguments for why a reasonable jury could find in LandAmerica's favor on the breach of contract issue are dealt with in section D(ii) above, and do not need to be reargued here. The jury was not obligated to find a breach of the Policy, and substantial evidence supported them finding to the contrary.

Moreover, there was substantial evidence presented by LandAmerica at trial that the alleged easement over the Appellants' Property did not impact the value at all. Testimony from both Stanley Moe and Bruce Jolicoeur established that on either side of the Property no easements of record existed to reach the Bisecting Road. **TP 213; STP 71-72, 100-01.** In other words, evidence was admitted showing no person (private or public) had the right to get to the Bisecting Road on the Property except the Appellants. From this testimony it is reasonable that the jury could conclude the Bisecting Road actually caused no damages to the Property. Respondent argued this theory to the jury throughout trial,

and there was substantial evidence to support the verdict awarding no damages.

Similarly, Appellants' argument that the evidence only supported a finding by the jury that LandAmerica acted in bad faith in violation of the CPA fails because substantial evidence pointed to the contrary. The jury was reasonable in its conclusion that LandAmerica acted in good faith in negotiating settlement pursuant to the Policy with the Millies. Whatever process the jury went through to conclude no single criteria listed in Jury Instruction Number 9 was met now inheres in the verdict. *State v. McKenzie,* 56 Wash. 2d 897, *supra.* Appellants cite the testimony of LaRocca and Campbell as evidence that somehow no "good faith effort to settle the claim" was made before the appraisal was secured. Appellants Brief, p. 18. However, that citation completely mischaracterizes the testimony and the nature of the question posed by Jury Instruction Number 9.

> Jury Instruction Number 9 states, in relevant part:
>
> The following are unfair or deceptive acts or practices in the business of insurance:
>
> ...
>
> 15. Failing to make a good faith effort to settle a claim before exercising a contract right to an appraisal.

CP 468-96

The evidence admitted at trial strongly supports the conclusion that LandAmerica did make a good faith effort to settle the claim before obtaining the appraisal. LaRocca sent an email to the Milles on April 24, 2007, to make sure they knew the process for filing a claim. **Exh. 203.** On July 19, 2007, the Millies formally made a claim on the Policy for the first time, and on the same day LaRocca sent an email back acknowledging receipt of the claim letter. **Exh. 205.** Less than a month later, on August 17, 2007, LaRocca sent a follow up letter to the Appellants, indicating that the claim was covered under the policy. **Exh. 206.** The letter further acknowledges that the Appellants were demanding $125,000.00 in damages, but clarifies that Section 7 of the Policy includes a simple and common method for calculation of a loss or damage pursuant to the policy when there is an encumbrance to the Property as insured. *Id.* LaRocca testified she was not an appraiser, and needed to consult one to get that calculation correct. **CP 196, 200.** LaRocca hired AJG on September 18, 2007, asking for the appraisal, and then secured the signed formal engagement letter from AJG on the same day. **Exh. 207.** The AJG Appraisal was completed on November 9, 2007. **Exh. 134.**

What Appellants are suggesting is illogical at best, and two-faced at worst – they argue the trial court was obligated to conclude *as a matter of law* that none of the above acts constituted good faith efforts to settle

the claim. Appellants' argument is flawed primarily in that in their own attempt to negotiate settlement of their claim, *they first consulted an appraiser*, Skip Sherwood! **Exh. 211; STP 11**. Mr. Sherwood's informal opinion of the DIV to the Property because of the Bisecting Road formed the entire basis for the Appellants' initial demand of $125,000.00 (even though his letter and later testimony was that he had *not made* an assessment of the damages to the Millies' Property at that time at all, **STP 20-21**). Yet, they amazingly expected the trial court to conclude as a matter of law that LandAmerica was not entitled to the same consultation of an appraiser to get a DIV calculation.

Based on the extremely diligent and thorough communications between LandAmerica and Appellants throughout the process of obtaining an appraisal, it is absolutely reasonable that the jury concluded paragraph 15 in Jury Instruction Number 9 was not violated by LandAmerica in this case. A motion for judgment as a matter of law should only be granted only if the court can say, as a matter of law, that no reasonable person could have found in favor of the nonmoving party." *Ayers v. Johnson & Johnson Baby Prods. Co.*, 117 Wash. 2d 747, *supra,* at 753. The trial court correctly denied Appellants' motion for judgment as a matter of law.

V. CONCLUSION

This Court should not entertain reversal of the jury's sound verdict in this case through any of Appellants' unsound legal arguments on appeal. No proffered argument successfully meets the standards for review here on appeal. The trial court's denial of Appellants' post-trial motions for a new trial and judgment as a matter of law was proper and based on substantial evidence supporting the jury's conclusions. Moreover, an attempt to argue for inclusion of a jury instruction for the first time on appeal cannot be entertained by this Court. This is especially true considering the included instruction caused no prejudice to Appellants' case. Appellants have unfortunately misunderstood this case from its inception, and remain largely confused here in their appeal, making arguments that are awkwardly circular and reliant on mischaracterized evidence. The trial court and jury understood the case perfectly, and the verdict should stand.

RESPECTFULLY SUBMITTED this 31st day of January, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that on the date given below I caused to be served the foregoing document entitled BRIEF OF RESPONDENT LANDAMERICA TRANSNATION on the following individuals in the manner indicated:

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SIGNED this 30th day of January, 2014, at Seattle, Washington.

Patricia Burnichon

Patricia Burnichon, Paralegal