

No. 71214-4-I

DIVISION I, COURT OF APPEALS  
OF THE STATE OF WASHINGTON

---

NO BOUNDARIES, LTD., a Washington corporation, and NBL II, LLC,  
a Washington limited liability company

Respondents/Cross-Appellants

v.

PACIFIC INDEMNITY COMPANY (a member of the CHUBB GROUP  
OF INSURANCE COMPANIES), an insurer authorized by the  
Washington Insurance Commissioner

Appellant/Cross-Respondent

---

ON APPEAL FROM KING COUNTY SUPERIOR COURT  
No. 09-2-10932-0 SEA  
(Hon. Jeffrey M. Ramsdell)

---

**OPENING BRIEF OF RESPONDENTS/CROSS-APPELLANTS  
NO BOUNDARIES, LTD. AND NBL II, LLC**

---

Katie Smith Matison,  
WSBA No. 20737  
Ryan P. McBride,  
WSBA No. 33280  
*Attorneys for No Boundaries, Ltd.  
and NBL II, LLC*

LANE POWELL PC  
1420 Fifth Avenue, Suite 4200  
P.O. Box 91302  
Seattle, Washington 98111-0402  
Telephone: (206) 223-7000  
Facsimile: (206) 223-7107

**ORIGINAL**

A handwritten signature in black ink is written over a faint, rectangular stamp. The stamp contains some illegible text, possibly a date or a reference number. The signature appears to be 'Katie Smith Matison'.

## TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION .....	1
II. ASSIGNMENT OF ERROR ON CROSS-APPEAL .....	4
III. COUNTERSTATEMENT OF THE ISSUES.....	4
IV. COUNTERSTATEMENT OF THE CASE.....	6
A. NBL Purchases Insurance From Chubb For The Metropole.....	6
B. A Portion Of The Metropole Basement Collapses In 2005; NBL Obtains Plans And Permits For Emergency Repairs .....	7
C. NBL’s Plans To Repair The Basement Are Suspended When Fire Breaks Out In The Metropole; Chubb Agrees to Treat Collapse And Fire Claims As A Single Project .....	9
D. Chubb Denies Coverage For Additional Repairs And Code Upgrades Without Analyzing The Applicable 2003 SBC.....	11
E. NBL Files Suit And Wins Interlocutory Appeal; Chubb Denies NBL Code Upgrade Coverage For A Second Time.....	14
F. Chubb Accuses NBL Of Intentionally Misrepresenting Its Claim Eight Years After The Basement Collapse.....	15
G. The Jury Rejects Chubb’s Fraud Claim, And Finds That Chubb Acted In Bad Faith And Violated IFCA.....	17

V.	ARGUMENT ON CHUBB’S APPEAL.....	18
A.	The Trial Court Properly Refused To Grant Chubb A New Trial Based On An Alleged “Inconsistent” IFCA Verdict.....	18
1.	Chubb Waived Its Right To Challenge Any Alleged Inconsistency In The Jury’s IFCA Verdict.....	19
2.	The Jury’s IFCA Verdict Is Consistent With Its Other Findings; Substantial Evidence Supports The Finding That Chubb “Unreasonably Denied” Coverage .....	22
B.	The Trial Court Did Not Abuse Its Discretion In Refusing To Give Chubb’s Proposed <i>Cox</i> Instruction .....	26
1.	The Trial Court’s Bad Faith Instructions Were Proper; <i>Cox</i> Does Not Limit An Insurer’s Duty Of Good Faith .....	26
2.	Chubb Cannot Show Prejudice; It Was Able To Argue Its Theory And Substantial Evidence Supported The Jury’s Bad Faith Verdict On Multiple Grounds.....	29
C.	The Trial Court Did Not Abuse Its Discretion In Admitting Evidence Concerning The “Legal Consequences” NBL Would Face If It Intentionally Misrepresented Its Claim.....	32
1.	Chubb Did Not Object To Evidence That A Finding Of Fraud Would Render NBL’s Policy “Void” .....	33

2.	Testimony Regarding The Consequences Of A Voided Policy Was Relevant To Chubb’s Burden To Prove NBL Intentionally Misrepresented Its Claim .....	36
3.	Admission Of The Insignificant “Legal Consequences” Testimony Was Harmless; Substantial Evidence Amplify Supports The Jury’s Verdict .....	40
D.	NBL Was Entitled To An Award Of Attorneys’ Fees Under IFCA And The <i>Olympic Steamship</i> Doctrine.....	43
1.	NBL Was Entitled To Attorneys’ Fees Under IFCA Because It Prevailed On Its IFCA Claim.....	44
2.	NBL Was Entitled To Attorneys’ Fees Under <i>Olympic Steamship</i> Because It Successfully Defeated Chubb’s Denial Of Coverage On The Basis of Fraud .....	44
E.	NBL Is Entitled To An Award Of Fees And Costs On Appeal .....	46
VI.	ARGUMENT ON NBL’S CROSS-APPEAL .....	47
VII.	CONCLUSION.....	50

TABLE OF AUTHORITIES

CASES

	<u>Page</u>
<i>Adcox v. Children's Orthopedic Hosp. &amp; Med. Ctr.</i> , 123 Wn.2d 15, 864 P.2d 921 (1993).....	27
<i>Ainsworth v. Progressive Cas. Ins. Co.</i> , 180 Wn. App. 52, 322 P.3d 6 (2014) .....	46, 47
<i>Barrett v. Lucky Seven Saloon, Inc.</i> , 152 Wn.2d 259, 96 P.3d 386 (2004).....	48
<i>Blue Diamond Group, Inc. v. KB Seattle 1, Inc.</i> , 163 Wn. App. 449, 266 P.3d 881 (2011).....	43
<i>Boeing Co. v. Harker-Lott</i> , 93 Wn. App. 181, 968 P.2d 14 (1998).....	27
<i>Bronsink v. Allied Prop. and Cas. Ins. Co.</i> , 2010 WL 2342538 (W.D. Wash. June 8, 2010).....	25
<i>Brown v. Spokane County Fire Prot. Dist. No. 1</i> , 100 Wn.2d 188, 668 P.2d 571 (1983).....	40
<i>Burnside v. Simpson Paper Co.</i> , 123 Wn.2d 93, 864 P.2d 937 (1994).....	22
<i>Carson v. Fine</i> , 123 Wn.2d 206, 867 P.2d 610 (1994).....	36
<i>Conrad v. Alderwood Manor</i> , 119 Wn. App. 275, 78 P.3d 177 (2003) .....	20
<i>Dayton v. Farmers Ins. Group</i> , 124 Wn.2d 277, 876 P.2d 896 (1994).....	45
<i>Delvo v. St. Paul Travelers Ins. Co.</i> , 2007 WL 2601030 (E.D. Wash. Sept. 10, 2007).....	37

<i>Egede–Nissen v. Crystal Mountain, Inc.</i> , 93 Wn.2d 127, 606 P.2d 1214 (1980).....	48
<i>Estate of Dormaier</i> , 177 Wn. App. 828, 313 P.3d 431 (2013).....	20, 21
<i>First State Ins. Co. v. Kemper Nat. Ins. Co.</i> , 94 Wn. App. 602, 971 P.2d 953 (1999).....	48
<i>Gjerde v. Fritsche</i> , 55 Wn. App. 387, 777 P.2d 1072 (1989).....	21
<i>Guijosa v. Wal–Mart Stores</i> , 144 Wn.2d 907, 32 P.3d 250 (2001).....	21
<i>In re Dependency of Penelope B.</i> , 104 Wn.2d 643, 709 P.2d 1185 (1985).....	34
<i>Indus. Indem. Co. v. Kallevig</i> , 114 Wn.2d 907, 792 P.2d 520 (1990) .....	28, 29
<i>Isilon Sys., Inc. v. Twin City Fire Ins. Co.</i> , 2012 WL 1202331 (W.D. Wash. Apr. 10, 2012).....	25
<i>Johnson v. Allstate Ins. Co.</i> , 126 Wn. App. 510, 108 P.3d 1273 (2005).....	27
<i>Ki Sin Kim v. Allstate Ins. Co., Inc.</i> , 153 Wn. App. 339, 223 P.3d 1180 (2009).....	37
<i>Lahmann v. Sisters of St. Francis of Philadelphia</i> , 55 Wn. App. 716, 780 P.2d 868 (1989).....	21
<i>Leingang v. Pierce County Med. Bureau, Inc.</i> , 131 Wn.2d 133, 930 P.2d 288 (1997).....	45
<i>Lodis v. Corbis Holdings, Inc.</i> , 172 Wn. App. 835, 292 P.3d 779 (2013).....	36
<i>McGreevy v. Oregon Mut. Ins. Co.</i> , 128 Wn.2d 26, 904 P.2d 731 (1995).....	45

<i>Merrill v. Crown Life Ins. Co.</i> , --- F.Supp.2d ----, 2014 WL 2159266 (E.D. Wash. May 23, 2014).....	25
<i>Mina v. Boise Cascade Corp.</i> , 104 Wn.2d 696, 710 P.2d 184 (1985).....	50
<i>Minger v. Reinhard Distrib. Co. Inc.</i> , 87 Wn. App. 941, 943 P.2d 400 (1997).....	21
<i>Mutual of Enumclaw v. Cox</i> , 110 Wn.2d 643, 757 P.2d 499 (1988).....	<i>passim</i>
<i>No Boundaries, LTD v. Pac. Indemn. Co.</i> , 160 Wn. App. 951, 249 P.3d 689 (2011).....	14, 23, 31
<i>Olympic S.S. Co. v. Centennial Ins. Co.</i> , 117 Wn.2d 37, 811 P.2d 673 (1991).....	<i>passim</i>
<i>Pettit v. Dwoskin</i> , 116 Wn. App. 466, 68 P.3d 1088 (2003).....	49
<i>St. Paul Mercury Ins. Co. v. Salovich</i> , 41 Wn. App. 652, 705 P.2d 812 (1985) .....	37
<i>Short v. Hoge</i> , 58 Wn.2d 50, 360 P.2d 565 (1961).....	49
<i>State v. Bourgeois</i> , 133 Wn.2d 389, 945 P.2d 1120 (1997).....	40
<i>State v. Gray</i> , 134 Wn. App. 547, 138 P.3d 1123 (2006).....	34
<i>State v. Ramirez</i> , 62 Wn. App. 301, 814 P.2d 227 (1991).....	39
<i>State v. Saunders</i> , 132 Wn. App. 592, 132 P.3d 743 (2006).....	34

<i>State v. Sullivan</i> , 69 Wn. App. 167, 847 P.2d 953 (1993).....	39
<i>State v. Townsend</i> , 142 Wn.2d 838, 15 P.3d 145 (2001).....	39
<i>Stiley v. Block</i> , 130 Wn.2d 486, 925 P.2d 194 (1996).....	26, 27, 29, 40
<i>Tank v. State Farm Fire &amp; Cas. Co.</i> , 105 Wn.2d 381, 715 P.2d 1133 (1986).....	32
<i>Tincani v. Inland Empire Zoological Soc’y</i> , 124 Wn.2d 121, 875 P.2d 621 (1994).....	22
<i>Wickswat v. Safeco Ins. Co.</i> , 78 Wn. App. 958, 904 P.2d 767 (1996).....	20

STATUTES, REGULATIONS AND COURT RULES

RCW 48.30.015(1).....	18
RCW 48.30.015(2).....	18
RCW 48.30.015(3).....	18, 44
Seattle Municipal Code § 3403.6 (2003) .....	47
Seattle Municipal Code § 3403.12 (2003) .....	47
RAP 18.1(a) .....	46
CR 15(b).....	17

MISCELLANEOUS

6A Wash. Prac., Wash. Pattern Jury Instr., Civ. 320.06.01 .....	25
O’Malley, Grenig, & Lee, <i>Fed. Jury Pract. &amp; Instruct.</i> : Civil § 126.72 at 419 (6th ed. 2011) .....	37

## I. INTRODUCTION

This case arose when the basement of the historic Metropole Building collapsed in 2005. Pacific Indemnity Company, a member of the Chubb Group of Insurance Companies (“Chubb”), assured No Boundaries, Ltd. (“NBL”) that it would cover the repairs and, after a 2007 fire damaged more of the building, Chubb’s team of consultants worked with NBL to define the scope of work and obtain the necessary permits to restore the Metropole to its prior condition—along with “code upgrades” required by the Seattle Building Code (“SBC”). But right as the economy faltered, so did Chubb’s cooperation. More than three years after the collapse and just as the majority of work was set to begin, Chubb informed NBL it had changed its mind, refused to pay any more toward the collapse repairs, denied NBL coverage for code upgrades and closed its file.

Over the next five years, Chubb attempted to deny NBL’s claim on three different grounds. In 2009, Chubb told NBL there was no coverage for code upgrades under the 2006 SBC. On appeal, however, this Court ruled that Chubb’s interpretation of the policy was untenable, and that it should have applied the 2003 SBC. Then, in 2011, Chubb told NBL that its improper denial didn’t matter, because NBL was not entitled to code upgrades under the 2003 SBC either. Finally, in 2013, eight years after the collapse and two months before trial, Chubb accused NBL of lying

about a kitchen in the basement, invoked the policy's "Concealment or Misrepresentation" clause and threatened to void NBL's policy altogether.

After a two week trial, the jury rejected Chubb's misrepresentation defense and found that Chubb acted in bad faith and violated the Insurance Fair Conduct Act ("IFCA"). On appeal, Chubb does not argue that the verdict was unsupported by substantial evidence. It plainly was. Rather, Chubb ignores that evidence, continues to insist that it acted in good faith (and that NBL lied), claims that each and every one of the jury's findings (but only those adverse to it) was tainted by some supposed legal, instructional or evidentiary error, and asks this Court to give it a chance to prove to a second jury what it failed to prove to the first. Chubb doesn't get a do-over. The trial was fair. None of its arguments have merit.

The jury's finding that Chubb "unreasonably denied" coverage or payment under IFCA does not conflict with its finding that Chubb did not owe additional coverage under the 2003 SBC. Chubb waived this issue on appeal. But even if it didn't, Chubb refuses to recognize the fact that the jury heard substantial evidence that it unsuccessfully tried to deny NBL coverage on two other bases—the 2006 SBC (rejected by this Court) and the policy's misrepresentation clause (rejected by the jury). The fact that the jury ultimately accepted one basis of denial didn't require it to ignore Chubb's unreasonable conduct in connection with the other two.

Chubb's claim that the trial court erred in crafting instructions or admitting evidence is also baseless. The court properly rejected Chubb's "Cox instruction" because *Cox* only prevents a finding of waiver where the insurer proves its insured committed fraud; it does not prevent a jury from finding bad faith where, as here, the insurer accused its insured of fraud without reasonable justification. The court also properly admitted evidence regarding the "legal consequences" NBL faced if the jury found fraud. Chubb waived its objection to most of this evidence and, in any event, it was relevant to show NBL's motive to be truthful in submitting its insurance claim and at trial. And, even had the court erred in either respect, it was harmless; overwhelming evidence supported the jury's findings that NBL did not commit fraud and that Chubb acted in bad faith.

There is only one ground for a new trial, and it is the subject of NBL's cross-appeal. The 2003 SBC contains two "triggers" requiring code upgrades. The trial court permitted the jury to consider one, but refused to allow it to consider the other ("substantial alteration" trigger). The court's refusal to give NBL's proposed instruction on the substantial alteration trigger was error; NBL presented lay and expert testimony showing that the basement repairs easily satisfied that threshold. Thus, this Court should affirm the verdict as far as it goes, but should order a new trial on this one issue, which the jury never had an opportunity to decide.

## II. ASSIGNMENT OF ERROR ON CROSS-APPEAL

The trial court erred when it rejected NBL's proposed instruction on whether the basement collapse repairs triggered the "substantial alteration" threshold for code upgrades under the 2003 SBC, which would have entitled NBL to coverage under the "Ordinance or Law" clause of Chubb's policy. RP 10/09/13 at 1067-68; RP 10/10/13 at 1195.

## III. COUNTERSTATEMENT OF THE ISSUES

### Issues Raised on Chubb's Appeal

1. **IFCA Verdict.** Did the trial court properly refuse to grant Chubb a new trial on NBL's IFCA claim based on an inconsistency in the verdict because (a) Chubb waived the issue by failing to object to the jury instructions and special verdict form or raise the alleged inconsistency before the jury was discharged, and (b) there was no conflict between the jury's finding that Chubb "unreasonably denied" coverage and its finding that Chubb did not owe NBL additional coverage under the policy?

2. **Cox Instruction.** Did the trial court properly exercise its discretion in refusing to give Chubb's proposed "Cox instruction" because (a) Cox's no-waiver rule does not limit an insurer's duty of good faith when the insurer asserts a misrepresentation defense, and (b) the trial court properly instructed the jury on good faith, which allowed Chubb to argue its theory of the case? Regardless, was refusal to give the instruction

harmless because substantial evidence supported a finding of bad faith on grounds separate from the timing of Chubb's misrepresentation defense?

3. **“Legal Consequences” Testimony.** Did the trial court properly exercise its discretion in allowing testimony regarding the “legal consequences” of Chubb's misrepresentation defense because (a) Chubb abandoned its objection to most of that testimony and, in any event, (b) the testimony was relevant and highly probative to NBL's truthfulness when making its claim and at trial? Regardless, was admission of the evidence harmless because the scant testimony regarding legal consequences was insignificant relative to the substantial evidence that otherwise supported the jury's finding that NBL did not knowingly misrepresent its claim?

4. **Entitlement to Attorneys' Fees.** Did the trial court properly conclude as a matter of law that NBL was entitled to an award of attorneys' fees because (a) NBL was the “prevailing party” on its IFCA claim, and (b) under *Olympic Steamship*, Chubb unsuccessfully attempted to dispute coverage on the basis of the policy's misrepresentation clause? Is NBL entitled to an award of fees on appeal on the same bases?

#### Issue Raised on NBL's Cross-Appeal

1. **Substantial Alteration Instruction.** Did the trial court err when it refused to give NBL's proposed instruction on the 2003 SBC's “substantial alteration” trigger when (a) NBL presented substantial

evidence to prove that the repairs did constitute a “substantial alteration,” thereby entitling NBL to coverage for code upgrades under the policy’s “Ordinance or Law” clause, and (b) in the absence of the instruction, NBL was prevented from arguing that theory of the recovery to the jury.

#### **IV. COUNTERSTATEMENT OF THE CASE**

Chubb’s one-sided statement of the case tells only half the story and, worse yet, ignores the verdict. For example, Chubb repeatedly refers to NBL’s “misrepresentations” and its own “good faith”—yet the jury rejected both theories; it specifically found that NBL did not misrepresent its claim and Chubb acted unreasonably and in bad faith. This Court, of course, views the evidence in the light that supports the jury’s verdict.

##### **A. NBL Purchases Insurance From Chubb For The Metropole.**

Reyn Yates and his wife originally founded NBL as an outdoor equipment company shortly after graduating from college and moving to Washington. RP 10/01/13 at 10, 15, 24-25. The Yates’s eventually switched the focus of their small business and began buying and improving older, architecturally significant (but often distressed) buildings in and around Seattle. *Id.* at 18, 21, 23. One of the buildings they bought was the historic Metropole Building in Pioneer Square, which was built in the late 1800s. *Id.* at 49; *see* Exs. 31 & 32 (pictures). The Metropole has three floors and a full-height basement level. *Id.* at 50-51.

NBL purchased insurance for the Metropole and several other buildings from Chubb for the period September 1, 2004 to September 1, 2005. Ex. 2. The policy required Chubb to pay for the repair or replacement of damaged property and, “[i]f there is an ordinance or law in effect at the time of loss or damage ..., the increased cost to repair or replace the building ... to the minimum standards of such ordinance or law ....” *Id.* at PI-POLICY 000322. NBL renewed the policy for the 2005-2006 and 2006-2007 periods before Chubb cancelled the policy due to “Account Loss History.” RP 10/01/13 at 49, 94; Ex. 18.

**B. A Portion Of The Metropole Basement Collapses In 2005; NBL Obtains Plans And Permits For Emergency Repairs.**

On June 22, 2005, the southwest portion of the Metropole’s basement collapsed. RP 10/01/13 at 54; RP 10/03/13 at 315. Chubb’s first claims adjuster, Michael Blackburn, visited the site two days later; he took a few photographs from a safe distance but could not access or photograph the entire collapsed area, including the kitchen area. RP 10/03/13 at 316-17; Ex. 104. Blackburn agreed that NBL’s engineering firm, Swenson Say Fagét (“SSF”), should be responsible for investigating the damage and recommending a scope of repairs. *Id.*; Ex. 6. Chubb did not ask NBL to prepare any kind of statement or proof of loss with respect to the collapse or the contents of the basement. *Id.* at 327-28.

After the basement was drained and the floor temporarily shored, SSF prepared initial sketches for a “Temporary Shoring/Emergency Repair.” Exs. 8 & 10; RP 10/01/13 at 70-71. The sketches contemplated removal and replacement of part of the basement floor and interior walls, as well as temporary shoring of the floor above. Ex. 10; RP 10/01/13 at 58, 73-75; RP 10/02/13 at 246-47. In April 2006, SSF prepared plans for this “Metropole Emergency Basement Repair.” Ex. 11. Because the plans were for temporary repairs only, they did not specify all work necessary to completely repair the collapse, nor did they include any “code upgrades” required by the SBC. *Id.*; RP 10/01/13 at 75; RP 10/03/13 at 305.

NBL interviewed contractors over the next several months, and ultimately settled on Paul Davis Restoration (“PDR”). RP 10/01/13 at 76-78. Chubb approved the hire and sent NBL a check to cover PDR’s estimate for the cost of the emergency repairs (plus other costs NBL had incurred). Ex. 13; RP 10/02/13 at 164; RP 10/03/13 at 378. Chubb’s Blackburn confirmed that the payment was not a full and final settlement, and that Chubb would pay additional costs—including, specifically, “code upgrades.” RP 10/03/13 at 331-32; RP 10/09/13 at 883-84; Ex. 113.

In early February 2007, PDR applied for a construction permit from the Seattle Department of Planning and Development (“DPD”), which was issued in March 2007. Exs. 16, 17 & 88; RP 10/02/13 at 102-

04. The permit described the scope of work as: “EMERGENCY structural repair to sinking/collapsed ... basement and first floor levels ....” Exs. 17 & 226; RP 10/07/13 at 560-61. Thus, and as Chubb would later concede at trial, the permit was not intended to and did not address all of the work recommended or necessary to completely repair the basement collapse, including the need for code upgrades. *Id.*; RP 10/03/13 at 307; RP 10/07/13 at 630-31; RP 10/08/13 at 719-20, 722, 791; RP 10/09/13 at 903.

**C. NBL’s Plans To Repair The Basement Are Suspended When Fire Breaks Out In The Metropole; Chubb Agrees To Treat Collapse And Fire Claims As A Single Project.**

Meanwhile, NBL continued to develop plans to permanently repair the basement. Around the same time that NBL applied for a permit to do the emergency repairs, NBL’s architect and SSF recommended the entire basement floor be removed and replaced. Exs. 14 & 15; RP 10/01/13 at 88-92; RP 10/07/13 at 630-31. PDR submitted bids for some of this work as well. Exs. 137 & 138. Just weeks later, however, and before NBL could obtain final plans or estimates on the permanent repairs (and before Chubb could pay for them), a fire broke out in the Metropole Building. All ongoing work related to the basement collapse was brought to a halt.

The fire occurred on May 21, 2007. Chubb opened a claim for fire damage (which was covered under NBL’s 2006-2007 policy) and assigned a new adjuster, Scott Peterson, to handle both claims. RP 10/01/13 at 92-

93; RP 10/02/13 at 106-09. NBL considered Chubb's decision to replace Blackburn to be a positive sign; Blackburn had been unresponsive in handling NBL's collapse claim, forcing NBL to twice complain to Blackburn's apologetic supervisor. RP 10/02/13 at 106-07, 173; RP 10/02/13 at 258-59. Indeed, NBL met with Peterson more times over the next three months regarding the collapse repair than it had with Blackburn over the preceding two years. RP 10/02/13 at 111.

NBL and Chubb agreed the two claims should be handled together and that NBL should hire one contractor to repair both the collapse and fire damage. RP 10/02/13 at 120-21; RP 10/07/13 at 563. NBL hired Krekow Jennings as the contractor. RP 10/02/13 at 117. On Peterson's recommendation, NBL also hired David Murphy of Murphy Varey as a project manager to oversee the project and to coordinate the efforts of both parties' consultants. *Id.* at 113-16, 173-74; RP 10/07/13 at 526. Within months, a team comprised of NBL, Peterson, David Murphy, SSF, and Chubb's consultants (Young & Associates, Wiss Janney) began meeting weekly on the project. RP 10/02/13 at 115-17; RP 10/07/13 at 495-96, 628; RP 10/08/13 at 716-20; Exs. 50, 51 & 56. All decisions regarding the scope of work were made by consensus. RP 10/02/13 at 118-20.

Consistent with its agreement to treat the Metropole repairs as a single project, Chubb agreed that NBL should apply for a new permit to

cover all the work—rather than use the previously issued emergency permit. *Id.* at 120; 10/08/13 at 730. Krekow Jennings estimated the cost of the repairs and, in May 2008, applied to Seattle DPD for the permit. RP 10/02/13 at 121-23; 10/07/13 at 561; Ex. 21. NBL was relieved and excited; since the collapse and fire (following which the Metropole Building was entirely vacated), NBL had incurred significant expenses and lost income. Finally, nearly three years after the collapse and one year after the fire, NBL felt it and Chubb had put together a good team and a good plan to get all necessary repairs completed and Metropole ready for re-tenanting by the Summer of 2009. RP 10/02/13 at 123-127, 134.

**D. Chubb Denies Coverage For Additional Repairs And Code Upgrades Without Analyzing The Applicable 2003 SBC.**

But that all changed. Chubb “pulled the plug” right as the project was getting underway. RP 10/02/13 at 173. In August 2008, Chubb informed NBL that it had elected to pay NBL for the fire damage up to the policy limits on the 2006-2007 policy. RP 10/07/13 at 570; Ex. 217. And, despite its year-long collaboration on a joint collapse/fire repair project, Chubb informed NBL that it had asked its consultants to “determine whether anything more may be owed on the collapse claim,” under the 2004-2005 policy. Exs. 217 & 218; RP 10/10/13 at 1117.

Although it previously agreed with NBL to contract and permit the repairs together, Peterson later told NBL he was concerned that NBL had not broken out the cost of the collapse repairs as a separate item—and, for the first time, Chubb instructed NBL to identify which repairs were related only to the collapse. The team project manager, David Murphy, provided Chubb an estimate of repairs for the basement collapse, including code upgrades. RP 10/07/13 at 568-69, 578-80; Ex. 181. Chubb sent letters to NBL in November and December 2008 criticizing the estimate and warning that its consultants would be making an independent assessment. Exs. 24 & 25. Although it expressed doubt on the issue, Chubb reluctantly agreed, however, that the collapse claim would include the cost of repairs necessary to support the weakened floor above the basement. *Id.*

Around this time, Peterson told Yates that Chubb's headquarters had become more stringent in its handling of claims given the current economic crisis. RP 10/02/13 at 134. This turn of events concerned NBL because it was inconsistent with the team approach Chubb had espoused and led after the fire. RP 10/02/13 at 142, 147. In a series of emails and meetings, NBL pleaded with Chubb to continue covering the agreed-upon repairs to the Metropole. NBL reminded Chubb that it had a contract with Krekow Jennings, which Chubb had reviewed and approved, and that,

without a source of funding, NBL would be forced to terminate the contract. RP 10/02/13 at 135-39, 143; RP 10/03/13 at 426-31.

Sure enough, behind the scenes, Chubb's consultants concluded that Chubb owed NBL almost no additional coverage for repairs stemming from the basement collapse, and no coverage at all for code upgrades. RP 10/09/13 at 929-34; RP 10/10/13 at 1117-20; Exs. 57 & 64. Critically, even though the collapse occurred in 2005, when the 2003 SBC was in effect, Chubb's consultant at Wiss Janney, Richard Dethlefs, analyzed the code upgrade issue exclusively under the 2006 SBC and interpretive rules promulgated in 2008. Ex. 57; RP 10/10/13 at 1118. No one at Chubb had bothered to tell Dethlefs to use the 2003 version of the SBC and he did not consult the terms of NBL's policy himself. RP 10/10/13 at 1155.

On January 16, 2009, three and a half years after the collapse, Chubb informed NBL that it would not continue to make payments for the collapse repairs and, relying entirely on Dethlefs' analysis, denied any obligation to pay for code upgrades. Ex. 26; RP 10/03/13 at 445-446, 637. Rather, Chubb simply cut NBL a check in the amount its consultants unilaterally determined was the balance owing on the collapse claim. Ex. 26. Ignoring additional entreaties from NBL, Chubb sent a follow-up letter several weeks later, reiterating its coverage decision and informing NBL that it was "closing this file." Ex. 27.

**E. NBL Files Suit And Wins Interlocutory Appeal; Chubb Denies NBL Code Upgrade Coverage For A Second Time.**

NBL responded to Chubb in a February 27, 2009 letter by counsel. Ex. 158. NBL pointed out that Chubb did “not base its coverage denial upon the version of the Seattle Building Code that applied in June 2005,” and that code upgrades were triggered by the 2003 SBC. *Id.*; RP 10/07/13 at 595. NBL filed suit shortly thereafter alleging, among other things, that Chubb improperly failed to cover code upgrades pursuant to the 2003 SBC. CP 1-55; RP 10/02/13 at 157. Chubb moved for partial summary judgment on the grounds that the 2003 SBC did not apply to NBL’s collapse claim. CP 70-79. The trial court granted Chubb’s motion, but agreed to certify its decision for interlocutory appeal. CP 191-92; 217-18.

This Court granted review and reversed. *No Boundaries, LTD v. Pac. Indemn. Co.*, 160 Wn. App. 951, 249 P.3d 689 (2011). It held that Chubb should have applied the 2003 SBC in effect at the time of the 2005 basement collapse to determine whether NBL was entitled to code upgrade coverage, noting that “[t]he interpretation offered by No Boundaries is reasonable .... [Chubb’s] interpretation is not.” *Id.* at 957-59. During the two years the case was side-tracked on appeal, NBL continued to incur substantial expenses maintaining the Metropole in its current condition,

and, without insurance coverage, was unable to fund the repairs (and code upgrades) necessary to re-tenant the building. RP 10/02/13 at 157-59.

NBL was hopeful that the Court's ruling would cause Chubb to rescind its 2009 denial. It didn't. At the request of counsel, Chubb asked its consultants to do what they should have done in the first place—determine whether the basement repairs triggered code upgrades under the 2003 SBC. RP 10/03/13 at 447, 454-55; RP 10/10/13 at 1131. Perhaps not surprisingly, they reached the same conclusion as before. In May 2011, six years after the collapse, Chubb informed NBL that it would not cover code upgrades under the 2003 SBC either. RP 10/03/13 at 454-55; RP 10/07/13 at 497-98; RP 10/10/13 at 1131-34; CP 681-82. Shortly thereafter, NBL amended its complaint to assert claims for breach of contract, bad faith, and violation of IFCA and the CPA. CP 293-54.

**F. Chubb Accuses NBL Of Intentionally Misrepresenting Its Claim Eight Years After The Basement Collapse.**

For the next two years, the parties litigated the coverage, code upgrade and bad faith/statutory claims. Then, in July 2013, two weeks before the discovery cut-off and two months before trial, Chubb claimed that NBL had lied about the existence of a kitchen in the Metropole's basement. RP 10/03/13 at 455. NBL's policy contains a "Concealment or Misrepresentation" clause. Ex. 2 at PI-POLICY 000390 ("This insurance

is void if you ... intentionally ... misrepresent[] any material fact”). Chubb argued that, under *Mutual of Enumclaw v. Cox*, 110 Wn.2d 643, 757 P.2d 499 (1988), the clause rendered the policy void and NBL was required to refund Chubb benefits already paid. CP 373-74; 389-93.

Chubb’s accusation struck NBL as a baseless tactic to exert leverage over NBL on the eve of trial. RP 10/02/13 at 174. As discussed in Section V.C.3 below, there was a kitchen in the basement and Chubb knew it; indeed, Chubb’s Blackburn, after inspecting the basement two days after the collapse, wrote in his notes that “the kitchen portion has collapsed.” RP 10/03/13 at 323. In the eight years that followed, and after countless visits and onsite meetings, Chubb never once questioned the existence of the kitchen or its contents—that is, until Chubb’s lawyers raised the issue four years into the litigation. RP 10/07/13 at 505-06; RP 10/08/13 at 761, 834; RP 10/09/13 at 1030, 1042. Chubb did not simply refrain from challenging NBL’s kitchen claim at the time, it never asked NBL to prepare a proof of loss, and NBL never did. RP 10/01/13 at 83-84; RP 10/03/13 at 327-28, 462; RP 10/10/13 at 1177.

On the contrary, from the beginning, Yates repeatedly told Chubb and its experts he could not remember the precise lay-out of the kitchen prior to the collapse, *see* RP 10/02/13 at 163-64; RP 10/07/13 at 606-09; RP 10/08/13 at 798—a fact reflected in Chubb’s claims file: “no one has a

good idea about what was in the kitchen when the collapse occurred.” Ex. 50. As a result, it was Chubb’s own consultants—not NBL—who had created the original specifications for the kitchen in 2007 and 2008. RP 10/07/13 at 498; RP 10/08/13 at 754-56; RP 10/09/13 at 921-25, 1020; Exs. 64, 66, 67 & 192. Ironically, NBL used those same specifications as the basis for the estimates Chubb’s lawyers now claimed were fraudulent. Despite its dubious premise, the trial court permitted Chubb to assert its previously unplead fraud defense at trial under CR 15(b). CP 1334-35.

**G. The Jury Rejects Chubb’s Fraud Claim, And Finds That Chubb Acted In Bad Faith And Violated IFCA.**

The parties tried the case over two weeks in October 2013. By special verdict, the jury rejected Chubb’s fraud theory, and found that Chubb breached its duty of good faith and violated IFCA—awarding damages to NBL in the amount of \$768,200 and \$200,000 respectively. CP 2009, 2012-13. The jury found for Chubb on the breach of contract, code upgrade and CPA claims. CP 2010-11, 2014. Critically, however, the trial court permitted the jury to consider only one of two grounds for code upgrades under the 2003 SBC, and refused to allow the jury to consider the other. RP 10/10/13 at 1095. The failure to give NBL’s proposed jury instruction on this alternative theory of liability is the sole subject of NBL’s cross-appeal and is addressed in Section VI below.

NBL thereafter moved the trial court to exercise its discretion and treble the IFCA damages under RCW 48.30.015(2), CP 2114-25, and, separately, to award NBL its attorneys' fees and costs in the amount of approximately \$1.7 million under the *Olympic Steamship* doctrine and IFCA, RCW 48.30.015(3). CP 2140-2453. The trial court refused to treble the IFCA damages. CP 2707-08. The trial court agreed, however, that NBL was entitled to fees and costs under *Olympic Steamship* and IFCA, but it awarded NBL only \$568,005. CP 2765-66. Chubb timely appealed and NBL cross-appealed. CP 2567-73; 2702-06; CP 2711-15.

#### V. ARGUMENT ON CHUBB'S APPEAL

##### A. **The Trial Court Properly Refused To Grant Chubb A New Trial Based On An Alleged "Inconsistent" IFCA Verdict.**

IFCA gives a first-party insured a cause of action where an insurer has "unreasonably denied a claim for coverage or payment of benefits ...." RCW 48.30.015(1). The jury found that Chubb violated IFCA. CP 2013. At the same time, it found that Chubb did not breach NBL's policy, and owed no additional coverage. CP 2010-11. Ten days after the jury was discharged, Chubb filed a "Motion to Correct the Verdict." CP 2032-57. Chubb argued, as it does on appeal, that because the jury found no breach of the policy, it was "inconsistent" for the jury to have found that Chubb "unreasonably denied a claim" within the meaning of IFCA. *Id.*; Chubb

Br. at 27, 32-36. Chubb moved for new trial on the same grounds. CP 2089-90. The trial court denied both motions. CP 2077-78; 2700-01.<sup>1</sup>

This Court should likewise uphold the jury's IFCA verdict. Chubb waived its right to appeal any inconsistency in the verdict because it failed to propose instructions or a verdict form consistent with its interpretation of IFCA, and then failed to raise the issue before the jury was discharged. The jury's verdict was not inconsistent in any event. Substantial evidence supported the jury's finding that Chubb "unreasonably denied" coverage when it first relied on the inapplicable 2006 SBC and later accused NBL of fraud. Moreover, nothing in the text or history of IFCA prevented the jury from finding that Chubb acted "unreasonably" *in the manner* in which it denied NBL's claims, even if it ultimately owed no additional coverage.

**1. Chubb Waived Its Right To Challenge Any Alleged Inconsistency In The Jury's IFCA Verdict.**

Chubb did not object to the jury instructions or the special verdict form, both of which permitted the jury to find, as it ultimately did, that Chubb violated IFCA although it owed NBL no additional coverage under the policy. CP 1874; CP 2010-11, 2013. Under Chubb's own (flawed)

---

<sup>1</sup> Chubb confines its appeal to the trial court's denial of its motion for new trial, although it suggests that it should have been (or should be) granted judgment "notwithstanding the verdict." Chubb Br. at 35-36 & n. 93. Even were Chubb's argument preserved and correct on the merits, neither of which is the case, Chubb would not be entitled to such relief; Chubb failed to move for judgment as a matter of law under CR 50, either before or after the verdict.

interpretation of IFCA, the jury never should have been given that opportunity. A party waives its challenge to an allegedly inconsistent verdict where, as here, the party fails to object to a verdict form that allowed the jury to reach the result it did. *Estate of Dormaier*, 177 Wn. App. 828, 868 n. 13, 313 P.3d 431 (2013); *Conrad v. Alderwood Manor*, 119 Wn. App. 275, 289-90, 78 P.3d 177 (2003); *Wickswat v. Safeco Ins. Co.*, 78 Wn. App. 958, 966-68, 904 P.2d 767 (1996).

“This requirement is more than just an idle, legal technicality. The object in this process is to avoid trying a case twice. ... So, if a lawyer thinks the court is about to commit error, he or she must speak up ... at a time when the trial judge can do something about it.” *Conrad*, 119 Wn. App. at 290 (citations omitted). If Chubb is correct, and a breach of policy is an “essential element” of an IFCA violation, then Chubb had to object and/or propose instructions and verdict form to that effect *before* the jury began its deliberations. Chubb did not do so—and it cannot now complain about the results.<sup>2</sup> In short, regardless of how IFCA is interpreted, absent

---

<sup>2</sup> Contrary to Chubb’s suggestion, nothing in *Cox* excuses its failure to object. Chubb Br. at 35-36. In *Cox*, the jury found that the insured committed fraud but still found in its favor on its extra-contractual claims. 110 Wn.2d at 647-48. The Court held that the insurer *should have objected* to the instructions and verdict form, which allowed a finding of waiver—but forgave the insurer because it had done enough to sufficiently raise the issue earlier in the litigation. *Id.* at 651-52. There is no similar reason to forgive Chubb here; Chubb had at least three opportunities to raise the issue (proposed jury instructions, proposed verdict form and completed verdict form), and missed all three.

an objection from Chubb, the trial court's instructions and verdict form—which allowed the jury to find as it did—became “the law of the case.” *Guijosa v. Wal-Mart Stores*, 144 Wn.2d 907, 917, 32 P.3d 250 (2001).

Not only did Chubb fail to object before the jury began its deliberations, it also failed to raise the alleged inconsistency with the trial court before the jury was discharged. It is settled law that failure to object to an inconsistency in the verdict before discharge of the jury waives the issue. *Dormaier*, 177 Wn. App. at 868 n. 13; *Minger v. Reinhard Distrib. Co. Inc.*, 87 Wn. App. 941, 946, 943 P.2d 400 (1997); *Gjerde v. Fritsche*, 55 Wn. App. 387, 393-94, 777 P.2d 1072 (1989); *Lahmann v. Sisters of St. Francis of Philadelphia*, 55 Wn. App. 716, 723, 780 P.2d 868 (1989). Put simply, a party must raise the inconsistency with the first jury; he cannot choose to “try his luck with a second jury.” *Gjerde*, 55 Wn. App. at 394.

If there truly was a conflict between the jury's findings that Chubb did not breach the policy, on the one hand, and that Chubb violated IFCA, on the other, it was obvious on the face of the verdict form. CP 2010-11, 2013. Chubb should have raised the issue then; the court could have given further instructions or polled the jury to determine whether the verdict was inconsistent and, if so, whether to enter judgment or grant a new trial on the coverage claim *or* the IFCA claim (Chubb assumes the jury followed its instructions on coverage and ignored them on IFCA, but, if there were

truly an inconsistency, the opposite is just as possible). Chubb failed to do so, raising the issue for the first time in its “Motion to Correct the Verdict” ten days later. CP 2032-57. By then it was too late, and neither the trial court nor this Court can speculate about the jury’s intent. Chubb failed to preserve its challenge to the jury’s IFCA verdict for this reason as well.

**2. The Jury’s IFCA Verdict Is Consistent With Its Other Findings; Substantial Evidence Supports The Finding That Chubb “Unreasonably Denied” Coverage.**

Even had Chubb preserved the issue, the IFCA verdict still would need to be affirmed. A court must harmonize perceived conflicts in the verdict form; only if the answers are irreconcilable is a party entitled to a new trial. *Tincani v. Inland Empire Zoological Soc’y*, 124 Wn.2d 121, 131, 875 P.2d 621 (1994). At the same time, “[o]verturning 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). A court may “not substitute its judgment for that of the jury, so long as there was evidence which, if believed, would support the verdict rendered.” *Id.* at 108. Here, the jury’s IFCA verdict is both consistent with its other findings and supported by substantial evidence.

The jury was instructed that it could find a violation of IFCA if Chubb “unreasonably denied” coverage. CP 1874. Chubb argues this standard cannot be met if it did not owe NBL additional coverage under

the policy, and it speculates that the jury based its verdict not on a denial of coverage, but on violation of “claims handling regulations.” Chubb Br. at 33-34. Chubb studiously ignores, however, that the jury heard evidence that Chubb denied NBL coverage on three different occasions, for three different reasons: the first, in 2009, based on the 2006 SBC; the second, in 2011, based on the 2003 SBC; and the third, in 2013, on the policy’s “Concealment or Misrepresentation” clause. This Court rejected the first basis as a matter of law, *No Boundaries*, 160 Wn. App. at 957-59, and the jury rejected the third basis as a matter of fact at trial. CP 2009.

Substantial evidence supports the jury’s finding that Chubb acted “unreasonably” when it improperly denied coverage on the first and third bases. As to the 2009 denial, Chubb’s first adjuster, Blackburn, testified that he would have (properly) applied the code “in effect at the time of the loss.” RP 10/03/13 at 333. But he was replaced in 2007, and Chubb’s new adjuster, Peterson, never bothered to determine which code applied, nor did he give any guidance on the issue to Chubb’s consultants—who wrongly applied the 2006 SBC. *Id.* at 445-446, 637; RP 10/10/13 at 1118, 1155; Ex. 57. When NBL asked Chubb to apply the 2003 SBC, Chubb simply refused; NBL was then forced to file suit and successfully fight the issue on appeal—leading to an unnecessary two-year hiatus and additional costs to NBL. RP 10/02/13 at 157-59; RP 10/07/13 at 595; Ex. 158. The

jury could easily find Chubb's improper 2009 denial under the 2006 SBC to be "unreasonable," and that it caused NBL to incur significant damage, even if it agreed with Chubb's subsequent denial under the 2003 SBC.

The same is true with respect to Chubb's 2013 misrepresentation theory, which the jury rejected. As discussed above and in Section V.C.3 below, until Chubb's lawyers raised the issue eight years after the collapse and four years into the litigation, Chubb never questioned the kitchen—even though Yates told them from the beginning he did not know what was in it. RP 10/02/13 at 160-64; RP 10/07/13 at 498, 505-06, 606-09; RP 10/08/13 at 761, 798, 834; RP 10/09/13 at 1030, 1042. Indeed, Chubb made a partial payment for the kitchen based on a layout and estimate its own consultants created in 2007. RP 10/08/13 at 754-56; RP 10/09/13 at 921-25, 1020; Exs. 64, 66, 67 & 192. Here, too, the jury was entitled to find that Chubb acted "unreasonably" when it belatedly attempted to deny NBL's claim on the basis of a contrived and groundless accusation of fraud—regardless how it decided the coverage issues generally.

For the same reason, there is no merit to Chubb's claim that the IFCA verdict was premised on a violation of insurance regulations—and, thus, the supposed conflict between the verdict and Chubb's cherry-picked federal case law is illusory. The trial court rejected NBL's proposed instruction that would have allowed the jury to find an IFCA violation if

Chubb unreasonably denied coverage *or* “violated a statute or regulation governing the business of insurance claims handling.” CP 1651. Instead, and over NBL’s objection (CP 2000), the trial court gave an instruction that omitted reference to regulatory violations. CP 1874; RP 10/10/13 at 1196. NBL therefore could not argue, and the jury did not decide, that violation of the insurance regulations supported a violation of IFCA.<sup>3</sup>

Regardless, Chubb’s effort to tie reasonableness with contractual entitlement ignores the plain language of IFCA and its purpose. Nothing in the statute precludes a finding that an insurer acted unreasonably *in the manner* in which it denied coverage, even if ultimately owes no additional coverage. *Isilon Sys., Inc. v. Twin City Fire Ins. Co.*, 2012 WL 1202331 (W.D. Wash. Apr. 10, 2012) (contract claim dismissed where insurer paid policy limits, but triable issue existed on whether prior denial violated IFCA). This case is a perfect example; the fact Chubb prevailed on one basis for denying NBL’s claim did not require the jury to ignore Chubb’s

---

<sup>3</sup> Although the Court does not need to decide the issue, an IFCA claim can be based on violation of the insurance regulations. The WPI specifically recognizes this basis of IFCA liability, as do many federal decisions. *See* 6A Wash. Prac., Wash. Pattern Jury Instr., Civ. 320.06.01; *Merrill v. Crown Life Ins. Co.*, --- F.Supp.2d ----, 2014 WL 2159266, \*9 (E.D. Wash. May 23, 2014) (“The statute creates a private right of action against an insurer which (1) ‘unreasonably denie[s] a claim for coverage or payment of benefits’; and/or (2) violates one of several claims handling regulations”); *Bronsink v. Allied Prop. and Cas. Ins. Co.*, 2010 WL 2342538, \* 2 (W.D. Wash. June 8, 2010) (“The IFCA also enumerates several sections of the Washington Administrative Code ..., the violation of any one of which will trigger a violation of the statute.”).

conduct in unsuccessfully attempting to deny coverage on other grounds. Chubb cannot claim “no-harm-no-foul” when the jury found these other denials to be “unreasonable” and that they caused NBL to suffer \$200,000 in damages. The IFCA verdict must be affirmed for this reason as well.

**B. The Trial Court Did Not Abuse Its Discretion In Refusing To Give Chubb’s Proposed Cox Instruction.**

On the last day of trial, to thwart the jury from considering whether it acted in bad faith when it accused NBL of fraud, Chubb proposed a supplemental jury instruction culled from *Mut. of Enumclaw Ins. Co. v. Cox*, 110 Wn.2d 643, 757 P.2d 499 (1988), stating that an insurer “has no affirmative duty to inform its insured that it believes he has concealed or misrepresented material facts in connection with his claim ....” CP 1842. The trial court properly refused to give the instruction. RP 10/10/13 at 1203. *Cox* prevents a jury from finding waiver when the insurer proves fraud; it does not prevent a jury from finding bad faith when the insurer does not. Chubb cannot show prejudice in any case; it was able to and did argue its theory to the jury and, regardless, substantial evidence supported the jury’s bad faith verdict on multiple independent grounds.

**1. The Trial Court’s Bad Faith Instructions Were Proper; Cox Does Not Limit An Insurer’s Duty Of Good Faith.**

The trial court’s decision to refuse a proposed jury instruction is reviewed only for abuse of discretion. *Stiley v. Block*, 130 Wn.2d 486,

499, 925 P.2d 194 (1996). “A trial court abuses its discretion if its decision was manifestly unreasonable, or its discretion was exercised on untenable grounds, or for untenable reasons.” *Boeing Co. v. Harker–Lott*, 93 Wn. App. 181, 186, 968 P.2d 14 (1998). Instructions are sufficient if they permit a party to argue its theory of the case, are not misleading and, when read as a whole, properly inform the trier of fact on the applicable law. *Adcox v. Children’s Orthopedic Hosp. & Med. Ctr.*, 123 Wn.2d 15, 36, 864 P.2d 921 (1993). There was no abuse of discretion here.

Chubb’s argument is premised on a misreading of *Cox*. *Cox* did not address what a jury could consider when evaluating bad faith. Rather, *Cox* held that, where the insurer successfully denies coverage on the basis of fraud, the insured cannot argue that the insurer waived the defense if it made payments after knowing the insured’s statements were false—that is, the insurer has “no affirmative duty” to immediately reveal its suspicions to avoid a finding of waiver. 110 Wn.2d at 650; *Johnson v. Allstate Ins. Co.*, 126 Wn. App. 510, 517 n. 5, 108 P.3d 1273 (2005) (“the company did not waive the right to void the policy simply because it knew of the insured’s false statements, but still made partial payments”). The rule is based on the principle that an insured without “clean hands” cannot invoke equity. *Id.* at 650-51. In short, the “*Cox* rule” allowed Chubb to accuse

NBL of fraud years into the litigation, but it was not intended to immunize Chubb from its duty to act in good faith if it chose to do so.<sup>4</sup>

*Cox* does not address the situation where, as here, the jury finds no fraud and, thus, must decide whether the insurer acted in good faith. To be sure, neither *Cox* nor any other Washington case holds that *Cox*'s "no affirmative duty" language is a required instruction in a bad faith case. It is not, and it would have been error to give such an instruction because it would have allowed Chubb to argue that it had "no duty" to act in good faith when it accused NBL of fraud—even if, as here, substantial evidence proved the accusation to be unfounded. In effect, Chubb's proposed instruction would trump the well-settled standard for insurance bad faith. *Indus. Indem. Co. v. Kallevig*, 114 Wn.2d 907, 917, 792 P.2d 520 (1990) ("insurer must make a good faith investigation of the facts before denying coverage and may not deny coverage based on a supposed defense which a reasonable investigation would have proved to be without merit"). Indeed, that is precisely why Chubb wanted the instruction in the first place.

---

<sup>4</sup> Chubb successfully invoked the actual holding of *Cox* to assert its fraud defense when it did. When NBL argued that it was too late for Chubb to assert a misrepresentation defense on the eve of trial, years after it had made partial payments toward NBL's collapse claim, Chubb relied on the "*Cox* rule" to argue that there was no waiver. CP 929. The trial court agreed. CP 1334-35. When NBL later sought to preclude Chubb from denying coverage at trial on grounds not stated in its original 2009 denial letter, Chubb again cited *Cox* as authority to allow it to press forward with its fraud claim. CP 1347-48; CP 1690-92. And, again, the trial court agreed with Chubb. CP 1441-42; CP 1834-35.

The trial court properly rejected Chubb's effort to stack the deck by injecting *Cox*'s no-waiver rule and inapt "no duty" language into the court's bad faith instructions. Those instructions were a complete and correct statement of the law, CP 1870-72, and they properly entitled the jury to consider the basis and timing of Chubb's accusation of fraud just as it could for any other improper denial—and, if made without a "reasonable investigation" or "reasonable justification," to find bad faith. *Kallevig*, 114 Wn.2d at 917-20 (substantial evidence supported bad faith verdict where insurer accused insured of arson without reasonable justification). Chubb's decision to deny coverage on the basis of a misrepresentation clause is entitled to no greater deference than a denial of coverage on the basis of some other exclusion. At best, Chubb's proposed *Cox* instruction would have confused the jury; at worst, it would have distorted the proper standard for good faith and increased NBL's burden to prove bad faith.

**2. Chubb Cannot Show Prejudice; It Was Able To Argue Its Theory And Substantial Evidence Supported The Jury's Bad Faith Verdict On Multiple Grounds.**

The trial court's refusal to give the proposed *Cox* instruction was harmless in any event. Instructional error requires reversal only if it affected the outcome of the trial. *Stiley*, 130 Wn.2d at 498-99. There can be no prejudice here because Chubb was able to argue its theory of the case. Chubb claims that, without a *Cox* instruction, it could not argue that

it acted in good faith when it accused NBL of fraud during the litigation. Chubb Br. at 42-43. Chubb is wrong. The trial court ruled otherwise, RP 10/10/13 at 1203, and Chubb specifically did just that in closing argument. *Id.* at 1240 (“There was some comment that shouldn’t Chubb have raised the question back then? Well, there is a reason they didn’t. You heard it from that witness stand. ... It is only in 2013 when they thought that their trust had been betrayed.”). The jury simply didn’t buy it.

Chubb similarly claims that the lack of a *Cox* instruction allowed NBL to argue that it “acted in bad faith by breaching a duty to promptly discover and advise NBL of a suspected misrepresentation before NBL commenced this lawsuit.” Chubb Br. at 42-43. Wrong again. Chubb provides no citation for this statement because it simply is not true. NBL did not tell the jury that Chubb had a duty to assert its accusation of fraud earlier. Indeed, NBL made a similar legal argument to the court before trial—and lost. CP 1237-50; CP 1441-42. Thus, in closing, consistent with the court’s bad faith instructions, NBL argued only that Chubb’s lawyers concocted the claim without reasonable justification because they feared Chubb would lose the coverage issue. RP 10/10/13 at 1226-28.

Chubb cannot show prejudice for the additional reason that substantial evidence supported the jury’s verdict on grounds wholly unrelated to its accusation of fraud. Chubb did not challenge the bad faith

verdict for insufficiency of the evidence before or after trial, *see* CR 50, nor does it do so on appeal—for good reason. To begin with, as explained in Section V.A.2 above, there was more than substantial evidence to prove that Chubb acted without reasonable investigation or justification when, in 2009, despite NBL’s protestations, it failed to analyze and erroneously denied NBL code upgrades under the inapplicable 2006 SBC—leading to at least two years of unnecessary delay and costs to NBL. If this Court could find Chubb’s interpretation to be unreasonable, *see No Boundaries*, 160 Wn. App. at 957, the jury was certainly entitled to find the same thing. The bad faith verdict can and should be upheld on this basis alone.

The jury was likewise entitled to find bad faith based on Chubb’s unreasonable handling of NBL’s claim generally. After the fire, Chubb led NBL to believe it would treat the collapse and fire repairs as a single claim, agreed that NBL should have one contractor and a new permit for all repairs, encouraged NBL to hire a project manager to work with its experts, and actively participated in defining the scope of work—only to unexpectedly “pull the plug” a year and a half later due to economic pressures, stop all funding, criticize NBL for not treating the collapse repairs separately and deny additional coverage. RP 10/02/13 at 106-09, 113-27, 134-47, 173-74; RP 10/03/13 at 422-31; RP 10/07/13 at 495-96, 526, 563, 568, 628; RP 10/08/13 at 716-20, 730, 736-37; Exs. 24, 25, 26,

217 & 218. Chubb's proposed *Cox* instruction had nothing to do with this conduct and, even if given, would not have mitigated its effect. Substantial evidence supported the bad faith verdict on this basis as well.<sup>5</sup>

**C. The Trial Court Did Not Abuse Its Discretion In Admitting Evidence Concerning The "Legal Consequences" NBL Would Face If It Intentionally Misrepresented Its Claim.**

The jury instructions regarding Chubb's misrepresentation defense were highly favorable to Chubb. Over NBL's objections (CP 1884, 1886, 2000), the trial court dispensed with the "clear and convincing" standard and instructed the jury that it could presume an intent to deceive if Chubb proved NBL "knowingly" made a false statement of "material" fact. CP 1862-64. Chubb tried desperately to prove-up its theory of fraud at trial, but, as discussed in Section V.C.3 below, substantial evidence showed that there was a kitchen in the basement of the Metropole and, worse yet, Chubb had no good faith basis to accuse NBL of lying about it. The jury believed NBL, and returned a verdict in its favor on the issue. CP 2009.

---

<sup>5</sup> The jury also heard testimony on the requirements of Washington's claims-handling regulations. RP 10/03/13 at 350-357, 457-63; RP 10/07/13 at 478, 480-81, 84-85, 491. Although Chubb's adjusters denied violating the regulations, the jury was free to draw a contrary conclusion—which also would support a finding of bad faith. *See Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 386, 715 P.2d 1133 (1986). Below, Chubb suggested that the jury did not find a violation of the regulations because it rejected NBL's CPA claim. CP 2039. It is pure speculation. The jury could have rejected the CPA claim for any number of other reasons, including failure to prove Chubb's conduct "affected the public interest," CP 1865 (Instr. 16), or had a "capacity to deceive a substantial portion of the public," CP 1866 (Instr. 17).

Chubb argues the jury's verdict was the product of sympathy, not the evidence, because the jury was told that, if it found fraud, "NBL could lose its coverage and be compelled to return insurance proceeds to" Chubb. Chubb Br. 46-47. The trial court properly refused to grant Chubb a new trial on this basis, RP 10/09/13 at 871-73; CP 2700-01, because (1) Chubb waived its objection to testimony that a misrepresentation would "void" the policy, (2) evidence regarding the "legal consequences" of a misrepresentation was admissible in any event because it was relevant to NBL's truthfulness, and (3) had the court erred in admitting the testimony, it was harmless given the substantial evidence that supported the verdict.

**1. Chubb Did Not Object To Evidence That A Finding Of Fraud Would Render NBL's Policy "Void."**

The jury heard testimony of two "legal consequences" that would befall NBL if it misrepresented its claim. One, NBL's Yates and Chubb's Peterson testified that a misrepresentation would "void" the policy. RP 10/02/13 at 160:6-8; RP 10/07/13 at 498:20-23. Two, Peterson testified that, if the policy was void, "the amounts paid should be returned to the insurance company." RP 10/07/13 at 499:5-9. Although unclear, it appears Chubb argues it is entitled to a new trial because the jury was unfairly influenced by testimony and argument regarding both kinds of consequences. Chubb Br. at 3 and n. 3 (Assn. of Error 1).

As a threshold matter, Chubb waived any error based on the jury’s consideration of testimony that the policy would be “void” because it affirmatively abandoned its objection to that evidence. To challenge the admission of evidence on appeal, a party must have raised a timely and specific objection to the evidence at trial. *In re Dependency of Penelope B.*, 104 Wn.2d 643, 659-60, 709 P.2d 1185 (1985); *State v. Gray*, 134 Wn. App. 547, 557, 138 P.3d 1123 (2006). And failure to challenge the admissibility of the evidence waives any objection to its consideration by the jury. *State v. Saunders*, 132 Wn. App. 592, 607, 132 P.3d 743 (2006).

Chubb filed a motion *in limine* to exclude evidence relating to all “legal consequences” of a finding that NBL misrepresented its claim. CP 1591-93. In argument, however, Chubb clarified that it did not object to testimony that the policy would be void if NBL misrepresented its claim—recognizing the jury was “going to know that” because “it’s in the contract and it will also be ... in the verdict form.” RP 10/01/13 at 26-27. Chubb asked the court to exclude only references to the fact that NBL would have to repay Chubb. *Id.* at 25-40. The court summarized Chubb’s position:

THE COURT: The way I see the motion now that we’ve kind of refined it is that the -- the motion is to exclude any reference to the fact that a finding of material misrepresentation may lead to the Court entry of an order refunding prior payments. I think that’s it.

*Id.* at 28:18-23. Chubb’s counsel agreed, *id.* (“that is the concern”), and

repeatedly confirmed that understanding.<sup>6</sup> Based on Chubb's clarification, the court denied the motion, but suggested it might exclude testimony on the refund issue. *Id.* at 30-31 ("I'm going to deny that motion to the extent that [it] seemed to be reaching way beyond what I think I hear you saying now, Counsel, which is we don't want to get into the consequences of the refund issue. I think everything else is fair game."); CP 1838.

Consistent with its stated position, Chubb did not object when Yates and Peterson testified that fraud would void the policy, RP 10/02/13 at 160, 174; RP 10/07/13 at 498:20-23, nor did it ask the court to bar reference to that testimony during closing argument. RP 10/10/13 at 1204. Rather, Chubb objected only when Peterson testified that a finding of fraud would require NBL to repay Chubb. RP 10/07/13 at 498:24-499:9, 533:4-8. Its request for a mistrial likewise rested solely on that limited testimony. RP 10/09/13 at 871:15-872:20 ("It is this whole issue ... that [NBL] might be required to pay funds back to [Chubb]."). Because Chubb

---

<sup>6</sup> See RP 10/01/13 at 30:3-11 ("THE COURT: .... I think what they're asking is that we not parade in front of the jury: By the way, that 700 -- I forget how many hundreds of thousands of dollars were paid -- is going to need to be refunded back to the insurance company if you make this finding. That's where they don't want to go. COUNSEL: Precisely."); *id.* at 40:10-18 ("THE COURT: ... That's the narrow box ... I'm hearing the defense worry about. COUNSEL: Exactly. ..."). The transcript improperly identifies the speaking counsel in the beginning portion of the discussion, at pp. 25-27, as "MR. DONOVAN," one of NBL's lawyers, but it is clear from the context that it is Chubb's counsel; the transcript properly identifies "MR. JACOBI" and "MR. WILSON," Chubb's lawyers, for the remainder of the discussion, beginning at pg. 28.

did not make—and, thus, did not preserve—an objection to testimony that a misrepresentation would void the policy, its claim of error must be confined to Peterson’s single fleeting reference to the threat of repayment.

**2. Testimony Regarding The Consequences Of A Voided Policy Was Relevant To Chubb’s Burden To Prove NBL Intentionally Misrepresented Its Claim.**

Chubb did object to Peterson’s reference to a repayment, but that objection was properly overruled. RP 10/07/13 at 498:24-499:9, 533-536; RP 10/09/13 at 872:21-873:20.<sup>7</sup> Chubb ignores the standard of review. Chubb Br. at 49 n. 125. Relevant evidence is admissible unless the trial court finds its probative value “substantially outweighed by the danger of unfair prejudice[.]” ER 402, 403. The court “has broad discretion to balance probative value versus prejudice under ER 403.” *Lodis v. Corbis Holdings, Inc.*, 172 Wn. App. 835, 863, 292 P.3d 779 (2013). “Because of the trial court’s considerable discretion in administering ER 403, reversible error is found only in the exceptional circumstance of a manifest abuse of discretion.” *Carson v. Fine*, 123 Wn.2d 206, 226, 867 P.2d 610 (1994). No exceptional circumstances exist here.

First, even had Chubb objected to it, there was no basis to exclude the testimony of Yates and Peterson that the policy would be “void”

---

<sup>7</sup> Chubb cites “ER 408,” as the grounds upon which the testimony should have been excluded. Chubb Br. at 5, 24 & 49 n. 125. NBL assumes this is a typo, and that Chubb meant ER 403—upon which Chubb objected to the testimony below. CP 1591-93; CP 2091; RP 10/07/13 at 498:25, 535:2, 536:11.

because the jury already knew that fact. The policy says so expressly, Ex. 2 at PI-POLICY 000390, and it was also clear from the verdict form—which instructed the jury to stop deliberating if it found fraud. CP 2009. That is why Chubb abandoned its objection in the first place. RP 10/01/13 at 27:3-10 (“The jury will read the policy. They’ll know that’s what it means. And when they see the verdict form ... they’ll understand that that means [the] insured takes nothing”). There certainly was no error or prejudice in allowing testimony that was, at worst, cumulative of other evidence and instructions regarding the relevant terms of NBL’s policy.<sup>8</sup>

Second, as to Peterson’s reference to the threat of repayment, and to “legal consequences” evidence generally, the testimony was relevant to NBL’s credibility before and during trial. The jury was instructed that, to prevail on its fraud defense, Chubb had to prove that NBL knowingly made material misrepresentations regarding its claim and that, in doing so, it intended to deceive. CP 1862 & 1864; *Ki Sin Kim v. Allstate Ins. Co.*,

---

<sup>8</sup> Indeed, courts commonly instruct the jury that a finding of fraud will void the policy. *See St. Paul Mercury Ins. Co. v. Salovich*, 41 Wn. App. 652, 655 n. 1, 705 P.2d 812 (1985) (jury instructed that if defendants intentionally misrepresented material facts, then “Plaintiff owes Defendants nothing under this policy”); *Delvo v. St. Paul Travelers Ins. Co.*, 2007 WL 2601030, \*5 (E.D. Wash. Sept. 10, 2007) (jury instructed that “the insurance contract further provides that if the insured intentionally makes a false claim or material misrepresentation, the insurer may treat the insurance contract as being null and void and the insurer may recover all sums paid under the insurance contract”); also O’Malley, Grenig, & Lee, *Fed. Jury Pract. & Instruct.*: Civil § 126.72 at 419 (6th ed. 2011) (“the insurance policy... provides that the policy shall be void if the insured willfully misrepresents or conceals any material fact ....”).

*Inc.*, 153 Wn. App. 339, 355, 223 P.3d 1180 (2009). The trial court correctly recognized that NBL's knowledge that it would be forced to disgorge hundreds of thousands of dollars if it were caught lying about the kitchen made it far more probable that it was being truthful. RP 10/07/13 at 536:13-19; RP 10/07/13 at 873:9-15; RP 10/10/13 at 1200:1-9. Thus, contrary to Chubb's argument that there was "no viable rationale" to allow the jury to hear Peterson's testimony, Chubb Br. at 47, the testimony bore directly on the *mens rea* Chubb was required (but failed) to prove.

Chubb argues that the testimony was not relevant for this purpose because NBL was not aware of the "Concealment or Misrepresentation" clause, or its effect, when it first made its kitchen claim. Chubb Br. at 48-49. The trial court properly rejected this argument because, even if that were true, NBL's decision to press forward with its claim, after Chubb unambiguously invoked the clause in July 2013, was equally relevant to credibility. RP 10/07/13 at 873:9-15 ("if one is in jeopardy of having to pay a considerable amount of money back to the insurance company it might also bear on their credibility at this point in time and whether they would persist with the lawsuit"); RP 10/10/13 at 1200:1-9, 1204:11-19 (same). It was well-within the court's discretion to find the risk of unfair prejudice from this evidence remote relative to its probative value.

Moreover, Chubb cannot now complain that the jury may have misunderstood the relevance of the testimony. Chubb Br. at 47-48. After it overruled Chubb's objection, the trial court asked if Chubb wanted to propose a limiting instruction. Chubb declined. RP 10/07/13 at 536-37. A party who objects to evidence on the grounds of unfair prejudice, but refuses an invitation for a limiting instruction, waives any error that the instruction would have cured. *State v. Ramirez*, 62 Wn. App. 301, 305-06, 814 P.2d 227 (1991). While Chubb's election to refuse the court's offer of a limiting instruction may have been a reasonable trial strategy, it further forecloses Chubb's claim of error or prejudice on appeal. *Cf. State v. Sullivan*, 69 Wn. App. 167, 172, 847 P.2d 953 (1993) (a party cannot "simply lie back, not allowing the trial court to avoid the potential prejudice, gamble on the verdict, and then seek a new trial on appeal").

Finally, Chubb's reliance on *State v. Townsend*, 142 Wn.2d 838, 15 P.3d 145 (2001), is misplaced. Chubb Br. at 48. In *Townsend*, the Supreme Court held it was harmless error for a prosecutor to tell the jury during voir dire that the state would not seek the death penalty, because it might make the jury more inclined to convict. *Id.* at 846-47. Unlike here, the prosecutor's reference to a possible sentence was not evidence, nor was it relevant to any element of the crime or defense. Neither *Townsend* nor any other case holds that a trial court cannot admit, or a jury cannot

consider, admissible evidence regarding the “legal consequences” of a particular act where, as here, a party’s knowledge of those consequences may make the occurrence of the act either more or less probable.

**3. Admission Of The Insignificant “Legal Consequences” Testimony Was Harmless; Substantial Evidence Amply Supports The Jury’s Verdict.**

Chubb suggests the jury rejected its misrepresentation defense out of sympathy for NBL because the “legal consequences” testimony is the only evidence that explains the verdict. But it’s not—by a long shot—and that reality is equally fatal to Chubb’s argument. To obtain reversal, the objecting party must show that the inadmissible evidence was prejudicial, *i.e.*, it affected the outcome of the trial. *Stiley*, 130 Wn.2d at 508; *Brown v. Spokane County Fire Prot. Dist. No. 1*, 100 Wn.2d 188, 196, 668 P.2d 571 (1983). Where, as here, the evidence is of minor significance relative to the whole, and substantial evidence otherwise supports the verdict, the error is harmless. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). Thus, even had the trial court erred in admitting the “legal consequences” testimony, there still would be no grounds for reversal.

The testimony played a minor role at trial. As noted, Peterson referenced the possibility that NBL would have to repay Chubb once; it was never mentioned again. RP 10/07/13 at 499:5-9. Yates referenced the policy becoming “void” (again, something the jury would already know)

twice; Peterson once. RP 10/02/13 at 160, 174; RP 10/07/13 at 498-499. During closing argument, NBL's counsel briefly mentioned the policy's "Concealment or Misrepresentation" clause, not to garner sympathy for NBL, but to bolster NBL's credibility—just as the trial court intended. RP 10/10/13 at 1231. Over two weeks of trial, the jury cumulatively heard several days' worth of testimony and argument on the issue of NBL's alleged fraud. It is inconceivable that the jury ignored all that evidence, refused to follow the court's instructions, lost its impartiality, and found in NBL's favor solely because of this scant and benign testimony.

It didn't. Substantial evidence—all of which Chubb ignores—confirms that there was a kitchen in the Metropole's basement. Following his inspection two days after the collapse, Chubb's Blackburn noted, "the kitchen portion has collapsed." RP 10/03/13 at 323. NBL's Yates and Tom Graff, the agent who sold the Metropole to NBL and who assisted NBL lease the building, both testified unequivocally that there was a kitchen. Indeed, two of NBL's prior tenants had served hot food from it. RP 10/01/13 at 51-54; RP 10/02/13 at 161-63; RP 10/10/13 at 1175-77.<sup>9</sup> David Murphy, the project manager, also testified—based on his

---

<sup>9</sup> Chubb makes a fuss because—more than eight years after the fact—Graff could not remember that the collapse occurred in 2005, and mistakenly testified he saw the kitchen in 2007. Chubb Br. at 23 & 47. Of course, Graff's confusion about the dates did not prevent the jury from finding his testimony regarding the existence of the kitchen wholly credible, which it was.

inspection of the area (which revealed gas lines and meters, exhaust ducts showing the existence of cooking grease, fans and other fixtures) and earlier floor plans—that he had no doubt there had been a kitchen in the collapsed part of the basement. RP 10/08/13 at 758, 761-72; Ex. 85. The jury was entitled to find this testimony credible, believe it, and reject Chubb’s accusation of fraud on this basis alone.

But there was more. Substantial evidence showed that Chubb did not prove that NBL “knowingly” overstated its claim. Yates, Murphy and Peterson testified that Yates repeatedly told Chubb that he did not know what was in the kitchen. RP 10/02/13 at 162-64; RP 10/07/13 at 606-09; RP 10/8/13 at 798. Chubb’s claims file confirmed his candor: “no one has a good idea about what was in the kitchen when the collapse occurred.” Ex. 50. Yates didn’t know because he rarely went into the basement (which was vacant), and had no reason to inventory its contents; the same was true for all of NBL’s buildings. RP 10/01/13 at 21-24, 51-54; RP 10/02/13 at 160. As a result, the specifications that Murphy and NBL later used in their allegedly inflated estimates were created by Chubb’s own consultant, Young & Associates, in 2007 and 2008. RP 10/09/13 at 921-22, 1010-12, 1020; RP 10/08/13 at 754-56, 799-800, 829-30; Exs. 66, 67 & 192. Simply put, NBL never intentionally falsified its claim.

Lastly, substantial evidence showed that NBL's statements were not "material" because Chubb never questioned NBL's plans or proof regarding the kitchen during the years Chubb adjusted the claim. It wasn't until 2013, eight years after the collapse and four years into the lawsuit, that Chubb's lawyers first told its consultants to attack the kitchen claim. RP 10/07/13 at 498, 505-06; RP 10/08/13 at 761, 834; RP 10/09/13 at 904-06, 1030, 1042. Indeed, far from questioning the claim at the time, Chubb paid more than \$100,000 toward kitchen repairs in 2008 and 2009 based on estimates drawn-up, as noted, by its own consultants. RP 10/7/13 at 511-12; RP 10/08/13 at 754-56; RP 10/09/13 at 921-26, 1020; Exs. 64, 66, 67 & 192. In short, Chubb did not care about the kitchen until its lawyers, long after the fact, began grasping for new grounds to deny NBL's claim. The "legal consequences" testimony was harmless for this reason too.

**D. NBL Was Entitled To An Award Of Attorneys' Fees Under IFCA And The *Olympic Steamship* Doctrine.**

Chubb appeals the trial court's conclusion that NBL was entitled to a partial award of attorneys' fees under both IFCA (in the amount of \$280,000) and *Olympic Steamship* (in the amount of \$254,250). Chubb Br. at 37-40. Chubb does not appeal the amount, reasonableness or allocation of the award. *Id.* This Court reviews a legal entitlement to fees *de novo*. *Blue Diamond Group, Inc. v. KB Seattle 1, Inc.*, 163 Wn. App.

449, 457, 266 P.3d 881 (2011). For the reasons explained below, NBL was entitled to attorneys' fees on both bases as a matter of law.

**1. NBL Was Entitled To Attorneys' Fees Under IFCA Because It Prevailed On Its IFCA Claim.**

The trial court was required to award NBL reasonable attorneys' fees and costs because it prevailed on its IFCA claim. RCW 48.30.015(3) ("The superior court shall ... award reasonable attorneys' fees and actual and statutory litigation costs ... to the first party claimant of an insurance contract who is the prevailing party in such an action."). Chubb argues the award must be reversed because the IFCA verdict itself must be reversed; it asserts no independent grounds for reversal. Chubb. Br. at 37.<sup>10</sup> For all the reasons set forth in Section V.A above, because the IFCA verdict must be affirmed, so too must the trial court's award of IFCA fees and costs.

**2. NBL Was Entitled To Attorneys' Fees Under *Olympic Steamship* Because It Successfully Defeated Chubb's Denial Of Coverage On The Basis Of Fraud.**

Chubb's appeal of the trial court's award under *Olympic Steamship* is also without merit. "[A]n award of fees is required ... where the insurer

---

<sup>10</sup> Chubb half-heartedly suggests—but does not actually argue as grounds for reversal—that the trial court should not have awarded NBL attorneys' fees for its successful interlocutory appeal because NBL amended its complaint to add an IFCA claim only after this Court issued its decision. Chubb Br. at 37 n. 94. But, of course, this Court's ruling that Chubb should have applied the 2003 SBC was one of the predicates of NBL's IFCA claim and a key reason why the jury found Chubb's 2009 denial to be "unreasonable." Plainly, the fees NBL incurred on appeal were necessary—integral—to NBL ultimately prevailing at trial.

compels the insured to assume the burden of legal action to obtain the full benefit of his insurance contract[.]” *Olympic S.S. Co. v. Centennial Ins. Co.*, 117 Wn.2d 37, 54, 811 P.2d 673 (1991). This is so because, “when an insurer unsuccessfully contests coverage, it has placed its interests above the insured,” and a fee award “remedies this inequity by requiring that the insured be made whole.” *McGreevy v. Oregon Mut. Ins. Co.*, 128 Wn.2d 26, 39-40, 904 P.2d 731 (1995). As Chubb points out, the rule does not apply where the parties dispute only the value of a claim. *Dayton v. Farmers Ins. Group*, 124 Wn.2d 277, 280, 876 P.2d 896 (1994).

Chubb argues that *Olympic Steamship* does not apply because it covered NBL’s claim, and only disputed its value. Chubb Br. at 38-39. But this was not just a valuation dispute. Chubb made it a coverage dispute when it invoked the policy’s “Concealment or Misrepresentation” clause in an attempt to void the policy and claw back benefits already paid. Chubb lost that dispute, and it was required to make NBL whole for forcing NBL to unnecessarily incur fees contesting coverage on that basis. *McGreevy*, 128 Wn.2d at 39-40. It is well-settled that *Olympic Steamship* applies where an insurer improperly denies coverage on the basis of a policy exclusion. *Leingang v. Pierce County Med. Bureau, Inc.*, 131 Wn.2d 133, 145-48, 930 P.2d 288 (1997). An insurer’s improper denial on the basis of a misrepresentation clause should be no different.

Chubb also argues its fraud defense was really a valuation dispute because, to defeat it, NBL did not have to do anything more than what it already had to do. Chubb Br. at 40. Nonsense. Chubb’s gambit changed the nature and focus of the case. When Chubb invoked the “Concealment or Misrepresentation” clause in mid-2013, it ordered its consultants to find evidence to substantiate the claim—something it did not do when the dispute was just a question of value. RP 10/07/13 at 505-06; RP 10/09/13 at 904-06, 1030. NBL responded in kind, and presented lay and expert testimony regarding not just the existence of the kitchen, but also to refute knowledge, intent and materiality—elements of proof that are not relevant to a “valuation dispute.” As noted, even though the kitchen was only a fraction of NBL’s overall claim, nothing received more attention at trial. In sum, the attorneys’ fee award was not an “extension of the *Olympic Steamship*,” Chubb Br. at 40, but rather a faithful application of it.

**E. NBL Is Entitled To An Award Of Fees And Costs On Appeal.**

This Court may award attorneys’ fees and expenses if permitted by “applicable law.” RAP 18.1(a). As noted, the trial court properly awarded NBL fees and expenses under IFCA and the *Olympic Steamship* doctrine. CP 2765-66. If this Court affirms the verdict and fee award, as it should, the same two grounds likewise support an award of reasonable fees and expenses on appeal. See *Ainsworth v. Progressive Cas. Ins. Co.*, 180 Wn.

App. 52, 81-82 & n. 24, 322 P.3d 6 (2014) (awarding appellate fees under *Olympic Steamship* and noting that fees also proper under IFCA).

## **VI. ARGUMENT ON NBL'S CROSS-APPEAL**

Under the policy's "Ordinance or Law" clause, Chubb's coverage included the cost of "code upgrades" required by the relevant building code. Ex. 2 at PI-POLICY 000322. The 2003 Seattle Building Code contained two alternative "triggers" for mandatory code upgrades. RP 10/03/13 at 393-96; RP 10/10/13 at 1132, 1138. First, if the cost of repairs exceeded 60 percent of the building's value, the building had to comply with all the requirements of the code (the "60% Trigger"). Seattle Municipal Code ("SMC") § 3403.6 (2003). Second, if the repairs did not exceed the 60% Trigger, but still constituted "substantial alterations," then the building had to comply with six (6) specific (but not all) requirements of the code (the "Sub Alt Trigger"). SMC § 3403.12 (2003).

NBL argued at trial that the basement repairs satisfied the 60% Trigger or, in the alternative, the Sub Alt Trigger. NBL proposed instructions and a verdict form that would have permitted the jury to consider both theories. CP 1937-38, 1940, 1990-91, 1993. Over NBL's objection, CP 2000-01, the trial court rejected NBL's instruction and verdict form on the Sub Alt Trigger—allowing the jury to consider only the 60% Trigger. RP 10/09/13 at 1067-68; RP 10/10/13 at 1195; CP 1876.

Although substantial evidence proved that the repairs satisfied the 60% Trigger, the jury awarded NBL no code upgrade damages. CP 2010.

NBL disagrees with the jury's verdict, but (unlike Chubb) respects it. The trial court erred, however, when it refused to allow the jury even to consider NBL's claim under the Sub Alt Trigger. A party is entitled to an instruction on its theory of the case when substantial evidence supports it. *Egede-Nissen v. Crystal Mountain, Inc.*, 93 Wn.2d 127, 135, 606 P.2d 1214 (1980). Failure to so instruct is *per se* prejudicial where, in the absence of the instruction, the party cannot argue its theory of recovery to the jury. *Barrett v. Lucky Seven Saloon, Inc.*, 152 Wn.2d 259, 266-67, 96 P.3d 386 (2004); *First State Ins. Co. v. Kemper Nat. Ins. Co.*, 94 Wn. App. 602, 612-13, 971 P.2d 953 (1999). Here, there was more than substantial evidence to show that the basement repairs "pulled" the Sub Alt Trigger.

NBL called Cornell Burt, a long-time engineer with Seattle DPD who was thoroughly familiar with the 2003 SBC and Metropole repairs. RP 10/03/13 at 389-90. Burt explained that DPD viewed "substantial alterations" as anything "beyond very, very minor repairs," and he testified unequivocally that the work necessary to repair the Metropole basement collapse easily cleared that threshold. *Id.* at 396-99. "[W]hen you have a damage that requires repair and replacement of foundation and the supporting structure of the lower level of the building, it is naturally

going to have effects all throughout the building, going up. Your entire support system for the building is compromised at that point, or that portion of the building.” *Id.* at 399. David Murphy, the project manager and architect of record, agreed and also testified that the repairs would require code upgrades under the Sub Alt Trigger. RP 10/08/13 at 742-50.

The trial court ruled that none of this evidence mattered because, in approving NBL’s 2007 permit for basement collapse repairs, DPD did not classify the work as a “substantial alteration.” RP 10/10/13 at 1195. The court’s apparent belief that the 2007 permit was indisputable proof on the Sub Alt Trigger was flawed for two reasons. *First*, whether the repairs qualified as a “substantial alteration” under the 2003 SBC was a question of fact for the jury, not a question of law. *Short v. Hoge*, 58 Wn.2d 50, 52, 360 P.2d 565 (1961) (jury properly instructed on Seattle building code, and properly admitted expert opinion on whether code was violated); *Pettit v. Dwoskin*, 116 Wn. App. 466, 473-75, 68 P.3d 1088 (2003) (error not to instruct jury on Seattle building code in negligence action because “[i]t was for the jury to decide whether the code was violated”).

*Second*, the 2007 permit covered partial and temporary repairs only. RP 10/01/13 at 74-75, 81; RP 10/03/13 at 305; RP 10/08/13 at 719-20, 722-23, 791; RP 10/09/13 at 903; Exs. 11, 17 & 88. Every witness agreed that the 2007 “EMERGENCY” permit did not include all the work

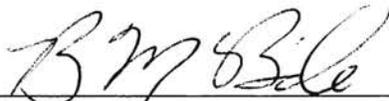
necessary to repair the basement. *Id.* Indeed, NBL applied for the permit before SSF had recommended replacing the entire south portion of the basement floor and adding more support for the first floor—repairs that Chubb would later agree to cover. RP 10/03/13 at 307; RP 10/07/13 at 557-61, 629-31; RP 10/08/13 at 722-23; RP 10/10/13 at 1144-47, 1156-57; Ex. 24. Thus, even if the 2007 emergency permit was relevant to whether the repairs constituted a “substantial alteration,” it was not conclusive. This Court can and should order a new trial on this single issue. *Mina v. Boise Cascade Corp.*, 104 Wn.2d 696, 707, 710 P.2d 184 (1985) (new trial may be confined to a particular issue where the error pertains to that issue only and justice does not require resubmission of the entire case to jury).

## VII. CONCLUSION

This Court should affirm the verdict as far as it goes. The trial court’s attorneys’ fee award likewise must be affirmed. The Court must, however, order a new trial on the limited issue of whether the basement collapse repairs satisfied the “substantial alteration” trigger.

RESPECTFULLY SUBMITTED this 19th day of September, 2014.

LANE POWELL PC

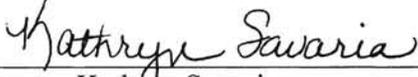
By   
Ryan P. McBride, WSBA No. 33280  
*Attorneys for Respondents/Cross-Appellants*

**CERTIFICATE OF SERVICE**

I hereby certify under penalty of perjury of the laws of the State of Washington that on September 19, 2014, I caused to be served a copy of the foregoing document to the following person(s) in the manner indicated below at the following address(es):

John D. Wilson David M. Jacobi Wilson Smith Cochran Dickerson 901 Fifth Avenue, Suite 1700 Seattle, WA 98164	<input type="checkbox"/> by <b>CM/ECF</b> <input checked="" type="checkbox"/> by <b>Electronic Mail</b> <input type="checkbox"/> by <b>Facsimile</b> <input type="checkbox"/> by <b>First Class Mail</b> <input checked="" type="checkbox"/> by <b>Hand Delivery</b> <input type="checkbox"/> by <b>Overnight Delivery</b>
--	---

Executed on the 19th day of September, 2014, at Seattle, Washington.

  
\_\_\_\_\_  
Kathryn Savaria 128.343.1

2014 SEP 19 PM 12:43  
COURT OF APPEALS  
STATE OF WASHINGTON