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No. 71424-4-I
COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

CHERYL STREMKE, a single person; TYE PANZONE, a married person; JAMI PANZONE, husband and wife; and UNITRIN, INC., d/b/a UNITRIN AUTO AND HOME INSURANCE COMPANY, d/b/a KEMPER, a foreign corporation,

Plaintiffs/Respondents,

v.

FISHER & PAYKEL APPLIANCES, INC., a California corporation,

Defendant/Appellant,

and

LOWE'S HIW, INC., a Washington corporation,

Defendant.

**APPELLANT FISHER & PAYKEL APPLIANCES, INC.'S
REPLY BRIEF**

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I. INTRODUCTION

The threshold issues in this appeal are the trial court's legal rulings that deprived F&P of its constitutional right to defend itself during trial. The trial court should have, *inter alia*, (1) provided F&P with a remedy for missing evidence, and (2) granted a directed verdict, dismissing the CPA claim and fee award and personal property claims as a matter of law. F&P is not asking this Court to substitute its judgment for that of the jury; rather, it is asking for the opportunity to have a fully-informed and properly-instructed jury consider the minimal proof offered to support the product liability claim.

For the reasons set forth herein and in F&P's opening brief, the trial court's legal rulings—including those that allowed Unitrin/Stremke to benefit from the evidence Unitrin failed to preserve—must be reversed.

II. REPLY ARGUMENT

A. Unitrin's Acts and Omissions are Central to This Case.

This case is being prosecuted jointly by the homeowner (Stremke) and her insurer (Unitrin). Even so, the Unitrin/Stremke response brief ignores Unitrin. Unitrin and Stremke made a strategic decision to join forces before trial and to present a joint case (under Stremke's name) that resulted in a judgment in favor of Unitrin as well as Stremke. CP 4184-94. That judgment, which is the product of rulings that addressed the

conduct of and benefited both Unitrin and Stremke, is being appealed by F&P. As Unitrin's acts and omissions (including its role in managing the fire scene and providing documentation to support the personal property damage claim) are central to this case, Unitrin/Stremke cannot defend the judgment without defending Unitrin. It is therefore appropriate for this Court to infer from Unitrin/Stremke's silence on issues raised in F&P's opening brief related to Unitrin's conduct that they were unable to find any authority to support the challenged legal rulings.

B. Unitrin is to Blame for Its Failure to Preserve Evidence Before F&P Had an Opportunity to Investigate.

Unitrin/Stremke's response brief acknowledges that "[Thomas] Miller did not preserve everything in the laundry room" and retained only "the evidence he determined was relevant to the fire investigation." Resp. Br. at 7. According to Unitrin/Stremke, "[t]he decisions about what evidence to preserve and what to leave behind were made by Miller." Resp. Br. at 8. Miller is the origin investigator retained by Unitrin. CP 147, 4335 (Miller's assignment sheet from Kemper, which identified in the caption as a dba of Unitrin). During trial, Unitrin/Stremke affirmatively offered Miller's testimony in support of their theories against F&P. *See* RP 352.

Even though evidence was not properly preserved by Miller while he was at the fire scene, Unitrin/Stremke ask this Court to fault F&P for not conducting its own investigation. *See* Resp. Br. at 9, 20.¹ The undisputed timeline of events confirms that Unitrin deprived F&P of any opportunity to investigate, as the fire scene was released *before* F&P was notified of the fire, evidence was destroyed, and, unbeknownst to F&P, demolition of the house was completed *before* F&P was given access to the dryer:

- **July 1, 2008** – fire damages parts of Stremke’s residence (CP 4766-73, RP 405)
- **July 2, 2008** – Unitrin’s investigator (Miller) conducts a walkthrough, identifies selected evidence to be retained, and releases the house to Stremke (RP 237, 352, 388-89, 396)
- **July 2, 2008** – Unitrin removes the dryer (including its parts and components) from the house, transporting it more than 50 miles from the house in Auburn to Whidbey Island (RP 352, 396; CP 122)
- **Early July 2008** – repairs to the house commence (RP 225-26)
- **Middle of July 2008** – all personal property had been removed from the house (RP 330:3-6; RP 332:6-12)
- **August 5, 2008** – F&P receives first notice of the fire, but was not advised that personal property had been removed, that repairs to the home were underway, or that demolition was imminent (RP 769-74)

¹ Resp. Br. at 9 (“F&P neither promptly investigated the fire scene nor took any steps to ensure preservation of the various items of evidence that F&P now claims were essential to a thorough investigation.”); *id.* at 20 (“Yet F&P neither inspected the fire scene nor requested that evidence be preserved.”).

- **August 5, 2008** – The same day F&P learned of the fire, F&P asks to see the dryer that Unitrin had already transported to Whidbey Island; F&P was given the earliest possible inspection date of August 22, 2008; at F&P's insistence, Unitrin agreed to allow F&P earlier access to the dryer (RP 868)
- **On or before August 15, 2008** – unbeknownst to F&P and before F&P was allowed to inspect the dryer, the house had been completely gutted (RP 249²)
- **On or before August 20, 2008** – the house had been stripped to the studs, with the laundry room and kitchen gutted (RP 234-35, 238)
- **August 20, 2008** – After the house had already been demolished, F&P is given first access to the dryer on Whidbey Island (RP 233-38)

Unitrin was given full access to the house immediately after the fire, unilaterally selected which evidence to preserve and destroy, and then released the fire scene more than a month before F&P was notified that there was a fire. Upon receipt of notice of the fire, F&P acted diligently and pushed to make arrangements to access the dryer earlier than Unitrin had proposed. Even though Unitrin knew that repairs were underway and demolition of the house was imminent, it failed to pass this information on to F&P.

Once F&P was finally given access to the dryer, the damaged portions of the house had already been demolished. Unitrin was in the

² The electrical contractor inspected the electrical work in the house on August 15, 2008, which was after the house was "completely gutted and smoke sealed up" RP 249:6-10; Exhibit 118 (electrical contractor bid, dated August 15, 2008).

best position to investigate, preserve evidence, timely notify involved parties, and provide others with access to the house before repairs were made and demolition was underway. Unitrin acted at its own peril by failing to properly do so. Unitrin/Stremke cannot be allowed to shift blame to F&P under these circumstances.

C. **Unitrin/Stremke Cannot Reap Benefits From Unitrin's Failure to Preserve Evidence.**

The issues with the investigation and preservation of evidence are well-documented in the record and not denied in Unitrin/Stremke's response brief. This is not a technicality or an isolated discretionary issue; rather, the legal rulings that shaped the trial were predicated on the spoliation issue. As spoliation was decided as a matter of law in a pre-trial motion based upon the same record before this Court, the standard of review is *de novo*. *Tavai v. Walmart Stores, Inc.*, 176 Wn. App. 122, 135, 307 P.3d 811 (2013); *Henderson v. Tyrrell*, 80 Wn. App. 592, 604, 910 P.2d 522 (1996). In addition, the legal accuracy of instructions is reviewed *de novo*, and it is reversible error where, as here, a legally inaccurate instruction prejudices a party. *See Gregoire v. City of Oak Harbor*, 170 Wn.2d 628, 635, 244 P.3d 924 (2010).

1. Unitrin is Responsible for Spoliation Because it Disregarded Evidence That Should Have Been Preserved.

Without addressing the legal analysis set forth in F&P's opening brief, Unitrin/Stremke continue to maintain that a remedy is only warranted for spoliation if a party "intentionally" destroys evidence. Resp. Br. at 15; *see* Opening Br. at 19-23. This is incorrect. Washington law does not require that a party destroy evidence in bad faith or with a malicious intent in order to be culpable for the destruction of evidence; rather, a party that has a duty to preserve evidence and proceeds to disregard the importance of the evidence may be responsible for spoliation. *Homeworks Const., Inc. v. Wells*, 133 Wn. App. 892, 900, 138 P.3d 654 (2006).

Unitrin/Stremke argue next that they had no duty to preserve evidence at the fire scene because "potential litigants have no duty to preserve evidence." Resp. Br. at 22 (citing *Homeworks*, 133 Wn. App. at 901). As a general proposition, potential litigants do have an independent duty to preserve evidence that they know, or reasonably should know, is relevant to the action. *Henderson*, 80 Wn. App. at 611 n.7 (quoting *Fire Insurance Exchange v. Zenith Radio Corp.*, 103 Nev. 648, 747 P.2d 911 (1987): "[E]ven where an action has not been commenced and there is only a potential for litigation, the litigant is under a duty to preserve

evidence which it knows or reasonably should know is relevant to the action.”). Moreover, the case relied upon by Unitrin/Stremke focuses on whether a party is in control of the evidence, not on the party’s status as a litigant as compared to a potential litigant:

While [respondents] may be correct that a party has a general duty to preserve evidence on the eve of litigation, we do not agree that this duty extends to evidence over which a party has no control.

Homeworks, 133 Wn. App. at 901. The *Homeworks* Court’s holding that the party had not engaged in spoliation likewise focused on the fact that that party had no control over the premises at issue. *Id.* at 902.

Where, as here, a party controls evidence and fails to preserve it without satisfactory explanation, the only inference the finder of fact may draw is that such evidence would be unfavorable to that party. *See Pier 67, Inc. v. King County*, 89 Wn.2d 379, 385-86, 573 P.2d 2 (1977). In *Pier 67*, our Supreme Court explained as follows:

[W]here relevant evidence which would properly be a part of a case is within the control of a party whose interests it would naturally be to produce it and he fails to do so, without satisfactory explanation, the only inference which the finder of fact may draw is that such evidence would be unfavorable to him.

Id. Although evidence can be destroyed in some instances without an adverse inference, the circumstances presented here do not fit within those parameters. For example, in *Marshall v. Bally’s Pacwest, Inc.*, 94 Wn.

App. 372, 382-83, 972 P.2d 475 (1999), this Court concluded that a party's destruction of a treadmill four years after an incident was permissible because the opposing party had sufficient time to ask to inspect it. The timing of the destruction (four years after the incident) and the opportunity for the opposing party to ask for an inspection before destruction were key components in the *Marshall* Court's holding. In this case, by contrast, the evidence was not preserved (and the fire scene had been released) weeks before F&P was notified of the fire.³

In this case, Unitrin had a duty to preserve evidence at the fire scene because the evidence was within its control and because Unitrin knew, or reasonably should have known, that the fire scene evidence would be relevant to the forthcoming determination of the fire's cause and origin, and of which person or entity should be responsible for paying for repairs. The evidence at the fire scene was also critical to F&P's evaluation of damages, including the personal property that was destroyed before F&P was even notified of the fire.

³ Unitrin/Stremke also argue that they had no duty to preserve evidence because "F&P never asked that anything be preserved." Resp. Br. at 21. As set forth above, a duty arises independent of a request. Moreover, F&P did not receive notice until 50 days after the fire, *i.e.*, after the fire scene had been released and the dryer had been transported 50 miles away. By the time F&P was given first access to the dryer, the house had already been demolished; any preservation request would have been futile.

2. The Missing Evidence is Important and Relevant.

Unitrin/Stremke's response brief asks this Court to start with a presumption that the missing evidence—the evidence that Unitrin opted to destroy—“is neither important nor relevant.” Resp. Br. at 17. By suggesting that F&P is required to come forward and describe with specificity evidence it never saw,⁴ Unitrin/Stremke merely underscore the impossible situation F&P is facing as a result of Unitrin's conduct.

Part of the spoliation analysis is an assessment of the “potential importance or relevance of the missing evidence[.]” *Ripley v. Lanzer*, 152 Wn. App. 296, 326, 215 P.3d 1020 (2009). “Whether the missing evidence is important or relevant obviously depends on the particular circumstances of the case.” *Henderson*, 80 Wn. App. at 607-08. One “important consideration” in determining whether missing evidence is important or relevant “is whether the loss or destruction of the evidence has resulted in an investigative advantage for one party over another, or whether the adverse party was afforded an adequate opportunity to examine the evidence.” *Id.* In this case, the loss and destruction of evidence undoubtedly resulted in an investigative disadvantage for F&P. In addition, F&P was not afforded an opportunity to examine the dryer

⁴ See Resp. Br. at 17 (“F&P has not disclosed what evidence should have been preserved and why it was important to this case.”); *id.* at 18 (“F&P is unable to offer more than speculation about how that evidence would have altered the investigation.”).

before it was moved, or the house before it was demolished. Therefore, this important consideration weighs heavily in favor of a spoliation instruction that would give F&P the benefit of any inferences from the missing evidence.

Unitrin/Stremke argue next that the missing evidence, namely the dryer's ventilation system, was not important, arguing that "preserving the ventilation system would not have substantially contributed to F&P's investigation" because the fire did not start in the ventilation system. Resp. Br. at 18. There is simply no way to know how an actual on-site investigation—by an expert who was independent of Unitrin—of the fire scene and the dryer (before Unitrin moved it) would have impacted F&P's investigation and the defenses it could raise during trial. There is no evidence in the record or any logical rationale to support Unitrin/Stremke's assertion that only evidence that is physically located at the origin of a fire is relevant to a fire investigation. Cause and origin are distinct concepts, and the cause of a fire is necessarily determined by examining a broader range of evidence. As discussed in F&P's opening brief, the ventilation system, flexible foil ducting, the lint, and the washing machine water were critical to F&P's defense on the issue of causation. Opening Br. at 19-20. The personal property and replaced components of real property were also important to F&P's defense on the issue of

valuation. *Id.* The impact of F&P's inability to access any evidence not hand-selected for preservation by Unitrin's own expert cannot be underestimated. *Id.* at 24-27.

Unitrin/Stremke also take the position that the photos taken by Unitrin's expert provided a sufficient substitute for an in-person inspection by F&P because the same photos were relied upon by experts retained by Unitrin/Stremke and F&P during trial. Resp. Br. at 19. There is no support under Washington law for such a proposition. As set forth in the authorities discussed above, the party in control of the evidence (here, Unitrin) has a duty to preserve it. There is no exception for when there are photos. Moreover, in this case, the same person who determined which evidence to preserve at the scene was the person who took the photographs. That person (Miller) was hired by Unitrin and selectively photographed the parts he unilaterally deemed were relevant. Notably, the ventilation system that was of the utmost importance to F&P's theory of causation, was neither preserved nor photographed by Miller. *See* Exhibit 223 (Miller's photos).

Considering that the evidence not preserved by Unitrin resulted in an investigative disadvantage for F&P and also that the missing evidence identified and discussed in F&P's opening brief were of the utmost importance to its defenses on liability and damages, this Court should

conclude that the missing evidence was both important and relevant, for the purposes of the spoliation analysis, and should have been preserved. *See Henderson*, 80 Wn. App. at 607-08.

3. The Trial Court's Refusal to Impose a Remedy for Spoliation Necessitates Reversal.

Instead of properly instructing the jury to draw an inference *against* Unitrin/Stremke and in favor of F&P (the party deprived of the ability to investigate and deprived of evidence to defend itself), the trial court allowed Unitrin/Stremke to *benefit* from inferences about the missing and disrupted evidence. By doing so, the trial court not only violated the spoliation doctrine, but also prejudiced F&P's right to defend itself. As a result, reversal is required. *See Gregoire v. City of Oak Harbor*, 170 Wn.2d 628, 635, 244 P.3d 924 (2010).

One illustrative example is discussed in F&P's opening brief but never mentioned in Unitrin/Stremke's response brief: the lint-covered thermostat reset button. *See* Appendices A-1 & A-2 to Opening Br. (photos); Opening Br. at 11, 14-15, 25. These photos confirm that, at the time F&P was first allowed to examine the dryer, the button was covered in lint in an extended "tripped" or "fail safe" position (meaning that, long before the fire, electricity had been disconnected from the heating elements automatically as a safety measure). Out of the evidence that was

selectively retained by Unitrin, this evidence might have been the most problematic for Unitrin/Stremke's theory that the dryer's heating elements overheated, as there can be no heat when a thermostat reset button has been tripped. The presence of lint indicates that the reset button tripped a long time before the fire, and continued to collect lint for some time before the fire. Unitrin/Stremke were actually allowed to use Unitrin's disruption of the fire scene before notifying F&P of the fire, and ask the jury to draw inferences—in Unitrin/Stremke's favor—that the placement of lint on the button occurred after the fire during Unitrin's transport of the dryer.

RP 1181.

Unitrin/Stremke and F&P have competing theories of what caused the fire and where the fire originated, as set forth in F&P's opening brief and not refuted by Unitrin/Stremke. Opening Br. at 9-12. As a result of Unitrin's one-sided preservation of evidence, F&P was severely hindered in its ability to refute Unitrin/Stremke's theory. Even though it was Unitrin that opted to transport the dryer 50 miles from the fire scene without F&P's consent or knowledge, F&P was called upon to disprove an allegation that the lint on the button happened during that transport. The trial court's legal rulings that allowed Unitrin/Stremke to benefit while punishing F&P deprived F&P of its due process right to put on a defense.

See Wash. Const. art. I, § 3; U.S. Const. amend. XIV, § 1. Reversal is required.

In sum, Unitrin disregarded evidence in its control that it had a duty to preserve, and that was important and relevant to F&P's defense—not only to liability, but also to damages. The only way to prevent Unitrin/Stremke from reaping benefits from Unitrin's failure to preserve evidence is to conclude, as a matter of law, that F&P is entitled to a remedy under the spoliation doctrine, and remand for a new trial so a jury can properly consider inferences about the missing evidence in F&P's (not Unitrin/Stremke's) favor.

D. Unitrin/Stremke Have Not and Cannot Prove a CPA Violation.

As support for their Consumer Protection Act ("CPA") claim against F&P, Unitrin/Stremke discuss overheating problems with various F&P dryers that revealed themselves before the fire in this case, but fail to explain how any such problems relate at all to the Stremke fire. Resp. Br. at 23. This Court must reverse the trial court's denial of a directed verdict if it determines, in its *de novo* review, that Unitrin/Stremke failed to offer competent evidence on one element of the claim. See *Hizey v. Carpenter*, 119 Wn.2d 251, 271-72, 830 P.2d 646 (1992) (review is *de novo*); *Bennett v. Maloney*, 63 Wn. App. 180, 185-86, 817 P.2d 868 (1991) (reversal is warranted if no competent evidence is presented on one element).

Unitrin/Stremke's discussion of testimony about overheating and damaged heating elements in its appellate brief does nothing to connect the alleged cause of the Stremke fire to F&P's removal of a low airflow fault indicator light without a corresponding change to the user guide. *See* Resp. Br. at 22-26. Unitrin/Stremke focus on F&P's awareness of other incidents is also not helpful to their effort to present competent evidence on the CPA element of causation in this case. This is because, as discussed in F&P's opening brief (but not addressed in Unitrin/Stremke's response), any alleged prior knowledge of other incidents had no connection to the Stremke fire, as the trial court properly prohibited Unitrin/Stremke from presenting evidence of unrelated incidents and products. CP 2261-64.⁵ This instruction is the law of the case, as Unitrin/Stremke abandoned any challenges to the trial court's rulings when they decided not to pursue their cross-appeal. *See* Resp. Br. at 1.

No evidence was presented to the jury to indicate that the product updates or other incidents were causally related to the Stremke fire or any other fire. Therefore, even viewing the evidence in the light most

⁵ The trial court's order reads, in part, as follows: "The parties and counsel are instructed not to directly or indirectly mention, refer to, testify about, interrogate concerning, offer into evidence, or attempt to convey to the jury in any manner the existence and contents of any document, photograph, or material of any kind, offered by [Unitrin/Stremke] as alleged 'evidence' of other issues with Fisher & Paykel products in an attempt to show that those issues are similar to the alleged design defect asserted by [Unitrin/Stremke] in this action, and all evidence supporting same" CP 2262.

favorable to Unitrin/Stremke, this Court must conclude that Unitrin/Stremke failed to meet their burden of proving a CPA violation. Accordingly, the CPA claim (which the trial court expressed much skepticism about⁶ before reluctantly allowing the jury to consider it) must be dismissed as a matter of law.

E. The CPA Fees Awarded to Unitrin/Stremke Must be Reversed.

1. F&P's Arguments Are Proper and Should be Considered.

Unitrin/Stremke ask this Court to ignore F&P's arguments addressing the trial court's CPA fee award. *See* Resp. Br. at 26-27. As they have no reasonable basis (or appropriate justification), this Court should reject this request and address the merits of the trial court's \$624,354.75 CPA fee award. *See* CP 4193-94.

Appeals, of course, are not limited to a mere recitation of the same *arguments* made to a lower court. The only authorities cited by Unitrin/Stremke are RAP 2.5(a) and *Bankston v. Pierce Cnty.*, 174 Wn. App. 932, 942, 301 P.3d 495, 499 (2013) (which relies upon RAP 2.5(a) and RAP 9.12)). RAP 2.5(a) governs when a new "claim of error" can be raised for the first time on appeal. RAP 9.12 is a unique rule addressing

⁶ RP 791-92 ("I [the trial judge] have not heard evidence yet, that [F&P] knew that there were fires or dangerous situations resulting from the element configuration."); RP 852-53 ("I think that the evidence with regard to knowing, failure to reveal the problems in this case is very, very thin, but I'm going to allow the jury to consider it at any rate.")

summary judgment orders, limiting review to those “issues called to the attention of the trial court.” F&P did not raise a new “claim of error”⁷ and the CPA fee issue does not involve a summary judgment order. Therefore, the merits of all of F&P’s arguments should be addressed and decided as part of this appeal. *See* RAP 1.2(a) (explaining that the Rules of Appellate Procedure must be “liberally interpreted to promote justice and facilitate the decision of cases on the merits”).

2. The \$624,354.75 in CPA Fees Awarded to Unitrin/Stremke Based on Unitrin’s \$537,612 Damages Award is Not Supported by the Law or the Record.

F&P’s opening brief gave a number of reasons why the trial court’s CPA attorney fee award must be reversed or, at a minimum, reduced. *See* Opening Br. at 30-39. If the CPA claim is reversed, it necessarily follows that the CPA fee award must also be reversed. Even if the CPA claim were to stand, the jury awarded no separate damages under that theory; it is telling that Unitrin/Stremke’s brief provides no legal authority for its contention that it is proper to award CPA fees on a product liability damages award where, as here, no separate sums were awarded under the CPA. At a minimum, the CPA fees awarded to Unitrin cannot stand, as Unitrin/Stremke have offered no legal support for the trial

⁷ *See* Opening Br. at 4 (F&P’s assignment of error 2 and issue 2 challenge the trial court’s refusal to direct a verdict on the CPA claims; assignment of error 5 and issue 3 challenge the trial court’s CPA attorney fee award). Unitrin/Stremke cannot deny that F&P preserved these errors in the underlying proceedings.

court's decision to award CPA attorney fees to an insurer that is asserting a subrogation claim, as subrogating insurers have no right to recover fees. *See, e.g., Dayton v. Farmers Ins. Group*, 124 Wn.2d 277, 281, 876 P. 2d 896 (1994). Given that Unitrin has come forward with no basis on which to recover fees, the fee award to Unitrin (which is commingled with fees awarded to Stremke) must be reversed.

In the event this Court deems it appropriate to address the propriety of the fees, it should deem them unreasonable as a matter of law because they so far exceed the amount in controversy. *See* Opening Br. at 35-36. Unitrin/Stremke asked the jury to award \$571,000 in damages, from which the jury awarded \$537,612; this Court should conclude that Unitrin/Stremke are precluded by law from recovering \$624,354.75 in attorney fees they allegedly incurred in pursuit of those damages. RP 1256; *see Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 150-52, 859 P.2d 1210 (1993). Finally, despite having the burden of proving that their fees were reasonable, Unitrin/Stremke actually blame F&P for not providing more specificity in cataloging each inappropriate time entry among Unitrin/Stremke's 300 pages of invoices spanning 2,334.25 hours. Resp. Br. at 29. As this is not a reasonable or proper request, this Court should simply conclude that Stremke failed to meet her burden, vacate the award, and (if she is entitled to recover CPA fees), remand for a re-calculation of

eligible fees without application of a multiplier. *See* Opening Br. at 38-39 (a multiplier was not appropriate).

F. A Remand is Required for a Proper Calculation of Real Property Damages.

Unitrin/Stremke ask this Court to adopt a novel reading of our Supreme Court’s holding in *Thompson v. King Feed & Nutrition Service, Inc.*, 153 Wn.2d 447, 458, 105 P.3d 378 (2005). It is notable that Unitrin/Stremke’s brief focuses mostly on the dissenting opinion in that case, instead of the majority opinion that is binding precedent. Resp. Br. at 47. This Court should not seek guidance from a dissenting opinion, as that opinion necessarily reflects the views of justices who did not join in the majority, and conclude that *Thompson* requires reversal.

Unitrin/Stremke ask this Court to approve their deletion of the “lesser than” language from the pattern jury instruction “[s]ince evidence supported the conclusion that the Stremke home was destroyed by the dryer fire[.]” Resp. Br. at 47. This reasoning is circular and fails to address the issues raised by F&P. Opening Br. at 46-49 (explaining that the jury was actually directed to award a windfall to Unitrin/Stremke, thereby preventing F&P from defending itself on the appropriate scope of damages). The instruction given to the jury was contrary to Washington law because it directed the jury to award damages without distinguishing

between damages that were actually caused by the fire. It is undisputed that the Stremke home was *partially* damaged and capable of repair—in fact, it was repaired (and improved). Under these circumstances, the “lesser than” rule applies under *Thompson*, 153 Wn.2d at 457. Remand is required so that a properly-instructed jury can evaluate real property damages under the correct legal standard.

G. The Personal Property Damages Verdict Must be Reversed.

1. Unitrin/Stremke Were Unable to Meet Their Burden of Proving Personal Property Damages.

A directed verdict should have been granted on Unitrin/Stremke’s personal property claim independent of the spoliation issue because the record contains no substantial evidence or reasonable inference to satisfy the legal standard, as set forth in the instructions given to the jury. *See* Opening Br. at 40-42. The instruction recited the so-called “*Kimball* rule” announced in *Kimball v. Betts*, 99 Wash. 348, 169 P. 849 (1918), which requires testimony from the owner of the property as to its value to him or her, the age, purchase price, and condition of the property before the fire.⁸ Unitrin/Stremke do not deny that their evidence was lacking, but instead argue that the list of necessary information about property valuation

⁸ The jury instruction included the following admonition: “You should consider the cost of the items, the extent of their use, whether worn or out of date, and their condition at the time of the fire, to determine what they were fairly worth.” CP 2392-93 (emphasis added).

should be interpreted as optional factors. *See* Resp. Br. at 35. As Unitrin/Stremke point to no legal authority that relieves a plaintiff of providing evidence in support of basic features of property being valued, this Court should reject this argument.

It is also noteworthy that the only testimony presented during trial about the value of the personal property was Stremke's testimony that a lump sum of \$176,000 was paid *to replace* lost items of personal property, including some property she owned and some property owned by others (including her son and his family). RP 637-38, 640-41, 653-54.⁹ Replacement cost is not the correct measure under *Kimball* rule, and Unitrin/Stremke do not deny this. *See Kimball*, 99 Wash. at 352. Instead, they focus on the "inventory" assembled for Unitrin that was never published to the jury and does not include valuation information required by the *Kimball* rule. *See* Resp. Br. at 38 ("The inventory noted the approximate age of each item of personal property." (citing RP 325-326)). They also suggest that the photos taken of some, but not all, of the 946 personal property items should suffice as an appropriate substitute for testimony on the basic features of the property items as required by

⁹ Unitrin/Stremke's response brief states: "Stremke testified that the destroyed personal property had a value of approximately \$176,000." Resp. Br. at 39 (citing RP 641:11-16). Although not immediately apparent from this quote, a review of Stremke's testimony confirms that she arrived at this "value" figure based upon replacement cost, and not following *Kimball*, 99 Wash. at 352.

Kimball, 99 Wash. at 352. As discussed above, a failure to preserve is not cured by the existence of selected photographs. Therefore, this Court should conclude that the absence of necessary proof on personal property necessitates a directed verdict.

2. The Trial Court's Legal Error Led to the Exclusion of Expert Larkin, Leaving F&P With No Ability to Put on a Defense.

If the personal property damages claim is not dismissed, then a remand is required so the jury can hear testimony from F&P's expert, Steve Larkin. As set forth in F&P's opening brief, the trial court's belated exclusion of testimony from Expert Larkin following the tragic death of F&P's initial expert constitutes prejudicial and reversible error because F&P was deprived of its right to defend itself on the issue of personal property damages; this error was not harmless. *See Hoskins v. Reich*, 142 Wn. App. 557, 570, 174 P.3d 1250 (2008).

Unitrin/Stremke add speculation about what the trial court's "real reasons" might have been, and attempt to downplay the surrounding circumstances (including the sudden death of F&P's original expert), but are unable to provide this Court with a sound legal basis to support the trial court's refusal to allow F&P to defend itself against the personal property claims. *See Resp. Br.* at 42. Unitrin/Stremke remain silent on the issue raised by F&P in its opening brief that Unitrin/Stremke were

allowed to present an insurance inventory to support their claim, but were incorrectly and unfairly insulated from questions about evidence they offered in support of their own claims.¹⁰ Opening Br. at 42-45. The trial court instructed the jury not to speculate on whether a party has insurance. *See* CP 2374. The problem was not this instruction, but with the trial court's selective enforcement of that rule, leading to an incorrect determination that Expert Larkin's testimony about the insurance inventory offered by Unitrin/Stremke was not relevant. RP 962. By relying solely upon an insurance inventory, Unitrin/Stremke opened themselves up to inquiries about it. If they wished to avoid such inquiries, they had the option of not introducing testimony based upon it. By allowing one-sided insurance evidence, the trial court prejudiced F&P's right to defend itself at trial.

3. Unitrin/Stremke Have Provided No Reasonable Basis on Which This Court Could Affirm the Legally Unsupportable Damages Award.

Unitrin/Stremke contend that "it is impossible to grant the relief F&P seeks[,]" *i.e.*, judgment as a matter of law in F&P's favor on the personal property claim. In essence, they ask this Court to turn a blind eye to fatal flaws in the personal property damage award and provide a

¹⁰ Unitrin/Stremke criticize Larkin for not making an independent valuation of the property. Resp. Br. at 42. It is notable that Stremke herself made no effort to independently value the property, despite having the burden of proof on this issue.

windfall to them because of verdict form language they proposed after the trial court overruled F&P's objections to Unitrin/Stremke's damages theories. They cite no legal authority for such a proposition, as no such authority exists.

The record before this Court confirms that F&P preserved its objection to the trial court's rulings related to the alleged personal property damages. F&P argued strenuously that Expert Larkin should be permitted to testify. As discussed above, the record also confirms that Unitrin/Stremke failed to present evidence to satisfy the legal standard to recover personal property damages; therefore, there is no partial verdict that this Court could affirm. For the reasons discussed herein and in F&P's opening brief, reversal and dismissal of the personal property claims are required.

H. Neither Unitrin Nor Stremke are Eligible for an Award of Attorney Fees on Appeal.

Unitrin/Stremke ask for an additional CPA fee award on appeal. Resp. Br. at 49. This request should be rejected because there was no CPA violation, and because Unitrin (an insurer) is not eligible to recoup CPA fees for work done on its subrogation claim. For these and the other independent reasons set forth above in Part II.E.2 and in F&P's opening

brief, this Court should decline to award any CPA fee awards in this appeal.

III. CONCLUSION

For the reasons set forth herein and in F&P's opening brief, F&P respectfully requests that this Court reverse and remand with instructions that: (1) Unitrin/Stremke's liability case against F&P be considered by a properly-instructed jury (including a spoliation instruction, and a measure of damages instruction that includes the applicable "lesser than" rule), considering all properly-admitted evidence (including testimony from Expert Larkin), (2) Unitrin/Stremke's CPA claim be dismissed as a matter of law via directed verdict, and (3) Unitrin/Stremke's personal property damages cannot be recovered as a matter of law.

DATED this 20th day of November, 2014.



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DECLARATION OF SERVICE

Dava Bowzer states as follows:

I am a citizen of the United States of America and a resident of the State of Washington, I am over the age of 18 years, I am not a party to this action, and I am competent to be a witness herein.

On this 20th day of November, 2014, I caused to be filed with the Court of Appeals of the State of Washington, Division I, the foregoing APPELLANT’S REPLY BRIEF. I also served copies of said document on the following parties as indicated below:

<p><i>Counsel for Plaintiffs Stremke and Panzone:</i> Douglas R. Cloud Law Office of Douglas R. Cloud 901 S. “I” Street, Suite 101 Tacoma, WA 98405 253/627-1505 and</p>	<p><input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> Email: drc@dcloudlaw.com cmarsh@dcloudlaw.com <input type="checkbox"/> E-service through Court <input type="checkbox"/> Legal Messenger</p>
<p><i>Counsel for Plaintiff Unitrin dba Kemper:</i> Matthew J. Sekits Jerret E. Sale Daniel R. Bentson Bullivant Houser Bailey PC 1700 Seventh Ave Ste 1810 Seattle, WA 98101 206/292-8930</p>	<p><input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> Email: matthew.sekits@bullivant.com jerret.sale@bullivant.com dan.bentson@bullivant.com leslie.narayan@bullivant.com janice.mcginty@bullivant.com genevieve.schmidt@bullivant.com <input type="checkbox"/> E-service through Court <input type="checkbox"/> Legal Messenger</p>

I declare under penalty of perjury under the laws of the State of
Washington that the foregoing is true and correct.

Executed at Seattle, Washington, this 20th day of November, 2014.



Dava Bowzer