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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

NO. 31569-0-III

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

GABRIEL ESPINOZA and IRMA ESPINOZA

Respondents;

v.

AMERICAN COMMERCE INSURANCE COMPANY, Et al.

Appellant.

BRIEF OF THE APPELLANT

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I. INTRODUCTION

This is an insurance coverage dispute arising from a first-party property claim made by Respondents Gabriel and Irma Espinoza under a policy of insurance issued by Appellant American Commerce Insurance Company (ACIC). The insurance claim arises out of a residential house fire, the undisputed cause of which was a space heater.

ACIC denied the claim based on material misrepresentations by insured Gabriel Espinoza made during an Examination Under Oath. CP 121-124. The Espinozas sued claiming breach of contract, bad faith, violations of the Washington Consumer Protection Act and the Insurance Fair Conduct Act. CP 28-34.

Following a two-week trial, a Yakima County jury returned a verdict with the following finding:

> QUESTION 3: Did Gabriel Espinoza make a material misrepresentation during the claim investigation Examination Under Oath?
>
> ___X____ YES _____ NO

CP 1588-1593.

The verdict form instructed the jury to sign the verdict form and return it to the Court if the jury answered "yes" to Question 3. CP 1588-1593. Despite this instruction, the jury answered two of the subsequent fourteen (14) questions on the form. *Id.* The jury answered a question

finding coverage for the Espinozas under the ACIC policy and then assigned percentages of responsibility for Plaintiff's damages to ACIC and co-defendant Taylor (the Espinozas' insurance agent). *Id.*

In light of the jury's failure to follow the instructions on the verdict form by answering the two questions following Question 3, the trial court found that the jury's findings could not be harmonized to ascertain the jury's intent and ordered a new trial. CP 1755-1761.

ACIC appeals the trial Court's order for a new trial. Once the jury found that the insureds had misrepresented material facts to ACIC during the course of ACIC's coverage investigation, the policy's coverages were void as a matter of law. *Mutual of Enumclaw Ins. Co. v. Cox*, 110 Wn.2d 643, 757 P.2d 499 (1988). Judgment should have been entered in favor of ACIC based on the jury's misrepresentation finding. ACIC appeals the trial court's denial of its motion for entry of judgment.

Further, at the close of Plaintiff's case in chief, ACIC moved for directed verdict, seeking a dispositive ruling on several of Plaintiff's causes of action and liability theories. RP 957-969. While granting ACIC's motion for directed verdict on Plaintiffs' claims arising from the Additional Living Expense coverage in the subject policy RP 969), the trial court erred in failing to grant directed verdict as to several other issues, including ACIC's motion for directed verdict finding that ACIC

had a reasonable basis for its denial. See RP 962-964. ACIC appeals the Superior Court's denial of its Motions for Directed Verdict.

Finally, prior to the trial, ACIC filed a Motion for Summary Judgment seeking dismissal as a matter of law of Plaintiffs' extra-contractual claims. CP 57-65. Plaintiffs' failed to present evidence sufficient to raise a genuine issue of material fact as to the elements of their extra-contractual claims for which they bore the burden of proof. See CP 437-452. As a result, the Superior Court erred in denying ACIC's motion. ACIC appeals the denial of this dispositive motion.

ACIC has appealed the Superior Court's Order for a New Trial as a matter of right pursuant to RAP 2.2(a)(9). The Superior Court's denials of ACIC's additional dispositive motions are ripe for this Court's review pursuant to *Cox v. General Motors Corporation*, 64 Wn. App 823, 827 P.2d 1052 (1992).[1]

However, this Court need not reach these dispositive rulings predating the jury's verdict in this matter. The jury's misrepresentation determination is dispositive of all issues in this case. ACIC asks that the Court reverse the trial court's Order for New Trial and remand for entry of judgment in favor of ACIC.

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[1] In fact, under the *Cox* decision, ACIC would be deemed to have waived the right to appeal these dispositive motion rulings if it did not assign error to those rulings in this

II. ASSIGNMENTS OF ERROR

A. *Assignments of Error*

1. The trial court erred in entering an Order for a New Trial where the jury clearly found that the Espinozas had intentionally misrepresented or concealed material facts during the course of ACIC's investigation of their insurance claim.

2. The trial court erred in refusing to enter judgment in favor of ACIC based on the jury's verdict finding that the Espinozas had intentionally misrepresented or concealed material facts during the course of their insurance claim.

3. The trial court erred in failing to Grant ACIC's Motion for Directed Verdict at the close of Plaintiff's case due to the fact that Plaintiffs had failed to present evidence sufficient for a reasonable jury to find that they had met the elements of their causes of action against ACIC.

4. The trial court erred in failing to grant ACIC's pre-trial Motion for Summary Judgment on the Espinozas bad faith, Consumer Protection Act, and Insurance Fair Conduct Act causes of action where there was no genuine issue of material fact raised by the Espinozas from which a reasonable jury could have concluded that they had met the

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appeal on the new trial order.

elements of those extra-contractual claims.

B. *Issues Pertaining to Assignments of Error*

1. *Order for New Trial/Denial of ACIC's Motion for Entry of Judgment.*

Pursuant to the terms and conditions of the policy of insurance issued by ACIC to the Espinozas and clear Washington law, it was an error of law and/or abuse of discretion for the trial court to order a new trial where the jury had determined that insureds misrepresented material facts to ACIC during the course of ACIC's coverage investigation. *Mutual of Enumclaw Ins. Co. v. Cox*, 110 Wn.2d 643, 757 P.2d 499 (1988).

In light of the jury's misrepresentation finding, the Superior Court erred in denying ACIC's motion for entry of judgment in its favor. *Id.*

The Espinozas failed to present any valid basis under CR 59 supporting their motion for new trial. In the absence of any evidence that one or more of the factors set forth in CR 59 were applicable, the trial court abused its discretion in awarding a new trial.

RCW 4.44.440 is not applicable to the instant matter and to the extent that it relied on this statute, the trial court erred in granting a new trial and denying ACIC's Motion for Entry of Judgment in its favor.

2. ***Denial of Directed Verdict Motions***

During the presentation of their case in chief, the Espinozas failed to present substantial evidence sufficient for a jury to determine that its coverage determination was unreasonable. As such, the trial court erred in failing to dismiss Plaintiff's extra-contractual claims based on the claim that the denial was unreasonable. This fact is underscored bythe fact that the jury did ultimately find that the coverage determination was not only reasonable, but was correct.

The Espinozas failed to present substantial evidence sufficient to support a claim that they were entitled to the recovery of non-economic damages. The trial court found the evidence "thin" (RP 962), but denied the motion for directed verdict on the non-economic damage claims.

The Espinozas failed to present substantial evidence from which a reasonable jury could have concluded that ACIC breached Washington Administrative Code provisions requiring an adequate explanation of the basis for a coverage denial.

Because the Espinozas failed to present substantial evidence of any violation of any provisions of the WACs, and because the Espinozas patently failed to present any evidence of actual damage to business or property, under the *Hangman Ridge* analysis, the trial court erred in denying directed verdict on the Espinozas' Consumer Protection Act

claim.

3. *Denial of ACIC's Motion for Summary Judgment*

Prior to trial, ACIC moved for summary judgment seeking dismissal of the Espinoza's extra-contractual claims for bad faith, violation of the Consumer Protection Act, and violation of the Insurance Fair Conduct Act. CP 57-65. ACIC did not ask the trial court to rule as a matter of law that the Espinozas had misrepresented or concealed material facts during the course of the coverage investigation. Rather, ACIC presented substantial evidence that its coverage investigation and determination were reasonable at all material times thereby barring any extra-contractual claims.

In response to ACIC's motion, the Espinozas failed to present evidence sufficient to raise a genuine issue of material fact as to the elements of the extra-contractual claim for which they bore the burden of proof. As a result, the trial court erred in denying ACIC's motion for summary judgment.

III. STATEMENT OF THE CASE

A. *Plaintiff's Claim and ACIC's Investigation*

The Espinozas are the named insureds on ACIC Policy Number ACH3 – 000237597, a homeowner policy for the property located at 161

Pansy Lane, Wapato, Washington 98951. CP 69-114. The policy was obtained on or about October 12, 2010, through AAA Agency and Pamela Taylor. CP 69-114.

Mr. Espinoza telephoned the agency and spoke with Ms. Taylor on or about October 11, 2010, in order to obtain insurance. CP 918. Ms. Taylor took notes of that conversation, in order to verify coverages and complete an application for insurance. CP 918. During the October 11, 2010, telephone conversation, Mr. Espinoza informed Ms. Taylor that the home was heated by baseboard heat. CP 914. Ms. Taylor made the notation of "BB" on the Parcel Detail form that she was completing contemporaneously with the telephone discussion with Mr. Espinoza. CP 918-919.

Ms. Espinoza later went into the agency and signed the physical application. CP 979. Ms. Taylor reviewed the entire application with Ms. Espinoza on October 12, 2010, prior to Ms. Espinoza signing the application. CP 983-984.

On November 30, 2010, Plaintiffs' house suffered a fire caused by a space heater left operating near combustible material. CP 188-189. The house was a total loss.

During the investigation of the claim, examinations under oath were taken of the Espinozas. The examinations under oath took place on

February 1, 2011. CP 196, 405. Ms. Espinoza testified that the baseboard heaters in the house had been removed about ten years prior to the fire and that they had "always bought those space heaters." CP 1440. Ms. Espinoza testified that she understood what Ms. Taylor told her regarding the application and that she understands English. CP 409, 412.

During Mr. Espinoza's examination under oath, he testified as follows:

> Q. How long had you heated the house with space heaters?
> A. I would say about five years; five, six years, or longer.
> Q. What was used for heat before that?
> A. It had baseboard heaters. Baseboard heating. Which I took out, because my light bill was, you know, way too expensive.
> Q. All right.
> A. And those were taken out. And from then, after I took those out, I used space heaters.
> Q. So, is the only heat in the five years, space heaters?
> A. Space heaters.
> ***
> **Q. And when you got the policy, did you tell the agent that?**
> **A. Yes.**
> **Q. So, the agent knew it was only heated with space heaters?**
> **A. Space heaters, yes.**
> Q. Who told the agent it was space heaters?
> A. Specifically, me.
> Q. And you specifically said, the only heat is space heaters?
> A. Yes.
> Q. Did the agent ask you how the house was heated?
> A. Yes, I remember she did.
> Q. Were you in person or on the phone?

A. In person.
Q. And—
A. I think—Okay. Both. Because I think when I called in, she asked me, and I said "Space heaters." And when there was probably another incident, in person, that she asked me.
Q. Okay. Go over that again, because I lost you.
A. Okay. When I initially called in to ask about insuring my house, I believe she asked me what kind of heaters -- "How do you heat the house?" And I said I had space heaters.
Q. You said shelf space heaters?
A. Space heaters.
Q. What'd she say?
A. She said, "Okay." And the one other time when we went in to fill out the paperwork, I think she—I believe she asked me again. And I again said, "Space heaters."
Q. Was your wife there?
A. Yes.
Q. And you obviously know the difference between a space heater and a baseboard heater?
A. Yeah.

CP 197. (emphasis added).

On March 2, 2011, a sworn statement was taken of Ms. Taylor. CP 533. Ms. Taylor testified that Mr. Espinoza told her that the home was heated with baseboard heat, which she had memorialized by writing "BB" on the Parcel Detail sheet – something she had printed out from the county website. CP 922. Ms. Taylor testified that she never asked if Plaintiffs used space heaters because they had answered that they use baseboard heat. CP 924-925. Ms. Taylor testified that if any insured ever mentions space heaters she will simply stop the application process and tell them she cannot issue insurance for the person. CP 923-934.

B. *ACIC's Coverage Determination*

Based on the information secured in its coverage investigation, ACIC issued a letter to the Espinozas declining coverage on March 29, 2011. CP 121-124. In that coverage declination letter, ACIC advised the Espinozas of the basis in the policy for its coverage position, specifically identifying the following:

> AMENDATORY ENDORSEMENT – WASHINGTON
>
> . . .
>
> 14. Under Policy Conditions, Misrepresentation, Concealment, or Fraud is deleted and replaced by the following:
>
> **Misrepresentation, Concealment, or Fraud**
>
> This coverage is void if, before or after a loss"
>
> a. "you" or any "insured" has intentionally concealed or misrepresented:
>
> 1) a material fact or circumstance that relates to this insurance or the subject thereof; or
>
> 2) the "insured's" interest herein;
>
> b. there has been fraud or false swearing by "you" or any other "insured" with regard to a matter that relates to this insurance or the subject thereof.

CP 123.

ACIC's March 29, 2011 declination letter went on to explain the basis in fact for the denial.

> During the application process for your policy, you advised your agent, Pamela Taylor, that your home was heated with baseboard electricity, and you failed to tell her that in heating your home you actually relied solely on space heaters. Had American Commerce Insurance Company known that you used space heaters to heat your home, it would not have underwritten your policy. In going forward with writing your policy, American Commerce Insurance Company relied on your misrepresentation of the heat source in your home; the source of heat for your home was a material fact in the determination of whether a policy would be written for you.
>
> In addition, Mrs. Espinoza, during your examination under oath, you acknowledged that you told Ms. Taylor that the home was heated by electricity. Mr. Espinoza, you, on the other hand, testified that you specifically told Ms. Taylor that you used space heaters in the home. As noted above, had you in fact told Ms. Taylor about the space heaters, American Commerce Insurance Company would not have underwritten your policy.
>
> You have provided false information both during the application process, and the claims process, in an effort to ensure coverage.
>
> For the reasons set forth above, your claim with American Commerce Insurance Company is denied.

CP 123-124.

C. The Espinoza's Lawsuit

On June 30, 2011, the Espinozas filed a lawsuit in Yakima County Superior Court. The lawsuit asserted the following claims against ACIC:

- Breach of Contract;
- Bad Faith;
- Violation of the Washington Administrative Code;
- Violation of the Consumer Protection Act; and
- Violation of the Insurance Fair Conduct Act;

CP 18-34.

Plaintiff's also asserted claims against their insurance agent, Pamela Taylor and the insurance agency with which Ms. Taylor was employed alleging that they breached their fiduciary duties and were negligent in failing to convey true and correct information to ACIC regarding the Espinoza's application for insurance. CP 32-33.

ACIC answered the Espinozas' complaint denying all claims and asserting a counterclaim for declaratory relief seeking a judicial declaration that the Espinozas were not entitled to any coverage due to their misrepresentations of material fact in both the application and the coverage investigation. CP 20-26.

D. ACIC's Motion for Summary Judgment

On August 30, 2012, ACIC filed a Motion for Summary Judgment seeking judgment as a matter of law in regard to the Espinozas' extra-contractual claims. CP 57-65. Specifically, ACIC sought a ruling that it had complied with the Washington Administrative Code provisions for the handling of insurance claims and that the Espinozas were unable to meet their burden of proof as to the elements of their bad faith, CPA, and IFCA claims. *Id.*

In support of its motion, ACIC presented the Superior Court with the evidence concerning its extensive efforts at investigating the subject claim over the course of four months as well as the factual basis for its

declination of coverage. *Id.* See Also, CP 66-123. ACIC did not ask the Superior Court to rule on the actual coverage issue. Rather, its motion sought a ruling that its conduct in the handling of the claim was reasonable thereby precluding the Espinoza's extra-contractual claims.

The Espinozas responded arguing that the "sole basis" for ACIC's denial was misrepresentation in the application for insurance, which had been excluded from evidence by prior motion. CP 436-436; CP 437-452. The Espinozas' response focused solely on the application issue and did not address ACIC's denial based on the misrepresentations during the course of the coverage investigation. CP 437-452. For instance, in quoting the denial letter to the Superior Court, the Espinozas' brief left off the second paragraph of the explanation of the basis for the denial relating to misrepresentation in the investigation. CP 441.

Moreover, the Espinozas also did not present any actual facts or admissible evidence, or even any argument in brief, challenging ACIC's reasonable investigation of the claim. CP 437-452.

In sum, the Espinoza's briefing in opposition to ACIC's Motion for Summary Judgment was largely non-responsive to the actual issues presented in the subject motion. In fact, ACIC pointed this fact out in the initial pages of its Reply brief. CP 744-754.

On January 13, 2013, the Superior Court denied ACIC's motion. On February 15, 2013, counsel for the Espinozas filed a proposed order to this effect. CP 962-963. It does not appear that the Superior Court ever signed that order.

Regardless, the matter then proceeded to trial on March 4, 2013.

E. ***Trial – Plaintiff's Case***

On March 4, 2013, the trial in this matter began in the Yakima County Superior Court with the Court conducting a hearing on a number of pre-trial motions filed by all of the parties. RP, 03/04/13. The second trial day consisted of more pre-trial hearings and the selection of the jury. RP, 03/05/13.

On March 6, 2013, the Espinozas opened Plaintiff's case by calling Pamela Anderson, their insurance agent and a named defendant. RP 280. Ms. Anderson verified that during the application process, Gabriel Espinoza represented to her that the Espinoza residence was heating with baseboard heating. RP 289. She further testified that the Espinozas did not at any time advise that their home was heated with space heaters. RP 290; RP 339.

Ms. Taylor testified that following the issuance of the denial by ACIC, Irma Espinoza visited her office. RP 355. Ms. Taylor testified that she reviewed the ACIC letter and understood the basis of the denial as being related to the space heaters. RP 355-356.

> Q. In fact, when she came into your office, you told her, you didn't give me the correct information?
> A. That's correct, I did.
> Q. And she acknowledged that?
> A. And she kept nodding and crying.

RP 356.

Finally, Ms. Taylor testified very clearly that she could not bind

coverage if the insureds had told her that their house utilized space heaters. RP 377.

On March 7, 2013, the Espinozas called their expert in claims handling, Mr. Gary Williams to testify. On direct examination Mr. Williams testified that in his opinion ACIC had failed to comply with industry standards because it had broken his "rules" for insurance companies. RP 470-527. However, on cross-examination, Mr. Williams admitted that his "rules" have not been adopted by any Washington court, nor are the derived of any Washington Statute or Regulation. RP 542-543. When asked what he based these rules on, Mr. Williams stated, "I guess being in the insurance industry since 1968, and knowing what the rules are and what they're not." RP 543.

In regard to the basis of his opinions, Mr. Williams testified that he had weighed the testimony of Ms. Taylor in his review of the claim and stated, "I did not credit some of what she said very highly." RP 533. Contrary to this, Mr. Williams testified that he did not recall any of the Espinozas' testimony concerning the presence of space heaters in their residence. RP 547-48, 555.

Finally, Mr. Williams testified that insurance companies have not only the right, but the obligation to investigate. RP 557. Mr. Williams further testified that if an insured commits fraud, "the insurance company should not pay his claim for a million reasons." RP 557. Mr. Williams verified that in the context of insurance, a material misrepresentation is the equivalent of fraud. RP 557.

On the fifth day of trial, the Plaintiff's called Gabriel Espinoza. RP 632. Mr. Espinoza testified that as of the date on which he spoke with Ms. Taylor for purposes of purchasing the subject policy, the source of heat in the subject residence was space heaters. RP 673. Mr. Espinoza testified that he could not recall when it was that he told Ms. Taylor that the house was heated with space heaters. RP 699. Regardless, he continued to maintain, as he did in his examination under oath, that he told the agent that the residence was heated with space heaters. RP 694. He denied ever telling Ms. Taylor that the house had baseboard heating. RP 676.

On day 6 of trial, Plaintiffs called ACIC representative Paticia Brissette to testify. RP 858. Ms. Brissette briefly testified that she did not believe that there was any "misunderstanding" and that ACIC stood by its position that Mr. Espinoza misrepresented facts in the investigation of the claim. RP 927-928. In fact, she testified that the loss would have been covered but for those misrepresentations. RP 941.

At the close of Ms. Brissette's testimony, the Plaintiffs rested their case. RP 956.

F. ***ACIC's Motion for Directed Verdict***

Following the conclusion of the Plaintiffs' case, ACIC moved for directed verdict on several issues.

First, ACIC moved for summary judgment on the Espinozas' claims arising from violations of the WAC provisions for failure to

adequately explain the basis for the denial. Further, ACIC moved for the dismissal of any CPA claim based on the denial of this WAC provision based on the fact that there was no evidence of damage or proximate cause arising from any such allegation. RP 957.

Counsel for Plaintiffs responded by stating, without citation to the record, that Mr. Williams had testified that the letter, "didn't make sense." RP 958. Counsel then argued that, "the damages are that we got our claim denied." RP 958-959.

ACIC advised the Court that the damages component of a CPA claim requires actual damage to business or property caused by the alleged violation and that any issue with the explanation did not cause the claim to be denied and certainly did not cause damage to business or property. RP 959-960. The trial court denied the motion. RP 960.

ACIC then moved for directed verdict on the Espinozas' claims for non-economic damages as a measure of their extra-contractual claims. RP 960. The basis of ACIC's motion was the fact that neither Plaintiff testified that they had suffered any emotional distress caused by ACIC's conduct that could support a claim for non-economic damages. RP 960-961. For instance, Irma Espinoza testified that her emotional distress was related to the house fire, and did not attribute the emotional distress to the insurance claim. RP 961. The Court found the evidence of emotional distress, "very, very thin," but denied the Directed Verdict motion. RP 962.

Finally, ACIC moved for a directed verdict finding that ACIC had

a reasonable basis for its denial of coverage. RP 962. ACIC pointed out that Mr. Williams' testimony did not support an unreasonableness finding because it was based on his own "rules" and his own weighing of the testimony by the parties. RP 962-963. ACIC argued that there was no evidence of unreasonableness because its denial was based on essentially undisputed facts. *Id.* The Espinoza's responded that the Court should deny the motion based on an "equal consideration" legal standard adopted in the *Tank v. State Farm* case.[2] ACIC advised the Court that the *Tank* standard was associated only with duty-to-defend and reservation of rights cases. RP 962. The Court denied the motion. RP 962.

G. The Verdict

Following the denial of its motions for Directed Verdict, ACIC put on its defense case in little more than one full trial day. RP, 03/11/13-03/12/13. Co-Defendant AAA and Pamela Taylor put on their defense following ACIC's case. RP 1205.

On the eighth trial day, the jury was instructed. CP 1547-1587. The jury was instructed as to the legal standard regarding a finding of intentional misrepresentation of material facts in the context of an insurance claim. CP 1573-1574. The jury was instructed that a misrepresentation finding would preclude the Espinozas' extra-contractual claims. CP 1573. The jury was not instructed that a misrepresentation

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[2] 105 Wn.2d 381, 715 P.2d 1133 (1986)

finding would preclude the Espinoza's claim for coverage under Washington law.

The jury was presented with a 6-page, 17-question special verdict form. The jury because deliberations on March 13, 2013. On March 14, 2013, the jury returned its verdict. RP 1404; CP 1588-1593. In answer to the first question, the jury found that the Espinozas had proven a covered loss and they identified the value of the damage sustained in that loss. CP 1588. The jury then found that the Espinozas had not made any misrepresentations during the insurance application process. CP 1589. However, the jury did find the following:

> QUESTION 3: Did Gabriel Espinoza make a material misrepresentation during the claim investigation Examination Under Oath?
>
> ___X____ YES _____ NO

CP 1589.

The verdict form instructed the jury as follows in regard to its answer to Question No. 3:

> *(INSTRUCTION: if you answered "yes" to either Question 3* ***OR*** *4 (sic) sign this verdict form. If you answered "no" to both questions 2* ***AND*** *3, answer question 4.)*

CP 1589.

Despite this instruction, the jury did not sign the verdict form after answering "yes" to Question No. 3. Rather, the jury answered two (2) of the remaining fourteen (14) questions. Under the heading, "CLAIMS

AGAINST AAA/TAYLOR" the jury answered Question No. 1 finding that there was coverage for the loss under the ACIC policy. The jury also answered an allocation question on the final page of the verdict form. CP 1593.

H. ***Post-Verdict Motions***

Following the entry of the verdict into the record, the trial court invited comments from counsel as to how it should be interpreted. Counsel for the Espinozas took the following position:

> It is an inconsistent verdict, Your Honor. I believe that, apparently, the jury was not aware that the answer to the third question made everything else moot.

RP 1422.

The Espinozas then moved for a mistrial or a new trial order. RP 1422.

ACIC, citing to the *Cox v. Mutual of Enumclaw* Supreme Court decision, advised the trial court that the answer to Question No. 3 did in fact render everything else moot and that the jury's verdict was a defense verdict. RP 1423. ACIC advised the Court that had the jury actually followed the instructions on the Verdict Form, it would have returned the verdict with the misrepresentation finding and a defense judgment would clearly be warranted. RP 1423-1424.

The Court then referred to RCW 4.44.440 and took the position that this verdict form was inconsistent because general verdict was in conflict with special interrogatories. RP 1427. The Court found that despite the finding of misrepresentation, it was the jury's intent to award damages to the Espinozas. RP 1427-28.

After a lengthy discussion, the trial court dismissed the jury, found that the verdict was "internally inconsistent," and ordered a new trial. RP 1445-1447.

ACIC then filed a Motion for Reconsideration of the New Trial Order and a Motion for Entry of Judgment on its behalf based on the jury's verdict. CP 1602-1608. The Espinozas filed a Presentation of Order for New Trial or in the Alternative, a Motion for Judgment as a Matter of Law. CP 1683-1695. The basis of the Espinoza's motion for judgment as a matter of law was the claim that there was not substantial evidence presented at trial form which the jury could have reasonably answered Question No. 3 in the affirmative. CP 1683-1695.

On March 25, 2013, the Superior Court held a hearing on the cross-motions. The Espinozas argued, without citation to CR 59 that the Court should enter the new trial order and deny ACIC's motion for entry of Judgment based on RCW 4.44.440, claiming that the verdict was inconsistent. RP 03/25/13, pp. 4-5.

The Espinozas further asserted their motion for Judgment as a matter of law based on the argument that substantial evidence did not support the jury's finding of misrepresentation. RP 03/25/13, pp. 9-10. The Superior Court then held that the evidence presented at trial was sufficient to support the jury's finding. RP 29. The Espinozas have not appealed this ruling.

On that same date, the Superior Court entered the Order for a New Trial. CP 1755-1761. ACIC now appeals from this Order and those described above.

IV. ARGUMENT

A. *Standard of Review*

The standard of review applicable to each of the assignments of error set forth by ACIC is summarized as follows:

1. New Trial Order/Failure to Enter Judgment in Favor of ACIC

An appellate court reviews an Order for a New Trial by looking to the reasons given by the trial court for granting the motion for new trial. *Cox v. General Motors Corporation*, 64 Wn. App 823, 827 P.2d 1052 (1992).

> As a general rule, the trial court's decision to grant or deny a motion for a new trial will not be disturbed on appeal absent a showing of a clear abuse of discretion. *Kramer v.*

> *J.I. Case Mfg. Co.*, 62 Wn. App. 544, 561, 815 P.2d 798 (1991). However, if the reason for the new trial was predicated upon an issue of law, then the appellate court reviews the record for error in application of the law rather than for abuse of discretion. *Schneider v. Seattle*, 24 Wn. App. 251, 255, 600 P.2d 666 (1979)

Cox, 64 Wn. App. at 826, 827 P.2d 1052).

Here, the Superior Court's Order for a New Trial is predicated on an error of law. The Superior Court failed to recognize that pursuant to the Washington Supreme Court's ruling in *Cox v. Mutual of Enumclaw*, the jury's verdict finding misrepresentation operates as a matter of law to void the coverages of the ACIC policy issued to the Espinozas. The Superior Court's order was therefore a clear error of law.

To the extent, however, that the Court did look at this matter under an abuse of discretion standard, it would nonetheless be required to remand for entry of judgment in favor of ACIC. The Superior Court's ruling was an abuse of discretion given clear Washington law.

2. Denial of ACIC's Directed Verdict Motions

On motions for Directed Verdict, the Appeals Court's apply the same, "substantial evidence" standard as employed by the trial court.

> On review of a ruling on a motion for a directed verdict, the appellate court applies the same standard as the trial court. *Hizey v. Carpenter*, 119 Wn.2d 251, 272, 830 P.2d 646 (1992) . . . A directed verdict is appropriate if, as a matter of law, there is no substantial evidence or reasonable

> inference to sustain a verdict for the nonmoving party. *Harris v. Drake*, 152 Wn.2d 480, 493, 99 P.3d 872 (2004).

Chaney v. Providence Health Care, 176 Wn.2d 727, 295 P.3d 728 (Wash. 2013).

3. Denial of ACIC's Summary Judgment Motion

The Court reviews summary judgment *de novo*. *Lybbert v. Grant County,* 141 Wn.2d 29, 4, 1 P.3d 1124, (2000).

B. Under Clear Washington Law, An Insurer Is Entitled to Judgment in Its Favor If a Jury Finds that the Insureds Misrepresented or Concealed Material Facts

ACIC contends that this Court need go no further than Question 3 on the jury's Special Verdict Form. As Counsel for the Espinozas observed immediately following the verdict,

> ***[T]he jury was not aware that the answer to the third question made everything else moot.***

RP 1422.

The Verdict Form issued by the Superior Court was also correct under the law as it instructed the jury to sign the verdict form if it found a material misrepresentation by the insureds. The Superior Court was aware of the law, counsel for the Espinozas was aware of the law, and ACIC submits that the law is clear and unambiguous. The jury's finding of a misrepresentation on the part of the insured during the investigation of

their claims voids the policy and is a complete bar to any and all contractual and extra-contractual claims asserted by the Espinozas.

> In Wright, our Supreme Court stated that courts should strive to implement the jury's intent, ***if that intent is in accord with the law***: In the construction of a verdict, the first object is to learn the intent of the jury, and when this can be ascertained, such effect should be given to the verdict, ***if consistent with legal principles***, as will most nearly conform to the intent. The jury's intent is to be arrived at by regarding the verdict liberally, with the sole view of ascertaining the meaning of the jury, and not under the technical rules of construction which are applicable to pleadings. ***Where the effect of a jury's verdict is inconsistent with applicable law, the court is not free to implement that jury's intent.***

Buckner, Inc. v. Berkey Irrigation, 89 Wn. App. 906 (Wash. Ct. App. 1998)(emphasis added).

In this case, the Superior Court expended substantial effort to ascertain the jury's intent in answering the questions that it answered on the verdict form. RP 1426-1427, RP 03/25/13, p.29; CP 1755-1761. However, the Superior Court may not attempt to implement its interpretation of the jury's intent where that intent would be contrary to Washington law. In regard to misrepresentations by insureds in the context of insurance claims investigations, Washington law is clear.

> Under Washington law, a clause voiding an insurance policy for the insured's material misstatement is enforceable. *See Mutual of Enumclaw Ins. Co. v. Cox*, 110 Wash. 2d 643, 649, 757 P.2d 499 (1988); *Saint Paul Mercury Ins. Co. v. Salovich*, 41 Wash. App. 652, 705 P.2d 812, review denied, 104 Wash. 2d 1029 (1985). Such a

> clause is enforced regardless of whether the misstatements caused any prejudice to the insurance company by causing it to bear the risk of additional risk. *Cox*, 110 Wash. 2d at 649. The key question is whether the misstatement was material. Id.

Onyon v. Truck Ins. Exch., 859 F. Supp. 1338 (W.D. Wash. 1994).

The foregoing statement of Washington law is not and cannot be disputed. It is noteworthy as well that the policy provision contained within the ACIC policy issued to the Espinozas is substantially the same as that at issue in the *Cox* case. The ACIC policy provides as follows:

> **Misrepresentation, Concealment, or Fraud**
>
> This coverage is void if, before or after a loss"
>
> a. "you" or any "insured" has intentionally concealed or misrepresented:
>
> 1) a material fact or circumstance that relates to this insurance or the subject thereof; or
>
> 2) the "insured's" interest herein;
>
> b. there has been fraud or false swearing by "you" or any other "insured" with regard to a matter that relates to this insurance or the subject thereof.

CP 123.

Here, the jury found that the insureds misrepresented material facts during the course of their claim. Under *Cox*, *Salovich*, *Onyon*, and dozens of subsequent Washington cases, the Espinozas are not entitled to any

recovery in this case. Moreover, the Superior Court made a fundamental error of law in concluding that it was in a position to attempt to interpret and implement the intent of the jury in the face of a misrepresentation verdict.

In fact, the Washington Supreme Court has directly addressed the very same issue before this Court:

> We recognize that the special interrogatories to the jury were incorrect. Once the jury found that Cox had committed fraud, it should have stopped its deliberations and not considered whether Cox could invoke estoppel.
>
> Nevertheless, the court finally realized that Cox's assertion of estoppel was improper and correctly gave a judgment n.o.v. in favor of MOE. "The purpose of the judgment notwithstanding the verdict is to give the trial judge a last opportunity to correct errors." 10 L. Orland & D. Reaugh, Wash. Prac. 260 (1971) (citing *Brown v. Alkire*, 295 F.2d 411 (10th Cir. 1961)). The court properly used the judgment n.o.v. to correct the misstatement of law in the special interrogatories.

Mutual of Enumclaw Ins. Co. v. Cox, 110 Wn.2d 643, 757 P.2d 499 (1988).

Here, the Superior Court erred by *not* utilizing the judgment n.o.v. procedure to enter judgment in favor of ACIC. The special interrogatory/general verdict distinction is irrelevant because the jury's verdict must be reconciled with the law.

The Washington State Court of Appeals has held as follows regarding these issues.

> The matter proceeded to a jury trial. The jury answered a special interrogatory, namely:
>
> > QUESTION NO. 1: Did either Loren Johnson or Diana Johnson intentionally misrepresent or conceal any material fact to defendant in connection with their claim under the insurance contract? Answer "Yes" or "No".
> >
> > ANSWER: Yes
> >
> > If you answer Question No. 1 "Yes", sign and return this verdict form. If you answer Questions No. 1 "No", answer Question Nos. 2, 3, and 4 below".
>
> The jury answered "Yes" to Question No. 1 and, as instructed, did not answer the remaining questions about breach of contract, Consumer Protection Act, chapter 19.86 RCW, violations, or plaintiffs' damages. CP at 60-61.
>
> Based on this finding, the court ruled that "Defendant is not liable and is entitled to judgment of dismissal with prejudice and costs, which will be taxed as provided by law; ADDITIONALLY, by operation of law, Plaintiffs are obligated to repay the $ 16,043.43 paid by Allstate during the adjustment of this claim." CP at 120. The court awarded Allstate a total judgment of $ 18,568.35 based on the above repayment, plus prejudgment interest and attorney fees.

Johnson v. Allstate Ins. Co., 126 Wn. App. 510 (Wash. Ct. App. 2005).

The *Johnson* court affirmed the Superior Court's finding that the jury's verdict finding a misrepresentation of material fact in connection with the insured's claim operated as a complete bar to not only the extra-contractual claims, but also to any claims for breach of contract under the policy. *Id.* at

> Here, Allstate put the policy into effect and insured the Johnsons against fire loss, absent their misrepresentation or concealment. When the Johnsons concealed and misrepresented material facts regarding their loss, they voided their coverage.

Id.

Here, ACIC put a policy into effect and insured the Espinozas against fire loss, absent their misrepresentations. When the Espinozas misrepresented material facts, they voided their coverage.

Moreover, the *Johnson* Court actually held that upon a finding of material misrepresentation voiding the subject policy, the insurer is actually entitled to judgment in its favor in the amounts that it paid on the claim. *Id.*, See also, *Northwestern Mut. Life Ins. Co. v. Koch*, 515 Fed. Appx. 678 (9th Cir. Wash. 2013). Here, ACIC is not seeking reimbursement of the $16,000 that it paid to or on behalf of the Espinozas prior to the issuance of the denial. As the Espinozas' expert concedes, those payments were made in good faith. RP 544.

In the post-verdict briefing the Espinozas argued that under *Oregon Mutual Insurance Company v. Barton*, a misrepresentation in an examination under oath does not operate to void coverage. CP 1684-1685. The Espinozas' position regarding the *Barton* case is based on a misinterpretation of the actual issues and ruling in that case.

An insurance settlement induced by fraudulent

> misrepresentations is void. But the misrepresentations must be relevant and must predate the settlement. Here, Oregon Mutual Insurance Company accused its insured, George Barton, of arson, but only after it had agreed to a settlement, issued the settlement drafts along with a proof of loss statement, and after Mr. Barton had negotiated the drafts. It then sued to void the settlement agreement and its policy with Mr. Barton. A jury found that Mr. Barton did not commit arson but did misrepresent aspects of his claim--but only after settlement. The dispositive question before us is whether misrepresentations by an insured after settlement, which could not have induced the settlement, voided the insurance policy. We conclude that they did not and therefore reverse the trial court's decision.

Or. Mut. Ins. Co. v. Barton, 109 Wn. App. 405 36 P.3d 1065 (Wash. Ct. App. 2001).

> *Cox* is distinguishable. In *Cox*, the claims process was still ongoing when Dr. Cox made his misrepresentations. The company's payments to Dr. Cox were partial payments, not a full and final settlement. The dubious aspects of the claim remained open and in dispute. Here, there was no partial payment. All disputes were resolved by the settlement. The drafts have two boxes, one for partial payment and one for full settlement. The full settlement boxes are marked with Xs; the partial payment boxes are not. The alleged misrepresentations were made in Mr. Barton's examination under oath six weeks after this settlement had been reached. Any misrepresentations could not then have been made for the purpose of inducing the settlement.

Or. Mut. Ins. Co. v. Barton, 109 Wn. App. at 415-16, 36 P.3d 1065.(Wash. Ct. App. 2001).

In the instant case, it is undisputed that Mr. Espinoza's material misrepresentation occurred during the course of ACIC's coverage investigation. *Barton* does not stand for the blanket proposition that a

misrepresentation in an EUO has no effect. In fact, the *Barton* Court's conclusion was based on the fact that the misrepresentation in that case could not have been material to the insurer's decision to pay the claim because the misrepresentation was made *after* the payment. *Id.*

Here, in stark contrast, the jury has already found that the Espinozas made a *material* misrepresentation in the examination under oath. As a result, *Barton* does not apply.

Based on clear and long-standing Washington law, an insured who misrepresents or conceals material facts concerning their insurance claim is not entitled to recovery, either under the contract or some other liability theory, against their insurer. The jury found a material misrepresentation and the inquiry should have ended at that time.

C. The Espinozas' Inconsistent Verdict Argument Is Without Merit

The Espinozas based their oral motion for new trial and their arguments in support of a new trial on the notion that the jury's verdict was "inconsistent" under RCW 4.44.440 and that the jury's intent could not be determined. However, as set forth above, the jury's verdict must be interpreted in accordance with Washington law.

Under Washington law:

> When special findings of fact are inconsistent with the general verdict, the judge may enter judgment consistent

> with the findings of fact, may return the jurors to the jury room for further deliberations, or may order a new trial.

RCW 4.44.440.

As set forth above, the general verdict/special interrogatory issue is not applicable in the instant context where the jury's verdict must be interpreted in accord with Washington law. *Cox*, 110 Wn.2d 643, 757 P.2d 499.

Further, CR 59(a) provides for the "causes materially affecting the substantial rights of the parties" and the basis for granting a new trial. Specifically, the nine causes are:

> (1) *Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion, by which such party was prevented from having a fair trial.*
>
> (2) Misconduct of prevailing party or jury; and whenever any one or more of the jurors shall have been induced to assent to any general or special verdict or to a finding on any question or questions submitted to the jury by the court, other and different from his own conclusions, and arrived at by a resort to the determination of chance or lot, such misconduct may be proved by the affidavits of one or more of the jurors;
>
> (3) Accident or surprise which ordinary prudence could not have guarded against;
>
> (4) Newly discovered evidence, material for the party making the application, which he could not with reasonable diligence have discovered and produced at the trial;

(5) Damages so excessive or inadequate as unmistakably to indicate that the verdict must have been the result of passion or prejudice;

(6) Error in the assessment of the amount of recovery whether too large or too small, when the action is upon a contract, or for the injury or detention of property;

(7) That there is no evidence or reasonable inference from the evidence to justify the verdict or the decision, or that it is contrary to law;

(8) Error in law occurring at the trial and objected to at the time by the party making the application; or

(9) That substantial justice has not been done.

CR 59(a) (emphasis added).

These nine causes are the only reasons that a new trial may be ordered. *See Larson v. Georgia Pac. Corp.,* 11 Wn.App. 557, 524 P.2d 251 (1974).

A verdict is inconsistent when it contains answers to interrogatories that are contradictory and make the jury's resolution of the ultimate issues impossible to determine. *Alvarez v. Keyes,* 76 Wn.App. 741, 743, 887 P.2d 496 (1995). "If possible, jury verdicts must be read consistently." *Guijosa* v. *Wal-Mart Stores, Inc.,* 101 Wn.App. 777, 797, 6 P.3d 583 (2000). The court must look at the whole verdict, including jury instructions and the verdict form. *Id.* A Court, however, cannot substitute its judgment for that which is within the province of the jury. *Alvarez,* 76 Wn.App. at 743.

If there is evidence in the record to support the jury's findings, then the verdict is not inconsistent. *Estate of Stalkup v. Vancouver Clinic, Inc. P.S.,* 145 Wn. App. 572, 587,187 P.3d 291 (2008).

> The reason is that answers to interrogatories are the jury's findings of fact and the judgment of the court must be a proper conclusion of law from these facts as found. A conflict between a finding of fact as stated in the answer to an interrogatory, and the general verdict, means that the jurors did not properly apply the law and the instructions as given by the trial court when they were rendering their general verdict."

Guijosa, 101 Wn. App. at 800, 187 P.3d 291. A negative response to a special interrogatory prevails over an inconsistent implication. *Id.*, 187 P.3d 291.

Here, Plaintiffs moved the Superior Court for a new trial on the basis of inconsistent jury verdict under CR 59(a)(1). The jury's findings and the verdict form, however, did not equate to an inconsistent verdict. Further, any irregularity in the proceedings did not prevent the Espinozas from having a fair trial, since they occurred after the jury found Mr. Espinoza materially misrepresented during the claim investigation Examination Under Oath, voiding all coverage. Since there is a consistent verdict that material misrepresentations occurred during the claim investigation, ACIC was entitled to judgment as a matter of law and the

Superior Court made a clear error of law and/or abused its discretion in ordering a new trial.

Based on the foregoing, ACIC asks that this Court reverse the Superior Court's Order for a new trial and remand this matter for entry of judgment in favor of ACIC based on the material misrepresentations by the Espinozas during the course of their claim.

D. The Superior Court Erred In Denying ACIC's Directed Verdict Motions Where Plaintiffs Had Failed to Present Substantial Evidence Supporting Their Claims

Once again, ACIC contends that the Court's inquiry need not go any further than the new trial issue. ACIC is entitled to judgment as a matter of law and the new trial order should be reversed. However, to the extent that the Court is inclined to affirm that new trial order, ACIC asks that the Court reverse the Superior Court's rulings as to the following dispositive issues.

1. Directed Verdict Standard

A motion for directed verdict may be granted upon the failure of a party to present legally sufficient evidence to establish a cause of action. Specifically, CR 50 provides the basis for a directed verdict:

> If, during a trial by jury, a party has been fully heard with respect to an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find or have found for that party with respect to that issue, the court may grant a motion for judgment as a matter of law against the party

> on any claim, counterclaim, cross claim, or third party claim that cannot under the controlling law be maintained without a favorable finding on that issue.

CR 50(a)(1).

The Washington Court have repeatedly identified the standard for granting a motion for directed verdict:

> A directed verdict or judgment n.o.v. is appropriate if, when viewing the material evidence most favorable to the non-moving party, the court can say, as a matter of law, that there is no substantial evidence or reasonable inferences to sustain a verdict for the non-moving party.

Winbun v. Moore, 97 Wn. App. 602, 982, P.2d 1196 (1999)(internal citations omitted); see also, *Indust. Indemn. Co v. Kallevig*, 114 Wn.2d 907, 792 P.2d 520 (1990).

Substantial evidence exists when it is sufficient to persuade a "fair minded, rational person of the truth of the declared premise." *Bishop of Victoria v. Corporate Bus. Park*, 138 Wn. App. 443, 158 P.3d 1183 (2007); *Cowsert v. Crowley Maritime Corp*, 101 Wn.2d 402, 680 P.2d 46 (1984). The substantial evidence must include specific facts and may not include unsupported theories or speculation. *Chaussee v. Maryland Cas. Co*, 60 Wn. App. 504, 803 P.2d 1339 (1991).

In the instant case, the Superior Court erred in failing to grant ACIC's motions for directed verdict on a number of topics following the close of the Espinozas' case in chief.

2. *CPA Claims Based on Alleged Violation of WAC 284-30-330(13)*

After the Espinozas rested their case, ACIC moved for directed verdict on any claims by the Espinozas based upon WAC 284-30-330(13) for failure to adequately describe the basis for a coverage denial. In particular, ACIC moved for the dismissal of the Espinozas CPA claim based on this WAC provision. An insured may prove the liability elements of a CPA claim through a showing of a violation by the insurer of a WAC. However, the insured must not only demonstrate that violation, but must also establish the remaining CPA elements.

The Washington Supreme Court has ruled that in order to prevail on a claim for violation of RCW 19.86, Washington's CPA, a Plaintiff bears the burden of proving five elements:

1) An unfair or deceptive act or practice;
2) Occurring in trade or commerce;
3) That impacts the public interest;
4) Injury to his business or property; and
5) That the injury was proximately caused by the unfair or deceptive act.

Hangman Ridge Training Stables v. Safeco Title Ins. Co., 105 Wn.2d 778, 784-85,719 P.2d 531, (1986). *See also Cardenas v. Navigators Ins. Co.*, 2011 U.S. Dist. LEXIS 145194 (W.D. Wash. 2011).

The Supreme Court has ruled that in order for an insured to prevail on a CPA claim, the insured must establish each of the five elements of

the Hangman Ridge test listed above. *See Industrial Indem. Co. v. Kallevig*, 114 Wn.2d 907, 923, 792 P.2d 520 (1990). The question of whether an act or practice is actionable under the Consumer Protection Act is a question of law. *Dombrosky v. Farmers Ins. Co.*, 84 Wn. App. 245, 260, 928 P.2d 1127, *review denied*, 131 Wn.2d 1018, 936 P.2d 417 (1997).

An insured may establish a per se unfair trade practice under the CPA by demonstrating a violation of RCW 48.30.010 based upon a violation of WAC 284-30-330. *Dombrosky*, 84 Wn. App. At 260, 928 P.2d 1127. However, even if there is a technical violation of a WAC provision, the Washington Courts have held that reasonableness is a complete defense to a CPA claim. *Keller v. Allstate Ins.* Co., 81 Wn. App. 624, 634, 915 P.2d 1140 (1996).

Here, the Espinozas cannot establish the violation of the WAC because its declination letter contained a plain and simple explanation of the basis for the denial, including both the policy provisions on which the denial was based and the facts relied upon by ACIC. See pp. 12-13 *supra.*, CP 123-124. The only argument raised by the Espinozas in opposition to this fact was Mr. Williams' comment that the letter, "makes no sense." CP 959. This statement, however, is a disagreement with the conclusion rather than evidence that the content was inadequate.

Moreover, even if Mr. Williams' lone statement was sufficient to create an issue for the jury on the "unfair or deceptive acts or practices" elements, the evidence presented by the Espinozas in their case did not in any way establish that they were somehow injured in their business or property as a result of the inadequate explanation.

The Espinozas argued that the damages were the fact that the claim was denied. CP 960. However, the claim was not denied as a result of ACIC's explanation of the denial letter. The claim was denied because the Espinozas misrepresented material facts during the course of ACIC's investigation.

The trial court erred in failing to grant directed verdict as to the Espinozas claims arising out of WAC 284-30-330(13), including but not limited to the CPA claim based on that WAC.

3. Non-Economic Damages

The Espinozas claimed that they were entitled to recover non-economic emotional distress damages as a measure of damages in their extra-contractual claims. However, in their case in chief, the only evidence submitted by the Espinozas was the testimony of Irma Espinoza who testified that she experienced severe emotional distress due to the fire. RP 961-962. There was no testimony that the Espinozas emotional distress was caused by some act or omission of ACIC.

Again, the Espinozas cannot defeat a motion for directed verdict by relying on a scintilla of evidence or inferences. *Chaussee*, 60 Wn. App. 504, 803 P.2d 1339. The trial court erred in allowing the non-economic damages claims to proceed to jury.

4. Reasonable Denial of Coverage

The Espinozas case in chief regarding the claim that ACIC's denial of coverage was unreasonable was supported solely by the testimony of their "bad faith expert," Mr. Gary Williams. However, Mr. Williams' testimony is not sufficient to defeat a motion for directed verdict.

Specifically, Mr. Williams' testimony is not "substantial evidence" of an unreasonable denial, particularly in light of the fact that his entire testimony was based on his own personal "rules" for insurance companies (RP 542) and where he admitted that his opinions were based on his weighing of the credibility of the Espinozas' insurance agent.

I did not credit some of what she said very highly.

RP 533.

The only legal argument advanced in support of the Espinozas' claim that the denial was unreasonable again comes from Mr. Williams who claims that the insurer must give "equal consideration" to the insureds. However, the equal consideration standard applies in the context of the "enhanced obligation" of good faith and fair dealing in

cases involving reservation of rights defenses. *Tank v. State Farm*, 105 Wn.2d 381, 715 P.2d 1133 (1986). The equal consideration standard has not been expanded to first-party property claim investigations.

As explained by ACIC during argument, the standard is an ordinary good faith standard.

> Bad faith requires a showing of frivolous and unfounded denial of benefits. [The insurer] denied coverage based on a reasonable interpretation of the policy; this was not bad faith as a matter of law. . . The mere denial of benefits due to a debatable question of coverage is insufficient.

Miller v. Indiana Ins. Co., 31 Wn. App. 475, 479, 642 P.2d 769 (1982)(internal citations omitted).

> Our courts have rejected attempts to base bad faith and CPA claims on legal arguments when, as here, there is no showing of bad faith, there is a debatable question regarding coverage for the loss, and the denial of coverage is based on a reasonable interpretation of the insurance policy.

Capeluto v. Valley Forge Ins. Co., 98 Wn. App. 7, 22, 990 P.2d 414 (1999) (internal citations omitted). S*ee also Eide v. State Farm Fire and Cas. Co.*, 79 Wn. App. 346, 901 P.2d 1090 (1995).

The *Miller* and *Capeluto* cases are in accord with Washington's long held doctrine that reasonableness is a complete defense to bad faith and Consumer Protection Act claims.

> Finally, a reasonable basis for denial of an insured's claim constitutes a complete defense to any claim that the insurer acted in bad faith or in violation of the *Consumer Protection Act. Transcontinental Insurance Co. v. Washington Pub. Util. Dist. Util Sys., 111 Wn.2d 452, 760*

> *P.2d 337 (1988)*; *Felice v. St. Paul Fire & Marine Ins. Co., 42 Wn. App. 352, 711 P.2d 1066 (1985), review denied, 105 Wn.2d 1014 (1986)*; *Starczewski, 61 Wn. App. at 273.* Here, Farmers' reliance on the policy language governing replacement cost was reasonable.

Dombrosky v. Farmers Insurance Company of Washington, 84 Wn. App. 245; 928 P.2d 1127 (1996).

This case does not involve an unfounded denial of benefits. The Espinozas did not present substantial evidence sufficient to have overcome ACIC's motion for directed verdict. As such, to the extent that the Court considers the same, the Superior Court's denial of ACIC's directed verdict motion regarding this issue should be reversed.

E. ACIC Was Entitled to Summary Judgment In Its Favor on Plaintiff's Extra-Contractual Claims Prior to Trial

Once again, to the extent that the Court is inclined to affirm the Superior Court's new trial order, ACIC asks that the Court reverse the Superior Court's denial of ACIC's Motion for Summary Judgment on the Espinozas' extra-contractual claims.

1. Summary Judgment Standard

In Washington, motions for summary judgment are controlled by the Civil Rules. The summary judgment rule reads in relevant part:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.

CR 56(c).

Summary judgment is appropriate when the pleadings, affidavits, depositions, and admissions indicate that no genuine issue of material fact exists and a party is entitled to judgment as a matter of law. *Young v. Key Pharmaceuticals*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). In a summary judgment motion, the moving party bears the initial burden of showing the absence of an issue of material fact. *See LaPlante v. State*, 85 Wn.2d 154, 158, 531 P.2d 299 (1975). The trial court should grant the motion for summary judgment if a party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Young,* 112 Wn.2d at 225*, quoting Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986).

When responding to the moving party's motion, the nonmoving party cannot rely on the allegations made in its pleadings. "CR 56(e) states that the response, 'by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.'" *Young*, 112 Wn.2d at 225-26.

> The party opposing a motion for summary judgment "may not rely on speculation, argumentative assertions that unresolved factual issues remain, or in having its affidavits accepted at face value . . [T]he non-moving party must set forth specific facts that sufficiently rebut the moving

> party's contentions and disclose that a genuine issue as to material fact exists.

Herman v. SAFECO Ins. Co. Of America, 104 Wn. App. 783, 787-88, 17 P.3d 631 (2001); *quoting Seven Gables Corp. v. MGM/UAEntm't Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986).

2. ACIC's Reasonable Investigation and Coverage Determination Are Complete Defenses to the Espinozas' Extra-Contractual Claims

Regarding claims arising out of the tort of bad faith, The Washington Courts have further held that summary judgment is appropriate where an insured fails to establish evidence sufficient to raise a genuine issue of material fact as to whether the conduct of the insurer was unreasonable, frivolous, or unfounded. *Smith v. SAFECO Ins. Co.*, 150 Wn.2d 478, 485, 78 P.3d 1274 (2003). As discussed above, bad faith further requires as showing that there has been a frivolous or unfounded denial of benefits. *Dombrosky*, 84 Wn. App. 245; 928 P.2d 1127; *Miller*, 31 Wn. App. at 479, 642 P.2d 769; *Capeluto*, 98 Wn. App. at 22, 990 P.2d 414.

The Courts have applied the same standard for purposes of a claim under the Washington Insurance Fair Practice Act.

> Irrespective of the diputed [sic] time frames, the purported delay in acknowledgement of the tender and completion of an investigation was not unreasonable and not a violation of the IFCA. Although violations of the enumerated regulations provide grounds for trebling damages or for an

> award of attorney's fees; they do not, on their own, provide a IFCA cause of action absent an unreasonable denial of coverage or payment of benefits.

Cardenas v. Navigators Ins. Co., 2011 U.S. Dist. LEXIS 145194 (2011).

With regard to the CPA claim, the Courts impose an even more rigorous burden on the parties pursuing such claims. The Espinozas bear the burden of proving five elements:

1) An unfair or deceptive act or practice;
2) Occurring in trade or commerce;
3) That impacts the public interest;
4) Injury to his business or property; and
5) That the injury was proximately caused by the unfair or deceptive act.

Hangman Ridge, 105 Wn.2d 778, 784-85,719 P.2d 531.

In August of 2012, more than six months in advance of the scheduled trial, ACIC moved for summary judgment presenting substantial evidence of its reasonable investigation and the basis for its coverage determination. CP 57-65; CP 66-123; CP 744-754; CP 755-769. In fact, the facts set forth in that motion are the same facts that were tried to the jury in March of 2013.

In opposition, the Espinozas did not offer any facts or admissible evidence suggesting, much less establishing, that ACIC's investigation was unreasonable or somehow inadequate. CP 437-452. Rather, the entirety of the Espinozas brief is devoted to non-responsive arguments

concerning issues relating to the application for insurance. *Id.* Those issues were not raised in ACIC's motion. CR 744-754.

As a result, the Espinozas failed to meet their burden under the summary judgment burden-shifting standard of establishing a genuine issue of material fact through the presentation of competent and admissible evidence. The trial court erred in denying ACIC's motion and, to the extent that the Court considers this issue, ACIC asks that the Court reverse the trial court's dismissal.

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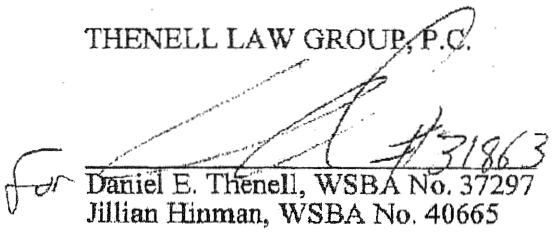
V. CONCLUSION

Based on the foregoing, American Commerce Insurance Company respectfully asks that this Court reverse the Superior Court's Order for a New Trial and remand this matter for entry of Judgment in favor of ACIC. To the extent that the New Trial Order is affirmed, however, ACIC asks that the Court reverse the Superior Court's dispositive orders denying relief to ACIC.

Respectfully submitted this 16th day of September, 2013.

THENELL LAW GROUP, P.C.



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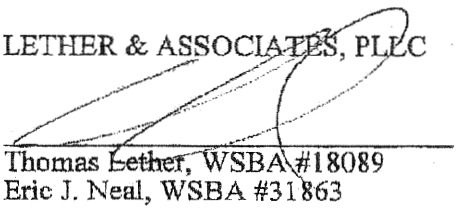

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