

No. 91301-3

**FILED**

NOV 06 2013

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

**FILED**

NOV 05 2013

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

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

---

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

Appellants,

v.

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

Respondent.

---

**APPELLANTS' OPENING BRIEF**

---

David P. Boswell  
WSBA #21475  
Attorney for Appellants  
  
Boswell Law Firm, P.S.  
505 W. Riverside  
Fernwell Building, Suite 500  
Spokane, WA 99201  
(509) 252-5088

COURT OF APPEALS, DIVISION III OF THE STATE OF  
WASHINGTON

**TABLE OF CONTENTS**

**I. Assignments of Error**.....3

    No. 1 .....3

    No. 2 .....3

    No. 3 .....3

    No. 4 .....3

**Issues Pertaining to Assignments of Error**.....3

            No. 1 .....3

            No. 2 .....3

            No. 3 .....3

            No. 4 .....4

            No. 5 .....4

            No. 6 .....4

            No. 7 .....4

**II. Statement of the Case** .....4

**III. Summary of Argument**.....14

**IV. Argument** .....15

**V. Conclusion** .....20

**TABLE OF AUTHORITIES**

**Cases**

*Byerly v. Madsen*, 41 Wn. App. 495, 704 P.2d 1236 (Div. III 1985) .....20

*Crittenden v. Fiberboard Corporation*, 58 Wn. App. 649, 659, 794 P.2d 554  
(1990).....15

*Helman v. Sacred Heart Hospital*, 62 Wn.2d 136, 147, 381 P.2d 605 (1963)  
.....16, 17

*Hojem v. Kelly*, 93 Wn.2d 143, 145, 606 P.2d 275 (1980) .....16

*Industrial Indem. Co. v. Kallevig*, 114 Wn.2d 907, 923, 792 P.2d 520 (1990)  
.....18

*Palmer v. Jensen*, 132 Wn.2d 193, 198, 937 P.2d 597 (En Banc 1997) .....19

*State v. Wanrow*, 88 Wn.2d 221, 237, 559 P.2d 548 (1967).....15

### **I. Assignments of Error**

1. The trial court erred in giving final Jury Instruction No. 7. *CP-476.*
2. The trial court erred in refusing to give plaintiffs' proposed WPI Jury Instruction on breach of contract. *CP-463.*
3. The trial court erred in denying the plaintiffs' Motion for Judgment as a Matter of Law by Order entered on February 26, 2013. *CP-532-533.*
4. The trial court erred by denying the plaintiffs' Motion for New Trial by Order entered on February 26, 2013. *CP 532-533.*

### **Issues Pertaining to Assignments of Error**

1. Whether the trial court's instructions permitted plaintiffs to argue their theories of the case, were misleading and/or misstated applicable law? *Assignments of Error Nos. 1 and 2.*
2. Where a contract of title insurance has admittedly been breached, can an insurer avoid payment of damages by instructing the jury that tort defenses (on a separate claim) excuse contract liability?  
*Assignments of Error Nos. 1, 2, 3 and 4.*
3. Whether or not final Jury Instruction No. 7 was prejudicial (or presumed prejudicial) because the jury awarded no damages for

breach of contract where damages had been admitted? *Assignments of Error Nos. 1, 2, 3 and 4.*

4. Whether or not the jury's verdict was inadequate and/or contrary to the evidence? *Assignments of Error Nos. 1, 2, 3 and 4.*
5. Whether the trial court abused discretion denying new trial where the verdict was contrary to the evidence? *Assignments of Error Nos. 1, 2, 3 and 4.*
6. Whether the trial court abused discretion denying Judgment as a Matter of Law? *Assignments of Error Nos. 1, 2, 3 and 4.*
7. Whether the jury and/or defense counsel committed misconduct? *Assignments of Error No. 3 and 4.*

## **II. Statement of the Case**

This case concerns the breach of a policy of title insurance (a contract of indemnity) and, for the first time in Washington, application of the Insurance Fair Conduct Act, RCW 48.30 *et seq.*, to title insurers. It also concerns a separate claim for violations of this statute.

Appellants Millies acquired a title policy from the defendant LandAmerica at the time of their purchase of a 75-acre parcel of real property overlooking Deer Lake in Stevens County

in 2006. *CP-17-25*. They are first party insureds. They had intended to build a dream home on the property and permanently retire there. *CP-6*. A dirt road bisected the entire property from north to south but, according to their policy, no third party easement rights existed over it. After paying the purchase price for their property, \$250,000, and after investing time and money into the process of construction, they learned that the defendant title company was wrong. Not only did the neighboring landowner to the north have easement rights over the road bisecting their property, so did the general public. *RP-34 (Savage testimony); RP-213 (LaRocca testimony); RP-39 (Moe testimony)*. The Millies would never have purchased the property had they known such a right-of-way existed. They filed a claim. *CP-251*. There is no dispute in this case that the Millies' claim was covered under their policy. *RP-15 ("plaintiffs are right"); RP-24 (claim was accepted); RP-189 ("absolutely"); RP-197; CP-255 (actual loss suffered by the insured is covered under the policy)*. Breach of the contract of indemnity was admitted. *Id.* Only damages needed to be determined.

The policy set out a method for determination of damages -  
- ascertaining under a contract right of appraisal the diminution in  
value of the Millies' property because of the missed right-of-way.  
*CP-255; CP-25; CP-350.*

LandAmerica hired a local appraiser to perform a so-called  
retrospective matched pairs appraisal in order to determine the  
diminution in value ("DIV") of the Millies' property because of the  
missed easement and public road (the "AJG appraisal"). *CP-258.*  
It was undisputed at trial that LandAmerica made no attempt to  
settle the Millies' claim prior to exercising its contract right to  
conduct this appraisal. *RP-218 (LaRocca testimony); RP-301*  
*(Campbell testimony).* This attempt was required by law, however,  
*CP-480*, and the jury was so instructed. *Id., CP-489.*

The AJG appraisal concluded the Millies' loss was 10% of  
the purchase price, or \$25,000. *CP-258; RP-10.* The Millies  
complained; an appraiser had informally communicated to them  
that the loss was at least 50 percent of the purchase price, or  
\$125,000. *CP-128.* They communicated this to their insurer and  
attempted settlement in a lesser amount, which was refused. *CP-*  
*262.* Subsequently, the Millies hired an expert appraiser to

conduct their own retrospective matched pairs appraisal. *CP-88 (Savage Report)*. Consistent with the previous, informal estimate of damages, the Millies' expert concluded the actual loss to the Millies was \$125,000. *CP-90*. Again, the Millies made demand and offered to settle in a lesser amount. LandAmerica refused again. *CP-271*. Twice more, LandAmerica refused the Millies' settlement overtures, refused their expert appraiser's damages calculation and, finally, told the Millies it was only going to pay them what they determined was appropriate. *CP-353-354*. They sent a check for \$25,000.00, which was returned. *CP-274-75; CP-278; (no unilateral determination of DIV)*.

In good faith, and as required, the Millies had filed a pre-claim notice under the state's Insurance Fair Conduct Act, RCW 48.30 *et seq.* *CP-272*. Still, LandAmerica refused to make any settlement offer other than its own appraiser's unilateral DIV conclusion, \$25,000. Later, just before the trial began, LandAmerica hired a second appraiser to conduct another retrospective matched pairs appraisal to determine the Millies' damages. Ninety days before trial, this second appraiser pegged the value of the Millies' loss at \$37,500, or 50 percent higher than

its previous DIV opinion, the one which compelled the Millies into the litigation. *CP-293-295*.

A four-day jury trial was held in Stevens County Superior Court in January 2013. The uncontradicted evidence at trial was that LandAmerica's first DIV opinion (AJG appraisal) of the Millies' loss (\$25,000) was based on an unreasonable investigation. *RP-96 (negative variance not reasonable); RP-256*. Even LandAmerica's own expert appraiser (the second one) agreed the first one's DIV opinion was unreasonable. *RP-256 (Moe testimony)*. Under its retrospective matched pairs appraisal, Land America's first appraiser had arrived at the \$25,000 damages opinion by considering and applying one "matched pair" which it concluded justified only 10% DIV. This was the so-called Matched Pair No. 1. Its premise was that easements burdening one's property add value to it, instead of subtract. It was referred to at trial as a "negative variance." *RP-96*. Although denied by LandAmerica, it meant the Millies should have paid more than \$250,000 for their property because of the public road bisecting it. *Id., RP-164*. AJG's own appraiser calculated the amount of the

increase at \$8,525.00 in deposition. *CP-187*. AJG used Matched Pair No. 1 to reduce its total DIV to 10%.<sup>1</sup>

The central question at trial on the Millies' breach of contract claim was the amount of damages, the DIV. The range of the evidence was between \$37,500 (the defense second appraisal) and \$125,000. Most of the trial testimony involved the dispute between this range of damages. *RP-25-124 (Savage testimony)*; *RP-149-181 (Jolicoeur cross-examination)*; *RP-239-258 (Moe cross-examination)*.

Although it was undisputed in the case, and at the trial, as mentioned, that LandAmerica missed a public right-of-way bisecting the Millies' parcel, breaching the title contract and causing the plaintiffs' damages, the jury awarded the Millies nothing.<sup>2</sup> *CP-498*.

---

<sup>1</sup> Matched Pair No. 1 was the only one of three used by AJG which the Millies contested. Two others showing diminution in value at 41% and 33.3% were accepted by both Millies' expert and defendant's experts as valid matched pairs.

<sup>2</sup> Over the Millies' objection, the trial court submitted final Jury Instruction No. 7 to the jury. This was the breach of contract instruction. It was not the WPI instruction proposed by the Millies. *CP-368*. It read: "Plaintiffs have the burden of proving each of the following propositions on their claim of breach of contract: 1) that plaintiffs entered into a contract with the defendant containing the following terms: This policy is a contract of indemnity against actual monetary loss or damage sustained or incurred by the insured claimant who has suffered loss or damage by reasons of matters insured against by this policy and only to the extent herein described: The difference between the value of the insured estate or interest as insured and the value of the insured estate or interest subject to the defect, lien or encumbrance insured against by this policy; 2) that defendant breached

Following final Jury Instruction No. 7, the jury felt it was prohibited from finding liability on the Millies' separate IFCA claim. *CP-522; CP-525; CP-528*. As explained below, the jury got confused. To resolve its confusion, the jury made an improper, independent examination of applicable law, ignored other instructions and improperly resorted to theory and speculation, assuming the trial judge would "pencil in" something for the Millies. *CP-522*.

Only one hour into its deliberations, the jury sent a question back to the judge. They wanted to know if they could make a "recommendation about the settlement amount separate from the verdict form." *RP-497*. They knew the Millies were entitled to

---

the contract as claimed by the plaintiffs; and 3) that plaintiffs were damaged as a result of defendant's breach. If you find from your consideration of all the evidence that any of these propositions has not been proved, your verdict should be for the defendant. On the other hand, if each of these propositions has been proved, then you must also consider the affirmative defense claimed by the defendant. Defendant has the burden of proving the following affirmative defense: 1) that defendant fulfilled the terms of the contract with the plaintiffs by investigating the claim and tendering payment in a timely manner based on a reasonable fair-market appraisal. If you find from your consideration of all the evidence this affirmative defense has been proved, your verdict should be for the defendant on this claim. On the other hand, if this affirmative defense has not been proved, then your verdict should be for the plaintiffs on this claim." (underlining added). Final Jury Instruction No. 7 had previously been denominated as LandAmerica's proposed Jury Instruction No. 11, to which the Millies objected, but apparently no record was made of the late-night instructions conference. The Millies expressly objected to it and filed their own proposed instruction, being the unmodified WPI 300.02. *RP-463; CP-368*. And see, *CP-355* ("the jury in this case should be instructed separately on this claim").

Page 10 of 21

APPELLANT'S OPENING BRIEF

BOSWELL LAW FIRM, P.S.  
The Fernwell Building  
505 West Riverside, Suite 500  
Spokane, WA 99201  
(509) 252.5088  
FAX: (509) 252.5081

damages, but they felt prohibited. The trial court told the jury simply to follow its instructions. *Id.* An hour later, the jury returned its Special Verdict Form denying recovery to the Millies under all causes of action. *CP- 498-499.*

Only subsequently did it become clear what had happened. Several jurors explained their confusion and regret over the jury instructions; they felt their “hands were tied” during deliberations. *CP-528.* All of the jurors agreed that the Millies were entitled to have something in the way of damages, *RP-520; RP-524, and RP - 526,* they just got confused. *RP-521; RP-525; RP-527. (jurors’ declarations).*

Their confusion originated with Final Jury Instruction No. 7, which erroneously instructed them that payment of the Millies’ damages for breach of contract must be denied if LandAmerica tendered payment in a timely manner under its affirmative defenses for the separate IFCA claim. In other words, Final Jury Instruction No. 7 erroneously allowed an admitted breach of contract claim, and a damages award thereunder, to be avoided. The jury felt they were “prohibited” from awarding the Millies anything. *Id.* They wanted to, as was manifested by the question

they sent to the court asking what amount they could recommend in settlement “separate from the verdict form.” *CP-497*. But, under this erroneous instruction they couldn’t.

Then, the jury got confused about the IFCA claim. Final Jury Instruction No. 9 advised the jury what conduct was an unfair and deceptive act or practice in the business of insurance and set out 15 statutory and regulatory violations of IFCA. *CP-478 - 480*. Any one of these 15 enumerated violations would have supported the Millies’ separate bad faith IFCA claim. *CP-489 (Jury Instruction No. 17-A)*. Juror Burlington erroneously thought all of the enumerated 15 statutory and regulatory violations had to be met for them to vote “yes” on the verdict form. *CP-525*. If any one of these regulatory items was not found, then they had to vote “no” on the verdict form. *Id.* Juror Hale was more specific. He recognized at least one violation of the enumerated statutory and regulatory standards under Final Jury Instruction No. 9, but succumbed to a majority of the other jurors who resolved their confusion by deciding that the statutory and regulatory violations were “a stupid law” or otherwise, “didn’t make sense.” *CP-527*. And, with respect to the unreasonableness of LandAmerica’s

investigation of the Millies' damages (using the negative variance of AJG's Matched Pair No. 1), also succumbed to the majority of the jury who independently made an improper conclusion that unreasonableness "could not be extended to the insurance company itself." *CP-528*. In other words, AJG's Matched Pair No. 1 couldn't be attributed to LandAmerica. Juror Hale corroborated Juror Horton completely, and vice versa. *CP-529 – 531*.

Now hopelessly adrift on an ocean of confusing and erroneous instructions, making independent examinations of law and its non-applicability, with no guidance from the court, at the very end of their deliberations, the jury reached for a speculative theory and seized it. The foreperson and another juror explained to the panel that the verdict form could be left blank regarding the money due to the Millies because the trial judge was known personally, thought of as fair, and that "he would pencil in something for the Millies in the way of a fair settlement of their claims." *CP-522; CP-531*. Under these circumstances, they delivered the verdict.

Needless to say, the Millies themselves and their counsel were shocked and confused. So was LandAmerica's counsel who

had argued on summation that the jury “stick” a number on the Verdict Form consistent with one of its two appraisals. *RP-335*. Even the trial judge was confused.

The Millies immediately moved for judgment as a matter of law and new trial. *CP-509 and 510*. The trial judge denied both. *CP-532 – 533*.

### **III. Summary of the Argument**

Final Jury Instruction No. 7 erroneously instructed the jury that recovery under the Millies’ breach of contract claim could be avoided by asserting a tort defense on the separate IFCA claim. It prevented the Millies from arguing their contract theory of the case, misled the jury and misinformed them of applicable law. It seems clear that the jury followed Final Jury Instruction No. 7, to their consternation, but only after questioning the court, knowing the Millies were entitled to an award. Believing themselves prohibited from making that award on any of the Millies’ causes of action, the jury sent out a question asking if it could recommend a settlement amount “separate from” the verdict form. *CP-497*. They got no clear guidance from the trial court. The jury simply could not resolve their confusion over the instructions. It couldn’t resolve its confusion about Final Jury Instruction No. 7, and it couldn’t resolve its

confusion over Jury Instruction No. 9, knowing that the undisputed evidence at trial supported both statutory and regulatory violations of IFCA. So, in the attempt at resolution, they improperly made an independent examination of applicable law, labeling it “stupid”; improperly concluded that the defendant’s appraisers’ opinions were not those of LandAmerica, even though unreasonable, and eventually speculated that the trial judge would “pencil in” something for the Millies, as one or more of them knew him to be fair. These events not only demonstrate confusion, but also constitute juror misconduct. It was promoted by defense counsel’s argument at trial.

#### **IV. Argument**

**a) Jury Instruction No. 7 is erroneous and presumed prejudicial.**

An erroneous instruction given on behalf of a party who received a favorable verdict is presumed prejudicial and is grounds for reversal.

*Crittenden v. Fiberboard Corporation*, 58 Wn. App. 649, 659, 794 P.2d 554 (1990), citing *State v. Wanrow*, 88 Wn.2d 221, 237, 559 P.2d 548 (1967).

Here, the trial court’s Final Jury Instruction No. 7, LandAmerica’s modified version of WPI 300.02, prohibited the jury from finding a breach of contract, or any damages thereunder, because of inserted language of an

affirmative defense under the separate IFCA claim. Final Jury Instruction No. 7 confounded a tort defense with a straight forward (and admitted) breach of contract claim. This was error. Obviously, it confused the jury and prejudiced the Millies; reversal and remand for a new trial is warranted.

Similarly, the trial court's refusal to instruct the jury under the Millies' proposed contract instruction was error. *CP-463*. This instruction was the unadulterated WPI Form 300.02 designating that there could be no affirmative defenses in tort raised by LandAmerica to the Millies' breach of contract claim. This instruction would have properly informed the jury of applicable law and prevented it from being misled. The Millies had specifically asked the court to "instruct the jury separately on this claim." *CP-355 @f.n. 2*. Reversal and new trial is warranted.

**b) The trial court erred in denying plaintiffs' motion for judgment as a matter of law.**

Evidence to support a jury's verdict must be substantial, i.e., it must be sufficient in quantum to persuade a fair-minded, rational person of the truth of the declared premise. *Helman v. Sacred Heart Hospital, 62 Wn.2d 136, 147, 381 P.2d 605 (1963)*. A verdict may not be founded on mere theory or speculation. *Id @ 148; Hojem v. Kelly, 93 Wn.2d 143, 145, 606 P.2d 275 (1980)*.

Here, the jury awarded the Millies nothing on their breach of contract claim -- zero. *CP-498*. During the trial, there was no evidence that the Millies had suffered no damages. The damages testimony ranged from \$37,500 (defendant's second appraiser's opinion) to \$125,000 (the Millies' experts' opinions). Thus, because there is no evidence whatsoever, much less substantial evidence, to support the jury's award of no damages, the trial court erred in denying the Millies' motion for judgment as a matter of law. No unprejudiced, thinking mind could come to the conclusion that the truth of the fact to which the evidence was directed was that the Millies were not entitled to anything for breach of their title policy. No fair-minded, rational person could be persuaded that LandAmerica owed the Millies nothing when it had admitted liability under the policy and its own expert's opinion of the damages exceeded \$37,000. *Helman, supra*.

The trial court erred by denying judgment as a matter of law on the breach of contract. *CP-515 (liability was admitted, damages were admitted, though the amount challenged)*.

Similarly, there was no legally sufficient evidentiary basis for a reasonable jury to have answered question No. 10 on the Special Verdict Form, *CP-499*, in the negative. Jury Instruction No. 9 informed the jurors of 15 regulatory acts or practices that are deemed unfair and deceptive in

the business of insurance, including failing to make a good faith effort to settle a claim before exercising a contract right to an appraisal. *CP-480*. Violation of a statute or administrative rule relating to insurance is negligence as a matter of law and the jury was so instructed. *CP-489*. The uncontradicted evidence at trial was that LandAmerica exercised its contract right to conduct an appraisal without making a good faith effort to settle the claim before. *RP-219 (LaRocca testimony)*; *RP-301 (Campbell testimony)*. A single violation of these regulatory proscriptions constitutes a violation of RCW 48.30.010. *Industrial Indem. Co. v. Kallevig, 114 Wn.2d 907, 923, 792 P.2d 520 (1990)*. Thus, plaintiffs should have judgment as a matter of law on this issue as well, and the trial court erred denying it.

**c) The trial court erred by denying plaintiffs' motion for new trial.**

Also, following trial, the Millies moved the court under CR 59 for new trial citing several grounds, i.e., misconduct, irregularity, inadequate damages, inadequate assessment of damages and that the verdict was contrary to the evidence at trial. *CP-517 – 519*.

A trial court abuses its discretion to deny a motion for new trial where the verdict is contrary to the evidence. *Palmer v. Jensen*, 132 Wn.2d 193, 198, 937 P.2d 597 (En Banc 1997).

Since no evidence at the trial supported an award of zero damages for breach of the Millies' title contract, the trial court erred in denying Millies' motion for new trial.

Similarly, CR 59(a)(1), (2) and (9) support the Millies' request for new trial. Clearly, there were irregularities in the proceedings of the court, the jury, the adverse party and/or misconduct of the prevailing party. After submission of the case to the jury, it quickly felt its "hands were tied" and that it was "prohibited" by the jury instructions from awarding any damages to the Millies at all. Then, after submitting a question to the court asking if they could recommend an amount by which the case should settle "separate from the verdict form", and being denied, several jurors told the panel that they would sign the verdict form making no award because the trial court judge was a fair man and would "pencil something in" as damages. Further, the jury would not affix liability to LandAmerica because it erroneously determined (making its own interpretation and construction of the

law) that LandAmerica's appraiser was not acting on its behalf. These extraneous comments, speculation and independent examination and construction of the law manifests the jury's confusion, misconduct and irregularity and warrants a new trial, in addition to the Millies' new trial grounds for inadequacy of damages or error in their assessment and for the lack of substantial evidence to support the jury's verdict. *Byerly v. Madsen, 41 Wn. App. 495, 704 P.2d 1236 (Div. III 1985) (extraneous comments and remarks constitute misconduct).*

#### **V. Conclusion**

The jury's verdict is not supported by substantial evidence.

The trial court erred in giving the jury Final Instruction No. 7 which prevented the Millies from arguing their theory of the case, misled the jury and misstated applicable law. It confounded the Millies' straight forward, admitted breach of contract claim with a separate tort defense by LandAmerica to the Millies' separate IFCA claim.

The trial court erred in refusing to give the Millies' WPI Instruction on breach of contract, without any such affirmative defense.

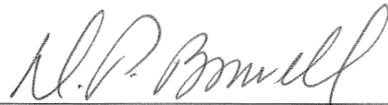
The jury exhibited either passion or prejudice, and committed misconduct in the determination of the adequacy of damages and/or in the assessment of them.

The jury's confusion and irregularities in deliberations constituted misconduct prejudicial to the plaintiffs.

The court should vacate the verdict in the case, reverse the trial court's denial of judgment as a matter of law on the Millies' breach of contract claims, negligence claims and IFCA claims and remand for new trial on appropriate instructions.

RESPECTFULLY SUBMITTED this 6<sup>th</sup> day of November 2013.

BOSWELL LAW FIRM, P.S.



---

David P. Boswell, WSBA #21475  
Attorney for Appellant