

63429-1

63429-1

No. 63429-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

JANE REARDON, Appellant,

v.

FARMERS INSURANCE COMPANY OF WASHINGTON, Respondent.

APPELLANT'S REPLY BRIEF AND RESPONSE TO CROSS APPEAL

Marianne K. Jones, WSBA No. 21034
Mona K. McPhee, WSBA No. 30305
Attorneys for Appellant

JONES LAW GROUP, P.L.L.C.
11819 NE 34th Street
Bellevue, Washington 98005
(425) 576-8899

FILED
COURT OF APPEALS, DIV. #1
STATE OF WASHINGTON
2010 FEB -11 AM 11:22

TABLE OF CONTENTS

	<u>Page</u>
I. Response to the Statement of Facts	1
II. Strict Reply To Response On Reardon Appeal	1
A. A Question Of Fact Regarding The Elements Of Causation And Damages Exists Requiring That Ms. Reardon's CPA Claim Be Submitted To The Jury	1
B. Common Language Should Be Used In Construing The Damages Verdict	6
III. Response to Cross Appeal	7
A. No Standard of Review Provided.	7
B. The Trial Court Correctly Determined that Ms. Reardon Was The Prevailing Party.	7
C. The Court Did Not Err in Failing to Dismiss Reardon's Breach of Contract and Bad Faith Causes of Action on Summary Judgment.	8
D. The Court Did Not Err In Denying A Motion For Directed Verdict.	9
E. Arguing About ACV Is Completely Irrelevant Given The Issues In This Appeal.	10
IV. Conclusion	11

TABLE OF AUTHORITIES

	<u>Page</u>
<i>Civil Rule</i>	
CR 50	9
CR 68	7,8
<i>Case Law</i>	
16A DAVID K. DEWOLF & KELLER W. ALLEN, WASHINGTON PRACTICE: TORT LAW AND PRACTICE Sec. 27.7, at 209 (3d ed. 2006) (citing <i>Gingrich v. Unigard Sec. Ins. Co.</i> , <u>57 Wn. App. 424</u> , 788 P.2d 1096 (1990))	4
<i>Ledcor Industries (USA), Inc. v. Mutual of Enumclaw Ins. Co.</i> , 150 Wn. App. 1, 12, 206 P.3d 1255 (2009)	4

I. RESPONSE TO STATEMENT OF FACTS

In order to properly counter many of the facts asserted, it would be necessary to obtain the verbatim report of proceedings from testimony at trial. Farmers Insurance has asserted facts from clerk's papers but asserted those facts with respect to an appeal related to the facts presented at trial which is improper. Farmers Insurance should have obtained a report of proceedings from the trial in order to argue against a directed verdict ruling. It is not appellant's burden to order the report of proceedings. To the extent that the facts submitted are for the purposes of summary judgment, there is no requirement to respond, because the facts are viewed in the light most favorable to the non-moving party.

II. STRICT REPLY TO RESPONSE ON REARDON APPEAL

A. A Question Of Fact Regarding The Elements Of Causation And Damages Exists Requiring That That Ms. Reardon's CPA Claim Be Submitted To The Jury

Farmers Insurance argues from opposite sides as it states Ms. Reardon was required to brief all the elements of the CPA claim in defense of summary judgment, yet argues that its own summary judgment brief which only addresses causation and damages as to all the claims generally is sufficient to meet its burden as to the CPA claim for which Farmers Insurance only stated the rule of

law with no analysis as to each element. It is important to note that in its opening brief on summary judgment, Farmers Insurance concedes that Ms. Reardon has an extensive list of damages. (CP 1558-1586) Farmers Insurance then argues that there is no expert testimony to show the causation. In the response to summary judgment the expert testimony was extensively showing the causation between the actions of Farmers Insurance and the harm to Ms. Reardon's home. Yet Farmers Insurance continues to argue now on appeal that "evidence" was not presented. Farmers Insurances' argument is hollow.

Farmers Insurance merely addresses the trial standard for Ms. Reardon in proving her CPA claim, by providing the legal standards. However, Farmers Insurance fails entirely to address Ms. Reardon's assertion on appeal that Farmers Insurance's Motion for Summary Judgment - Relief Requested section only contested the causation and damages with respect to Ms. Reardon's claims. (Reardon Opening Brief at 4.) Rather, Farmers Insurance points to general fact and expert witness declarations to show what Farmers Insurance did in the claims process. For example, directing the court to the Declaration of Daniel Radcliffe which in essence lists three things that Farmers Insurance alleged they accomplished in the matter. However, when Ms. Reardon responds in opposition with her fact and expert witness declarations to show what Farmers Insurance failed to do in the claims process that caused her damages, Farmers

Insurance merely argues that those declarations are allegations and conclusory. While the same could be said about Mr. Radcliffe's Declaration, Ms. Reardon's facts and expert testimony clearly shows there are extreme differences in what Farmers Insurance claims they did or did not do and that which Ms. Reardon claims they did or did not do. Those controversies were properly resolved by a jury.

Farmers Insurance's only opposition to Reardon's appeal on the CPA claim is that the evidence was merely "allegations" and "conclusory". The evidence was cited in Reardon's appeal. Two eye witnesses, Jane and Lisa Reardon, who saw the damage and experienced the expense of repairing the damage provided a detailed listing of the property damage that occurred. CP 1558-1586. An expert witness, Mr. Thorne, provided a declaration of what the Farmers Insurance representative did and failed to do which caused the damage to become catastrophic rather than severe. CP 86-98 While this evidence is restated in "block-quotes" as Farmers Insurance argues is improper, it exemplifies the actual evidence that the court was provided.

Next, the fact that Farmers Insurance now attempts to argue the legal defense of reasonableness on the issue of a *per se* unfair trade practice proves that there existed a fact issue with respect to that element. Farmers Insurance simply will not acknowledge that it had the initial burden of proof as the moving

party to establish the nonexistence of the elements, rather than to establish its defense. Farmers Insurances' recitation of their current summary judgment arguments on CPA violations is simply not relevant to this appeal.

Farmers Insurance states without any argument that *Ledcor* does not stand for the proposition that “[B]ad faith constitutes a per se violation of the CPA.” *Ledcor Industries (USA), Inc. v. Mutual of Enumclaw Ins. Co.*, 150 Wn. App. 1, 12, 206 P.3d 1255 (2009) In *Ledcor*, the court was citing the standard for proof of CPA violations and quoted, 16A DAVID K. DEWOLF & KELLER W. ALLEN, WASHINGTON PRACTICE: TORT LAW AND PRACTICE Sec. 27.7, at 209 (3d ed. 2006) (citing *Gingrich v. Unigard Sec. Ins. Co.*, 57 Wn. App. 424, 788 P.2d 1096 (1990) for this proposition. The court is stating the law, citing to its authority, and Farmers Insurance improperly dismisses it.

Ultimately the jury did find bad faith on the part of Farmers Insurance. At that point, it should have been a *per se* violation of the CPA, but the trial court had already improperly dismissed the CPA claim. This error should be reversed.

Birdsall provided evidence that he was directed by the Farmers Insurance Representative to where the water damage had been. Mr. Birdsall's role as an expert was to locate the damage that the Farmers Representative failed to provide coverage for and state what needed to be replaced. Mr. Thorne's

testimony linked the actions of Farmers Insurance with the damage and he stated repeatedly that as a direct result of the actions/inactions of Farmers Insurance, Ms. Reardon's very serious water damage claim turned into a catastrophic claim. This result was caused by failure of the Farmer's agent to provide coverage for all that should have been covered originally. This is what implicates the CPA for causation and damages. While Farmers Insurance claims "we paid every bill presented," Mr. Thorne's testimony taken in full context very specifically lays out many actions that Farmers Insurance should have done and states that as a direct result of not doing what should have been done, Ms. Reardon's damages became catastrophic.

Farmers Insurance fails to understand the importance of a finding under the CPA claim. A CPA violation gives rise to treble damages and it gives rise to attorney's fees. Contrary to Farmers Insurance's argument, there is nothing in the record which even comes close to supporting the statement that Ms. Reardon requested all of her damages from the jury. More importantly, there is nothing in the record that proves the jury awarded all of the damages requested by Ms. Reardon. These statements are simply without any support in the record. Nor does Farmers Insurance cite to any record. The CPA claim is not harmless error because Ms. Reardon could still be awarded damages, treble damages, and attorney's fees. Thus, the CPA claim is not moot.

Farmers Insurance's argument that all damages awarded were extra-contractual has no basis in fact and again is presumptive and without authority. There is no basis to claim that the damages awarded by the jury were all extra-contractual. This argument is a red herring.

B. Common Language Should Be Used In Construing The Damages Verdict

The jury asked the question "Should the total damage amount we provide in answer to Question 4 include amounts already paid by Farmers?" CP 126.

Farmers Insurance confuses the argument of whether the payments made to vendors were included in the jury award by utilizing the word "exclude." Only with this confusion does Farmers Insurance come to the conclusion that the argument is nonsensical. Farmers Insurance then twists Ms. Reardon's argument around such that it is the exact opposite of what Ms. Reardon is claiming. There is no assertion that when one includes a payment that it is actually excluded. The whole dynamic is whether the payment is being included as to a debt or as to something else. In this case the court instructed the jury to include the payments made by Farmers into the amount of total damages. The argument is simple. If one includes payments in the total amount owed, then the total amount owed must be reduced by the amount of the payments. The court abused its discretion, did not follow basic math and the

English language, in calculating the judgment after the jury award and following the instruction to the jury given through answering the jury question.

Farmers Insurance almost as an afterthought, makes a reference to reducing the jury award by the amount of the ServiceMaster settlement. Adding the amount of the ServiceMaster settlement into the jury award is mixing apples and oranges. It was not appealed. It is not before this court. Moreover, the ServiceMaster damages were not part of the jury award.

III. RESPONSE TO CROSS APPEAL

A. No Standard of Review Provided.

Farmers Insurance failed to state any standard of review with respect to the issues on their cross appeal. It is not Ms. Reardon's responsibility to state the standard of review. Thus, Farmers Insurance's appeal is deficient.

B. The Trial Court Correctly Determined that Ms. Reardon Was The Prevailing Party.

The trial court determined that the CR 68 Offer of Judgment was for less than the amount Farmers Insurance was found to be liable for by the jury.

Farmers Insurance says the court based its decision upon the verdict, but it was actually based upon the portion of the verdict for which Farmers Insurance was liable. Therefore the judgment amount was \$93,900 against Farmers Insurance.

The court then applied payments made by Farmers Insurance to further reduce the final amount owed to Ms. Reardon and entered judgment in that amount. The court correctly determined that the \$93,900 amount was the judgment of the jury that should be used to determine whether the CR 68 offer was more or less than what was ultimately the responsibility of Farmers Insurance.

C. The Court Did Not Err in Failing to Dismiss Reardon's Breach of Contract and Bad Faith Causes of Action on Summary Judgment.

This entire argument has been briefed in Ms. Reardon's opening appellate brief and now in reply. The substantive argument made with respect to the CPA claim also applies to the Breach of Contract and Bad Faith claims. It is ironic that Farmers Insurance is appealing this issue because to do so requires them to acknowledge that the court saw a distinction between causation in the breach of contract claims and bad faith claims with the CPA claims. Farmers Insurance is now arguing that there is no distinction and Ms. Reardon agrees. However, Farmers Insurance is taking the position that all the claims should have been dismissed and Ms. Reardon is taking the position that none of the claims should have been dismissed. Ms. Reardon contends that even the fact that Farmers Insurance recognizes the same result should have been applied to all the claims, supports her argument on appeal.

Ms. Reardon's proof on summary judgment was more than sufficient to prove there were issues of fact to be determined by a jury. There were two expert declarations and two fact declarations presented on the summary judgment with proof of damages listed out, with receipts provided. There was more than sufficient evidence that the actions of Farmers' Insurance resulted in the damages to the residence and personal property. Ultimately it went to the jury and a verdict was reached in favor of Ms. Reardon. Denying summary judgment on the bad faith claim and the breach of contract claims was proper.

D. The Court Did Not Err In Denying A Motion For Directed Verdict.

Again, Farmers Insurance fails to state the standard for review. However what is worse is that Farmers Insurance argues the wrong standard under Civil Rule 50. The rule requires "no legally sufficient evidentiary basis." CR 50(1) However, Farmers Insurance argues that Ms. Reardon was to provide "substantial evidence." (Farmers Cross Appeal at 38). Then Farmers Insurance simply states that Ms. Reardon failed to establish specific factual evidence to support all elements, without any cite to the record. There is nothing specific about Farmers Insurance's allegation to support any wrong doing by the court. (Farmers Insurance Cross Appeal Brief at 39, 41) For example, Farmers Insurance doesn't argue that the court ruled against a directed verdict in the face

of evidence brought by Ms. Reardon that . . . (Farmers Insurance should have stated evidence) and provide the testimony that was in the Plaintiff's case. Rather Farmers Insurance cites only two pages in the Clerk's Papers which is not even the accurate or actual testimony in Ms. Reardon's case, to make the argument that directed verdict should be granted. They cited pages directly from their own Motion for Directed Verdict. There is no testimony from Ms. Reardon's case which Farmers Insurance points to in order to prove that the judge was in error. The best example of how insufficient Farmers Insurance's appellate brief is when they state: "There is no evidence in this record of any intentional misrepresentation of the policy of insurance; Mr. Farnung simply misquoted the policy." (Farmers Insurance's Cross Appeal at 42). It is very clear that whether Mr. Farnung intentionally misrepresented the policy or misquoted it is a question for the jury to decide. The jury did decide. They found bad faith against Farmers Insurance. It was proper for the court to allow this case to go to the jury and deny Farmers Insurance's directed verdict.

E. Arguing About ACV Is Completely Irrelevant Given The Issues In This Appeal.

There is no appeal which discusses the defenses of Farmers Insurance. The two appellate issues as to the merits go to the issues of summary judgment and directed verdict. Farmers Insurance continues to argue its case at the trial

court level that 180 days passed so they should prevail. That defense did not work. It was not plead properly. It was not raised prior to trial. The court rejected it for that reason. RP 2/10/09 at 22. More importantly there is no appeal on that issue. The ACV argument is not relevant in this appeal.

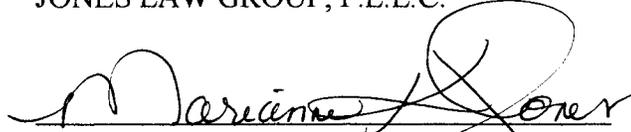
V. CONCLUSION

The trial court denied Farmers Insurance's motion for summary judgment as to causation on Breach of Contract and Bad Faith, yet despite causation being an element of the CPA claim, the trial court granted Farmers Insurance's motion for summary judgment. Now Farmers Insurance wants this court to set aside the jury verdict and grant summary judgment on those two claims as well. Farmers Insurance barely argues the case on appeal and it needs no more attention.

However, Farmers Insurance also presents no substantive argument as to why the CPA claim being dismissed is any different than the causation and damages in the Breach of Contract or Bad Faith claims. Thus, there is no reconciliation of these rulings. Even Farmers Insurance agrees it should be all or none. There were facts in controversy, those facts were presented through fact and expert witnesses on appeal, summary judgment on the CPA claim should not have been granted. That claim should have gone to the jury as well.

RESPECTFULLY SUBMITTED this 29th day of January 2010.

JONES LAW GROUP, P.L.L.C.

A handwritten signature in black ink, appearing to read "Marianne K. Jones". The signature is written in a cursive style with a large, looping initial "M".

MARIANNE K. JONES, WSBA No. 21034

MONA K. McPHEE, WSBA No. 30305

Attorneys for Appellant