

63429-1

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NO. 63429-1

COURT OF APPEALS, DIVISION I,
OF THE STATE OF WASHINGTON

JANE REARDON,

Petitioner,

v.

FARMERS INSURANCE COMPANY OF WASHINGTON,

Respondent,

CROSS-APPELLANT'S REPLY BRIEF

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COMES NOW Respondent/Cross-Appellant Farmers Insurance Company of Washington (hereinafter “Farmers”), and presents the following Reply Brief in response to Appellant’s Response to Cross-Appeal.

I. REPLY

A. Farmers’ Advised the Court as to the Appropriate Standards of Review

Appellant Jane Reardon’s initial challenge to Farmers’ Cross-Appeal is to declare the cross-appeal “deficient” due to an alleged failure to set forth the standard of review. This allegation is simply false.

Farmers did, in fact, advise the Court as to the appropriate standard of review for the Superior Court’s rulings applying the Civil Rules (*Respondent’s Brief*, pp. 30-31), as well as on motions for judgment as a matter of law. (*Respondent’s Brief*, p. 8).

To summarize, each of the Superior Court rulings to which Farmers assigns error are reviewed *de novo*. *Buckner v. Berkley Irrigation*, 89 Wn. App. 906, 951 P.2d 338 (1998); *Magnusen v. Tawney*, 109 Wn. App. 272, 34 P.3d 899 (2001) (CR 68 motions), *Gates v. Logan*, 71 Wn. App. 673, 676, 862 P.2d 134 (1993)(judgment as a matter of law).

Upon *de novo* review of the Orders to which Farmers has assigned error, it is clear that the Superior Court not only erred in the determination as to which was the “prevailing party” under CR 68, but it is also clear that this case should not have ever gotten to the jury in the first place. Reardon simply did not present evidence, either in pre-trial motions or during the trial itself, sufficient to establish critical elements of her claims. Moreover, it is undisputed that Appellant did not repair or replace within 180-days of the date of loss, a condition precedent to further recovery under her policy of insurance. Based on clear Washington law, this matter should be remanded to the Superior Court for entry of Judgment as a Matter of Law in favor of Farmers.

B. The Trial Court Improperly Determined the “Prevailing Party” Without Applying Farmers’ Offsets

It is undisputed that Farmers submitted a CR 68 Offer of Judgment to Reardon in the amount of \$85,000 more than ten days before trial. CP 2116-17. It is further undisputed that Reardon failed to respond to that offer and the judgment ultimately entered for Reardon was in the amount of \$28,818.98. CP 130-32.

Farmers then moved for an award of costs and statutory attorney’s fees as the prevailing party pursuant to CR 68. CP 2070-

2078. The Superior Court erroneously found that the total amount of damage attributed by the jury's verdict to Farmers, without considering offsets, was the basis from which the court would determine the prevailing party. CP 130-32.

Reardon argues, without citation to any legal authority, that the Superior Court was correct to use the \$93,500 figure as the basis for determining whether she had improved upon the \$85,000 offer of judgment. This argument, however, is completely contrary to Washington law.

In fact, the fact that Reardon's entire two-paragraph argument does not contain any legal citation is indicative of the fact that she knows her position is untenable, but has chosen not to advise this Court of the correct legal analysis. Pursuant to RAP 18.9, Farmers believes that it is entitled to terms for being forced to respond to Reardon's frivolous arguments.

This issue was resolved by this Court in *Eagle Point Condominium Owners Assoc. v. Coy*, 102 Wn. App. 697, 9 P.3d 898 (2000). There, a jury verdict in the amount of \$22,441 served as the basis for the defendant to claim entitlement to costs based upon the plaintiff's failure to improve upon a CR 68 offer of \$40,000. This Court

disagreed, holding that it is the final **judgment** that is determinative.

We come to the same result by the alternate route of showing that Coy is mistaken in his contention that the Association failed to improve upon the rejected offer of \$40,000. Coy contends the relevant figure for comparison is the Association's net damage award of \$22,441. But the court entered **judgment** in favor of the Association for \$47,617. That judgment included the award of \$25,000 in attorney fees. To exclude the attorney fees from the calculation would be inconsistent with the Supreme Court's determination of the prevailing party on similar facts in *Schmidt v. Cornerstone Invs., Inc.*, 115 Wn.2d 148, 795 P.2d 1143 (1990).

Eagle Point, 102 Wn. App. at 709, 9 P.3d 898 (emphasis added).

In applying *Schmidt*, this Court provided the method of calculation for determining the prevailing party, and specifically stating that offsets must be applied *before* determining which party prevailed.

Under *Schmidt*, the correct way to calculate the Association's recovery is to begin with the amount of damages proved (\$77,441), add the attorney fees (\$25,000) the trial court found appropriate to award under the Condominium Act, and the statutory costs (\$176), **and then subtract the \$55,000 offset** for the Brix settlement. The result is \$47,617 – the amount of the final judgment. By this calculation, the Association did improve upon Coy's offer of \$40,000.

Schmidt v. Cornerstone Invs., Inc. 102 Wn. App. at 710, 9 P.3d 898 (emphasis added).

Eagle Point is in accord with the plain language of CR 68, RCW 4.84, et. seq., and *Tippie v. Delisle*, 55 Wn. App. 417, 777 P.2d 1080

(1989), all of which stand for the very simple proposition that the Court must look to the *final judgment*, in order to determine which party is prevailing for purposes of CR 68 Offers of Proof.

This result only makes sense. Not only does CR 68 specifically and plainly use the term “judgment”, but as a practical matter, a Special Verdict Form could potentially ask any number of questions relating to damages in any given case. To have any figure control from that verdict form other than the Superior Court’s final judgment determination would lead to inconsistency in the Superior Courts’ interpretation and application of the rule.

CR 68 is clear. Farmers was the prevailing party in this matter and the Court should remand to the Superior Court for an award of costs and statutory fees in favor of Farmers.

C. This Case Should Have Been Dismissed As a Matter of Law On Summary Judgment and Again on Directed Verdict

In response to Farmers’ cross-appeal on the Superior Court’s summary judgment and directed verdict rulings, Reardon provides a mere 2-pages of briefing, and again fails to cite to any legal authority or to the record. As a result, there is very little left for strict reply. That said, Reardon’s unsupported arguments underscore the point that

Farmers has made first with the Superior Court and now before this Court: Reardon cannot defeat summary judgment by relying on self-serving allegations and conclusory legal arguments.

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).

Clearly, Reardon has nothing substantive – no **specific facts** as required by Washington law – to rebut Farmers’ position on these Superior Court rulings. Rather, Reardon relies again on self-serving arguments and conclusions.

1. Plaintiff Failed to Establish An Issue of Fact Supporting the Elements of Her Claims on Summary Judgment

Reardon claims that Farmers is somehow conceding that CPA damages and the contract and tort damages are the same. Reardon’s argument makes no sense. Farmers has maintained throughout this litigation that Reardon bears the burden of proving all of the elements, including causation and damages, for *all of her causes of action*. CP

457-480; 2037-2059. These are not interchangeable parts. Reardon fundamentally misunderstands Farmers' position. It is not Farmers' position that the "same result should have been applied to all of the claims," (Appellant's Reply at p. 8) because the elements of the claims are identical. Rather, it is Farmers' position, as discussed at length in its initial brief, that all of the claims should have been dismissed as a matter of law ***because Reardon failed to establish critical elements of each cause of action.***

Reardon's entire argument in opposition to Farmers' appeal on the Superior Court's denial of summary judgment dismissal of the breach of contract and bad faith causes of action is that she submitted two expert declarations and two fact witness declarations and that she had provided a list of receipts. Appellant's Reply Brief at p. 9. Reardon supplies no analysis. Reardon does not begin to connect the proverbial dots for establishment of causation.

As her own expert testified, all Reardon ever supplied to Farmers in support of her claims was a "shoebox full of receipts," and even that was undisputably not provided to Farmers until after this litigation commenced. CP 2047. Reardon's position is that she presented testimony of Farmers' alleged bad faith and breach, and

she presented all of the costs that she incurred following the toilet leak at her residence. Reardon then offers the self-serving conclusion that “there was more than enough evidence” for a jury to reach a causation finding. Appellant’s Brief at p. 9.

Contrary to Reardon’s position on this appeal, however, Washington law is clear that a party asserting breach of contract and tort claims bears the affirmative burden of proving causation. It is not enough to simply say, “*I was harmed, let the jury figure it out.*” *Smith v. SAFECO*, 150 Wn.2d 478, 485, 78 P.3d 1274 (2003) (insured must prove tort elements in bad faith action: duty, breach, causation, and damages); *McDonald v. State Farm*, 119 Wn.2d 724, 837 P.2d 1000 (1992)(insured bears initial burden in breach of contract claim of establishing damage proximately caused by covered loss).

Farmers has presented substantial evidence, legal and factual citation, and discussion of Reardon’s failure to establish these vital elements of her causes of action. The record on Farmers’ Summary Judgment Motion and the undisputed trial testimony and evidence required dismissal of these causes of action.

2. Farmers' Was Entitled to Directed Verdict in Its Favor

Reardon's only argument in response to Farmers' appeal of the denial of directed verdict is that Farmers did not rely on the entire trial record. Before reaching that argument, however, it is important to note the correct legal standard.

Again, Reardon argues that Farmers erroneously relies on a "substantial evidence" standard for assessment of motions for judgment as a matter of law. Reardon insists that she need only have submitted "sufficient" evidence. Appellant's Reply at p. 9. Once again, Reardon offers no legal citation for this premise.

Contrary to Reardon's unsupported argument, the Washington courts are clear as to the standard for assessing CR 50 motions. Again, the Courts have held:

A directed verdict or judgment n.o.v. is appropriate if, when viewing the material evidence most favorable to the nonmoving 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 nonmoving party.** The requirement of substantial evidence necessitates that the evidence be such that it would convince "an unprejudiced, thinking mind."

Winbun v. Moore, 97 Wn. App. 602, 982 P.2d 1196 (1999) (emphasis added).

Substantial evidence means evidence which would convince an unprejudiced, thinking mind of the truth of the declared premise. *Cowsert v. Crowley Maritime Corp.*, 101 Wn.2d 402, 680 P.2d 46 (1984). Slight evidence or equivocal evidence is insufficient. *State v. Harris*, 14 Wn. App. 414, 541 P.2d 122 (1975).

Thus, returning to Reardon's sole argument in opposition to the directed verdict issue, she complains that Farmers did not rely upon the complete trial record for purposes of this portion of its cross-appeal. However, Reardon does not claim that the evidence and testimony cited is in any way inaccurate or incomplete. She simply takes issue with Farmers' method of supporting its assignment of error.

It is not now, nor has it ever been Farmers' intention to retry this 5-week civil trial in the Court of Appeals. Rather, Farmers relied upon undisputed and uncontroverted testimony and evidence presented at that trial, all of which was entirely consistent with the vague and conclusory evidence and testimony presented by Reardon on Farmers' summary judgment motion. Farmers' created a record during the course of trial, and Reardon now complains about Farmers' reliance on that record. This position is without merit.

Reardon has not even attempted to rebut any contention raised by Farmers concerning the adequacy, or lack thereof, of the evidence presented at trial. Simply put, Reardon failed to present any evidence from which a reasonable jury could have determined that Farmers' had breached the policy of insurance or acted in bad faith. This fact is no more prescient than in looking to the fact that Reardon failed to present any claim for additional coverage under her policy pursuant to the terms and conditions of that policy, an issue that is cavalierly dismissed by Reardon.

D. The 180-Day Issue Is Significant to This Court's Review

At the close of her Response to Farmers' Cross-Appeal, Reardon provides a single paragraph, once again without any legal citation, simply stating that "[t]hat there is no appeal of the defenses of Farmers Insurance." Appellant's brief at p. 10. Reardon's position is contrary to the evidence presented at trial, the position taken by Farmers at trial, and the Notice of Cross-Appeal filed by Farmers which specifically seeks review of the trial court's denial of Farmers' 180-day motion. Moreover, Farmers' Motion for Directed Verdict also specifically sought dismissal based upon the 180-day issue. CP 2053-59.

In fact, Reardon acknowledges that Farmers' made the motion and that the motion was denied by the Superior Court. Appellant's Brief at p. 11. Thus, it is acknowledged that Farmers sought a ruling on the 180-Day issue in the Superior Court, and it is clear that Farmers sought review of that ruling. As a result, Reardon's position that "there is no appeal" on this issue is, to say the least, baffling.

Reardon also contends that Farmers' motion was denied due to it having been improperly pled. This is simply false in that Farmers' Answer to Reardon's complaint specifically states an affirmative defense based on failure to comply with the terms and conditions of the policy. CP 449-456. Moreover, Reardon fails to cite the actual reason for the Superior Court's denial.

Similarly to the analysis on how the Halo issue came out, I felt that it was not – the 180-day issue should have been raised pre-trial, either in a motion to dismiss or summary judgment motion. It was not.

Even if it had been, I think that there was enough by the acts of Farmers to sort of waive that claim, because of the subsequent letters and so forth. I found that it was waived.

RP II, p. 22.

This ruling is particularly problematic in that the Superior Court apparently ascribed a duty on the part of Farmers to file a pre-trial

motion for summary judgment in order to preserve the issue for trial. Farmers is not aware of any such requirement in Washington law.

Turning to the waiver issue, this was the exact same issue that was raised in the *Dombrosky* case cited in Farmers' initial briefing. *Dombrosky v. Farmers Ins. Co. of Washington*, 84 Wn. App. 245, 928 P.2d 1127 (1996) There, the insured argued that Farmers had waived its right to rely on the 180-day provision by continuing to adjust the claim and work with the insureds after the passing of that time period, and by demanding Appraisal under the terms of the policy. The Court rejected that argument.

The Dombroskys claim that Farmers waived its right to assert the policy language regarding loss settlement. The doctrine of waiver applies to all rights or privileges to which a person is legal entitled. ***A waiver is a voluntary relinquishment of a known right***, or such conduct as warrants an inference of the relinquishment of such right. It may result from an express agreement, or be inferred from circumstances indicating an intent to waive. Thus waiver is essentially a matter of intention. Negligence, oversight or thoughtlessness does not create it. The intention to relinquish the right or advantage must be proved, and the burden is on the party claiming waiver.

Dombrosky, 84 Wn. App. at 255, 928 P.2d 1127 (emphasis added) (internal citations omitted).

In fact, the *Dombrosky* Court was faced with the very same

evidence presented in this matter and rejected that evidence as being a waiver.

Finally, the Dombroskys make several claims regarding their correspondence with Farmers in which they could claim additional funds at a later date. Nothing in the record indicates that Farmers intended to offer anything other than repair and replacement costs above the actual cash value, ***as provided in the policy***. The Dombroskys argument on waiver fails.

Id. at 256, 928 P.2d 1127 (emphasis added).

In the present case, Reardon did not even argue waiver, and did not substantively respond to Farmers' motion. Rather, the Superior Court, *sua sponte*, found that Farmers had "sort of" waived the right to rely on the terms and conditions of the policy.

Reardon has not done anything in the Superior Court or before this Court to support any kind of a waiver argument. The *evidence* in the record before this Court also does not support such an argument. Without restating the complete discussion in Farmers' initial brief, the following is undisputed:

- Farmers paid every invoice or other request for payment relating to Reardon's claim that was ever submitted by or on behalf of Reardon.
- The loss at issue occurred on or about April 7, 2006.
- Reardon never made any request for further payments within

180 days of the loss.

- Reardon did not provide Farmers with any invoices, estimates, receipts, bank statements, or any other documentation requesting payment or reimbursement for any aspect of her claim at any time prior to the filing of this lawsuit, one year after the date of loss.

Based on these simple facts alone, the Superior Court erred in allowing Reardon's claims to go to the jury. How can Farmers have breached the policy of insurance where Plaintiff failed to submit a claim as provided by that policy? How can Farmers be in bad faith for failing to pay claims that were never made?

Farmers had every right to rely upon the terms and conditions of its policy of insurance and the trial court erred in refusing to enforce its specific terms. Reardon's argument that this issue is "irrelevant" to the issues on appeal is without merit. Not only does the issue stand alone, but the 180-day issue is indicative of the Trial Court's error in denying summary judgment and/or directed verdict in Farmers' favor.

Because Reardon has failed to substantively address any of the issues raised in Farmers' briefing, and because Farmers' has met its burden of establishing error, Farmers asks that this matter be remanded to the Superior Court for entry of Judgment as a Matter of

Law in its favor.

E. Attorneys' Fees

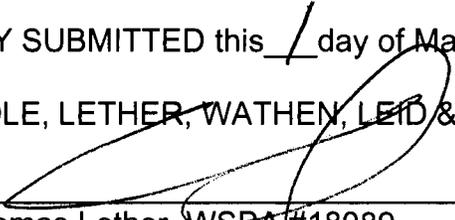
As set forth above, Reardon has taken several positions that are directly contrary to Washington law and the record before this Court. Farmers submits that Reardon's position on appeal is frivolous and has been submitted in violation of RAP 18.9. As a result, Farmers asks that the Court award Farmers its costs and fees incurred on appeal.

II. CONCLUSION

Because Reardon has failed to substantively address any of the issues raised in Farmers' briefing, and because Farmers' has met its burden of establishing error, Farmers asks that this matter be remanded to the Superior Court for entry of Judgment as a Matter of Law in its favor.

RESPECTFULLY SUBMITTED this 1 day of March, 2010.

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The undersigned certifies under penalty of perjury under the laws of the State of Washington, that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below, I caused to be served the following documents: **CROSS-APPELLANT'S REPLY BRIEF**; and this Proof of Service on the following persons and manner indicated:

Marianne K. Jones
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Place: Jones Law Group, P.L.L.C.
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Manner: By Email and Legal Messenger

DATED this 1st day of March, 2010, at Seattle, WA.



Elyse Conte, Legal Assistant