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No. 679066

DIVISION I, COURT OF APPEALS
OF THE STATE OF WASHINGTON

FIRST NATIONAL INSURANCE COMPANY OF AMERICA

Plaintiff/Respondent

v.

MARK DeCOURSEY and CAROL DeCOURSEY,

Defendants/Appellants.

ON APPEAL FROM KING COUNTY SUPERIOR COURT
(Hon. Patrick Oishi, Case No. 10-2-37944-4 SEA)

APPELLANT DECOURSEYS' REPLY BRIEF

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I. IDENTITY OF PETITIONERS

Mark DeCoursey, pro se, and Carol DeCoursey, pro se, (“DeCourseys”) file in strict reply to First National Insurance Company of America (“FNI”) responding brief (“Rsp.”) as set forth below.

II. SUMMARY OF CASE ACTIONS

- 10/29/2010: FNI’s Complaint. **CP 1.**
- 1/12/2011: DeCourseys’ answer and counterclaims. **CP 7.**
- 3/29/2011: FNI announced plans for summary judgment (SJ). **CP 630.**
- Prior to 8/3/2011: FNI scheduled SJ hearing for 9/9/2011. **CP 629.**
- 8/3/2011: The court rescheduled the SJ hearing for October 7. **CP 629.**
- 9/9/2011: Both parties’ motions for SJ. **CP 209, CP 446.**
- 9/16/2011: FNI’s answer to DeCourseys’ counterclaims. **CP 578.**
- 9/26/2011: DeCourseys’ motion to strike FNI’s answer, **CP 601.**
- 9/26/2011: DeCourseys’ response to FNI’s motion for SJ. **CP 644.**
- 9/26/2011: FNI’s response to DeCourseys’ motion for SJ. **CP 584.**
- 9/30/2011: DeCourseys’ reply in support of motion for SJ. **CP 741.**
- 10/3/2011: FNI’s reply in support of motion for SJ. **CP 860.**
- 10/3/2011: FNI’s response to motion to strike answer. **CP 854.**
- 10/5/2011: DeCourseys’ reply in support of motion to strike. **CP 868.**
- 10/7/2011: Summary Judgment hearing. **RP.**
- 10/12/2011: Order granting FNI’s motion for SJ **CP 891**
- 10/12/2011: Order denying DeCourseys’ motion for SJ **CP 889**
- 10/12/2011: Order denying motion to strike FNI’s answer. **CP 884.**

III. MAJOR QUESTIONS

1. DeCourseys claim that V&E Medical Imaging Services, Inc. (“V&E”) did injury to DeCourseys; FNI does not dispute it.
2. DeCourseys claim that the injuries were of the type covered by the Policy, namely damage that must be done *to the work of others* to access and repair V&E’s faulty work; FNI does not dispute it, except a) to say that it

“lacks knowledge or information sufficient to form a belief.” (CP 580) and b) to mischaracterize it as a claim for “faulty work.” Rsp. at 29.

3. DeCourseys claim that FNI sold the Policy to V&E, but FNI disputes this in its untimely answer (CP 578). The first question is: should the Court accept the untimely answer or grant DeCourseys’ motion to strike it?
 - a. If denial of the motion to strike is reversed and FNI’s answer is stricken, FNI admits to DeCourseys’ counterclaims under CR 8(d).
 - b. If FNI’s untimely answer is permitted, FNI can use its denials. But FNI cannot use any affirmative defenses concerning V&E that were not preserved in the pleadings. Then this court must decide:
 - i. Whether DeCourseys have demonstrated an issue of material fact for which FNI’s motion for summary judgment should be denied (reversing the Superior Court);
 - ii. Whether DeCourseys have shown there is no question that the Insured really was V&E. In that case, the Court should consider FNI’s denials in the light of DeCourseys’ evidence, and perhaps reverse the denial of DeCourseys’ motion for summary judgment.
 - iii. Whether both motions for summary judgment are marred by questions of material fact and the case must go to trial.

IV. THE DEFICIENT ANSWER

DeCourseys answered FNI’s claims on January 12, 2011, but FNI an-

swered only on September 16, 2011 (**CP 578**), after both parties moved for summary judgment. Even then, FNI did not preserve its affirmative defenses as required by CR 8(c)¹ and CR 12(b).² In consequence, FNI waived those defenses. In its response to the motion to strike, FNI admits, “First National’s answer did not include any affirmative defenses.” **CP 854**.

In the Response, FNI asserts at least six affirmative defenses concerning V&E. These are listed below by page number, with dates and locations of the first appearances in the lower court. The claims concerning “AHS” in FNI’s Complaint cannot be considered affirmative defenses concerning V&E.

- a. FNI alleges that FNI did not insure V&E. Rsp. at 9, 26. As Denial in 9/16/2010 Answer, **CP 579**. First as affirmative defense on 9/26/2010, Response to DeCourseys’ Motion for SJ, **CP 584**.
- b. FNI alleges that DeCourseys’ are claiming for V&E’s “improper work” and “failure to complete work,” claims outside the Policy. Rsp. at 29, 30. Never raised as a defense in the lower court.
- c. FNI alleges DeCourseys seek a double/excessive recovery for a damages award against V&E that was “highly suspect.” Rsp. at 28, 30, 31. First

¹ CR 8(c): Affirmative Defenses. In pleading to a preceding pleading, a party shall set forth affirmatively [etc.] and any other matter constituting an avoidance or affirmative defense.

² CR 12(b): Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross claim, or third party claim, shall be asserted in the responsive pleading thereto if one is required, ...

in FNI's 9/26/2010, Response to DeCourseys' Motion for SJ, **CP 595**.

- d. FNI alleges V&E did not tender DeCourseys' claim. Rsp. at 6, 9, 12, 14, 17. First in FNI's 9/26/2010, Response to DeCourseys' Motion for SJ, **CP 585**.
- e. FNI alleges that without FNI's consent, V&E limited the scope of judicial review by agreeing to submit the matter to arbitration. Rsp. at 26. Never raised as a defense in the lower court.
- f. FNI alleges that because V&E's left the claim undefended and otherwise acted against its agreement with FNI, FNI was prejudiced and is therefore relieved of any policy obligations. Rsp at 8, 22, 27, 28, 29. First in FNI's 9/26/2010, Response to DeCourseys' Motion for SJ, **CP 594**.

In *Lybbert v. Grant County*, the Washington Supreme Court ruled that affirmative defenses must be voiced in the pleadings, and the pleadings must be filed on time according to the rules. When these requirements are not met, a party waives those defenses. The case concerned a family's suit against Grant County. Like FNI (Rsp. 39-42), the County did not file a timely answer. It confessed that it "routinely avoid[s] answering a complaint until a motion for default is brought." It waited until the statute of limitations ran out, then moved for dismissal on insufficiency of service.

The Lybberts, citing the common law doctrine of waiver, claim that the County is precluded from asserting the defense of insufficient service of process because it acted in an inconsistent and **dilatory manner**. This court has discussed the doctrine of waiver in this context on

only one occasion. See *French v. Gabriel*, 116 Wash.2d 584, 806 P.2d 1234 (1991). In that case we recognized the viability of the doctrine, but concluded that under the facts of that case the defendant had not waived the defense. Significantly, all three divisions of the Court of Appeals of this state have also recognized the common law doctrine of waiver. See *Clark v. Falling*, 92 Wash.App. 805, 813, 965 P.2d 644 (1998) (Division One); *Davidheiser v. Pierce County*, 92 Wash.App. 146, 155, 960 P.2d 998 (1998), *review denied*, 137 Wash.2d 1016, 978 P.2d 1097 (1999) (Division Two); *Romjue v. Fairchild*, 60 Wash.App. 278, 281, 803 P.2d 57, *review denied*, 116 Wash.2d 1026, 812 P.2d 102 (1991) (Division Three). **Under the doctrine, affirmative defenses such as insufficient service of process may, in certain circumstances, be considered to have been waived by a defendant as a matter of law.** The waiver can occur in two ways. It can occur if the defendant's assertion of the defense is inconsistent with the defendant's previous behavior. *Romjue*, 60 Wash.App. at 281, 803 P.2d 57. **It can also occur if the defendant's counsel has been dilatory in asserting the defense.** *Raymond v. Fleming*, 24 Wash.App. 112, 115, 600 P.2d 614 (1979) (citing 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1344, at 526 (1969)), *review denied*, 93 Wash.2d 1004 (1980).

We believe the doctrine of waiver is sensible and consistent with the policy and spirit behind our modern day procedural rules, which exist to foster and promote "the just, speedy, and inexpensive determination of every action." CR 1(1). **If litigants are at liberty to act in an inconsistent fashion or employ delaying tactics, the purpose behind [1130] the procedural rules may be compromised.** We note, also, that the common law doctrine of waiver enjoys a healthy existence in courts throughout the country, with numerous federal and state courts having embraced it. See, e.g., *Trustees of Cent. Laborers' Welfare Fund v. Lowery*, 924 F.2d 731, 732 (7th Cir.1991) (observing that "[a] party may waive a defense of insufficiency of process by failing to assert it seasonably"); *Santos v. State Farm Fire & Cas. Co.*, 902 F.2d 1092, 1096 (2d Cir.1990); *Marcial Ucin, S.A. v. S.S. Galicia*, 723 F.2d 994, 997 (1st Cir.1983); *Kearns v. Ferrari*, 752 F.Supp. 749, 752 (E.D.Mich.1990); *Burton v. Northern Dutchess Hosp.*, 106 F.R.D. 477, 481 (S.D.N.Y. 1985); *Tuckman v. Aerosonic Corp.*, 394 A.2d 226, 233 (Del.Ch.1978); *Joyner v. Schiess*, 236 Ga.App. 316, 512 S.E.2d 62 (1999).

... Our holding today merely underscores the importance of preventing the litigation process from being inhibited by inconsistent or dilatory conduct on the part of litigants.

We are satisfied, in short, that the doctrine of waiver complements our current notion of procedural fairness and believe its application, in appropriate circumstances, will serve to reduce the likelihood that the "trial by ambush" style of advocacy, which has little place in our present-day adversarial system, will be employed.

[1132] ... The civil rules require that the defense of insufficient service of process be brought forth in a pleading. *See* CR 12(b) ("**Every defense ... shall be asserted in the responsive pleading...**"). The rules are quite clear as to what constitutes a pleading. *See* CR 7(a) (A pleading is one of the following: a complaint, *an answer*, a reply to a counterclaim, an answer to a cross claim, a third party complaint, and a third party answer.) **Absent from this list is a notice of appearance.** [Emphasis added.]

Lybbert v. Grant County, 141 Wn.2d 29, 1 P.3rd 1124 (2000).

FNI suggests that DeCourseys should have derived its answers and affirmative defenses from its Complaint and discovery responses. Rsp. at 42. But Rule 8(c) states:

When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

No Rule enables a party to re-designate a claim or a discovery response as an affirmative defense. An affirmative defense not articulated in a pleading is waived. In *King v. Snohomish County*, Snohomish moved for dismissal on the basis that King had failed to comply with the County's notice claim provisions in Snohomish County. The court ruled that Snohomish had waived the defense by not preserving it in a pleading.

We have held that a defendant may waive an affirmative defense if either (1) assertion of the defense is inconsistent with defendant's prior behavior or (2) **the defendant has been dilatory in asserting the defense.** *Lybbert v. Grant County*, 141 Wash.2d 29, 39, 1 P.3d 1124 (2000). See also *French v. Gabriel*, 116 Wash.2d 584, 806 P.2d 1234 (1991). In *Lybbert* we explained, "the doctrine of waiver is sensible and consistent with ... our modern day procedural rules, which exist to foster and promote the just, speedy, and inexpensive determination of every action." *Lybbert*, 141 Wash.2d at 39, 1 P.3d 1124 (quoting CR 1). **The doctrine is designed to prevent a defendant from ambushing a plaintiff during litigation either through delay in asserting a defense or misdirecting the plaintiff away from a defense for tactical advantage.** *Lybbert*, 141 Wash.2d at 40, 1 P.3d 1124. [Emphasis added]

King v. Snohomish County, 47 P.3d 563 (2002). Ambush is very much an issue. FNI's affirmative defenses concerning V&E were not raised before 10/3/2011, less than a week before the summary judgment hearing.

V. THE UNTIMELY ANSWER

FNI argues that the Rules permit withholding answers and affirmative defenses until after summary judgment motions have been filed, then ambushing its opponent with surprise answers. The courts, however, have ruled that ambush strategies are inconsistent with the Rules, and that a failure to articulate an affirmative defense in the pleadings waives the defense.

FNI's strategy of withholding its answer for eight months is disapproved by the *Lybbert* and *King* courts; so is FNI's strategy of withholding its affirmative defenses from its answer. The opponent must be timely informed of the answers to conduct discovery, investigate, and argue the issues.

FNI's late answer prejudiced DeCourseys; they were unable (for exam-

ple) to conduct discovery to address FNI's defenses. Moreover, FNI's answer was filed without a motion to enlarge time, in violation of CR 6(b).

DeCourseys immediately moved to have the untimely answer stricken. **CP 601**. The court below did not address that motion to strike until after the summary judgment hearing (**CP 884**). This further prejudiced DeCourseys because the state of the pleadings was unknown.

Rule 6, Rule 12, *Lybbert*, and *King* forbid dilatory answers. The claims (or counterclaims) of the opponent are admitted when not timely denied.

CR 8(d) Effect of Failure To Deny. Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading.

As argued in the DeCourseys' Appellants' Brief, CR 12(a)(4) states:

(4) ... The plaintiff shall serve his reply to a counterclaim in the answer within 20 days after service of the answer or, if a reply is ordered by the court, within 20 days after service of the order, unless the order otherwise directs.

And CR 6(b), which states:

(b) Enlargement. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or **within a specified time**, the court for cause shown may at any time in its discretion, (1) with or without motion or notice, order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or, (2) **upon motion made after the expiration of the specified period**, permit the act to be done where the failure to act was the result of excusable neglect ... [Emphasis added]

The co-operation of Rules 6 and 12 is clear: to file an answer to a counterclaim "after the expiration of the [20 day] period," a litigant is required to

show cause or excusable neglect, and obtain permission.

FNI argues that the answer was filed in accordance with the Rules, but then admits it was “late.” Rsp. at 40. Below, FNI admits the answer was “not timely filed.” **CP 856**. But then FNI asserts “FNI’s answer was properly filed...” Rsp. 42. These are contradictory assertions.

FNI argues that when it did not timely file an answer, DeCourseys’ “remedy was to bring a motion for default under CR 55(a).” Rsp. at 40. But DeCourseys did not bear that burden. FNI had the obligation to answer.

The Superior Court Civil Rules require a reply to a counterclaim; it is not optional. *Jansen v. Nu-West, Inc.*, 102 Wash.App. 432, 438, 6 P.3d 98 (2000) (citing CR 7(a)), review denied, 143 Wash.2d 1006, 20 P.3d 945 (2001). Absent a contrary court order, a reply must be filed within 20 days and must fairly meet the substance of any averment denied. CR 12(a)(4). *Jansen*, 102 Wash.App. at 438, 6 P.3d 98 (citing CR 8(b)). Failure to deny an averment in a counterclaim constitutes an admission. *Jansen*, 102 Wash.App. at 438, 6 P.3d 98 (citing CR 8(d)).

Beers v. Ross, 173 Wn. App. 566, 571, 154 P.3d 277 (2007).

Under the Rules, when FNI failed to timely answer to DeCourseys’ counterclaims, it admitted those counterclaims. **CP 507 et seq.** CR 8(d) provides:

(d) Effect of Failure To Deny. Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading.

VI. THE COURT’S FAILURE TO STRIKE THE ANSWER

DeCourseys found NO cases in which a late answer was filed without a CR 6(b) enlargement motion. And even with a motion, a litigant does not

have the unfettered right to file a dilatory or untimely answer. *Beers* again:

We note first that a **motion to file an untimely reply is addressed to the sound exercise of the trial court's discretion**. CR 6(b); *Goucher v. J.R. Simplot Co.*, 104 Wash.2d 662, 665, 709 P.2d 774 (1985). **A trial court abuses that discretion when it grants or denies a motion on untenable grounds or for untenable reasons**. *Davis v. Globe Mach. Mfg. Co.*, 102 Wash.2d 68, 77, 684 P.2d 692 (1984); *Boss Logger, Inc. v. Aetna Cas. & Sur. Co.*, 93 Wash.App. 682, 684-85, 970 P.2d 755 (1998). **Here, the trial court did not state its reason** for denying the Beers' request; instead it summarily denied the motion to file an untimely reply to Ross's counterclaims. **The trial court erred when it denied the Beers' motion for no apparent reason**. See *State v. Hampton*, 107 Wash.2d 403, 409, 728 P.2d 1049 (1986) ("**we cannot say [the trial court] based its decision on tenable grounds or reasons**" when it did not provide any reasons for its decision). [Emphasis added.]

Beers v. Ross, 173 Wn. App. 566, 571, 154 P.3d 277 (2007).

In the instant case, the issue is the same, though with the opposite result. FNI filed the answer without a motion (in violation of CR 6(b), so the Court had no basis for "sound exercise of ... discretion." This Court "cannot say [the trial court] based its decision on tenable grounds or reasons," nor that the motion was denied "on such terms as are just"³ The trial court denied the motion to strike for no apparent reason – and in fact had no reason or basis.

Because the trial court abused its discretion, this Court should reverse the ruling below and strike the dilatory answer.

VII. ARE THE RULES CONTRADICTIONARY?

Cited in isolation, FNI makes CR 55 sound like CRs 6 and 12 are without

³ Quoting RCW 4.32.250, argued at CP 856.

force, as though they were but regulatory dewclaws that time and usage have forgot. FNI argues, “The Civil Rules did not require FNI to seek court permission in order to file a late answer” and cites CR 55(a): “Any party may respond to any pleading or otherwise defend at any time ...” Rsp. at 40.

How should this apparent contradiction between CR 55(a) and CRs 6&12 be resolved? Each Rule must work in concert with others, not in isolation. CR 55 presumes all other Rules are operant. This is explicit in CR 55(a)(1): “... as provided by these rules.” CR 55 presumes, for example, CR 6(a):

In computing any period of time prescribed or allowed by these rules, by the local rules of any superior court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included.

CR 7(b):

An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing.

And CR 11:

Every pleading, motion, and legal memorandum of a party represented by an attorney shall be dated and signed by at least one attorney of record in the attorney's individual name ...

The Rules work together; they do not contend. CR 55(a) does not cancel or amend CR 6 or CR 12, nor does it grant a party license to ignore other Rules. CR 55(a) does not relieve the pleader from the periods of time specified in CR 12, nor from showing cause or “excusable neglect” for a tardy pleading as required by CR 6(b). CR 55(a) operates simply as a guide to the

judge who is considering a CR 6(b) motion for enlargement in the context of a motion for default (and to set the expectations of the litigants involved).

CR 55(a) repeatedly uses the word *may*:

Any party *may* respond to any pleading or otherwise defend at any time before a motion for default and supporting affidavit is filed, whether the party previously has appeared or not.

The word “may” does not grant an unfettered right, but merely states possibility. The same word “may” is used in CR 55(b):

Judgment after default *may* be entered as follows ... the court *may* conduct such hearings as are deemed necessary ...

and in CR 55(c):

... the court *may* set aside an entry of default and, if a judgment by default has been entered, *may* likewise set it aside in accordance with rule 60(b).

Those clauses use “may” to indicate the court is observing all the Rules, not just CR 55. FNI is simply wrong. Since one Rule states when permission is required and when it should be granted, other Rules need not so state.

VIII. FNI HAS WAIVED ITS DEFENSES

Given the facts above, FNI has no arguments left in Response. But in the following text, DeCourseys will argue in the alternative.

IX. THE INSURED’S LEGAL BUSINESS NAME

FNI’s allegation that the Insured was the defunct corporation (“**Automated Home Solutions, Inc.**”) is not supported with any evidence other than the Insured Name on the Policy. FNI has not produced a business license or

any other evidence of its customer's identity (though it undoubtedly has something). FNI does not support its allegation with a Washington UBI number, human name, federal tax ID, or anything else. And as it admits, the original corporation sold its name to V&E in 2003. Rsp. at 3.

In 2004 when the policy was purchased, the defunct corporation did not have the legal right to use the name in commercial transactions, even in buying insurance. The new owner of the name (V&E) did have the right.⁴ In 2004 when FNI sold the policy (Rsp. at 1), FNI insured the entity that owned the name, i.e., V&E. Appellants' Brief (at 13-15) cites multiple precedents holding that insurance sold to a trade name insures the underlying entity.

On page 32 of the Response, FNI returns to this subject: "Even though the FNI policy unambiguously insures Automated Home Solutions, Inc. – and only that entity ..." Not true, by FNI's own evidence. **CP 100, 101, 243.** The address of the Insured was V&E's address. **CP 714.** The activity insured was V&E's activity. **CP 707.** When FNI sought communication with the Insured, it called Lester Ellis, the registered agent for V&E. **CP 478.**

Conversely, as argued below and in the Appellants' brief, the defunct corporation had no employees, assets, activities, or potential liabilities to in-

⁴ V&E used the "Automated Home Solutions" trade name in public commerce from 2004 through 2009. **CP 466 ¶5, CP 491-494, 547-568.** The street address tells all. Compare addresses **CP 703** and **CP 707.**

sure,⁵ and no assets or revenue with which to purchase insurance. **CP 758, 765.** “Post-dissolution period” notwithstanding (Rsp. at 34), the defunct corporation had neither the motive nor the means to buy insurance. The assets had all been sold and the sole remaining officer took employment with V&E. **CP 759.** The activity that was insured by FNI would have been illegal for the defunct corporation to perform. **CP 101, 765.** Stefan Birgh, registered agent and founder of the defunct corporation, in sworn deposition, told the story of the two corporations, the take-over by V&E, and the demise of his own corporation. **CP 754-762.** FNI disputes none of that evidence.

The check used to pay for the Policy was monogrammed “Automated Home Solutions,” and the signatory was the registered agent of V&E. **CP 547, 587.** The name was not a “mistake” (Rsp. at 35-36) –V&E’s had the legal right to use its own trade name for commercial activity, and quite wrong for FNI to now deny coverage to V&E on the basis of that legally registered trade name. FNI argues, “Automated Home Solutions, Inc. is not the legal business name of V&E” (Rsp. at 32), but FNI is wrong. V&E legally registered the trade name “Automated Home Solutions” in 2003 (**CP 498**). Under Washington law, the suffix “Inc.” is without significance.⁶

⁵ Insurance purchased in 2004 would not, of course, insure for prior years. It would cover only contemporaneous assets, activities, and liabilities of which the defunct corporation had none. **CP 255.**

⁶ RCW 23B.04.010(5): A name shall not be considered distinguishable upon
(continued . . .)

The policy did not need to be reformed (Resp. at 36). And “the intent” of the insurer (Resp. at 36) is not an issue when the insurer has no legal identification of its alleged customer. FNI introduced the confusion in the first “Fact” of the Complaint⁷ (CP 2, ¶3.1, CP 446), while producing in evidence the pleading from that underlying suit with V&E’s name in the caption. CP 6.

FNI argues that an insurance policy issued a corporation does not insure the individual owners. Resp. at 38. The argument is not relevant to this case.

X. IDENTITY OF THE INSURED

The Court may be understandably confused by the Response. FNI continues to misidentify entities and misrepresent claims. For example, “First National issued a liability insurance policy to Automated Home Solutions, Inc., a corporation dissolved in January 2004 ...” Resp. at 1. FNI is clearly identifying the corporation with UBI 602157829, CP 687. But FNI also identifies “the insured’s agent” as Lester Ellis. Resp. 14. Case evidence shows that Lester Ellis is the registered agent for V&E Medical Imaging,

(... continued)

the records of the secretary of state by virtue of: (a) A variation in any of the following designations for the same name: "Corporation," "incorporated," "company," "limited," "partnership," "limited partnership," "limited liability company," "limited liability partnership," or "social purpose corporation," or the abbreviations "corp.," "inc.," "co.," "Ltd.," "LP," "L.P.," "LLP," "L.L.P.," "LLC," "L.L.C." "SPC," or "S.P.C.";

⁷ “On March 29, 2006 AHS (under the name ‘V&E Medical Imaging Services, Inc. dba Automated Home Solutions’) sued the DeCourseys and Home Improvement Help in the King County District Court ...” CP 2, ¶3.1.

Inc., dba “Automated Home Solutions” (hereinafter, “V&E”), UBI 602255510. **CP 702.**

(In the quotes following, emphasis has been added.) So goes the Response throughout, sometimes in agreement and sometimes disagreement with Respondent’s prior statements in the case. FNI states, “In 2005, **V&E sued the DeCourseys** for non-payment; the **DeCourseys counterclaimed** alleging that **V&E’s work** was defective.”⁸ Rsp. 1. Then FNI states, “In addition, FNI asserted that the DeCourseys’ underlying **suit against AHS, Inc.** came more than two years after AHS, Inc.’s dissolution **when AHS, Inc. no longer had the capacity to sue or be sued.**” Rsp. 7. Then FNI resorts to the ambiguity: “If the suit was in fact against **AHS, Inc.** [Rsp. 24] ... If the suit was in fact against **V&E Medical Imaging...**” Rsp. 26.

At this point, FNI actually suggests that **V&E** might be the Insured: “If the suit was in fact against **V&E Medical Imaging, ... the insured**, without First National’s consent, **limited the scope of judicial review.**” Rsp. 26.

But then FNI returns to the ambiguity: “Because **V&E or AHS, Inc.** left the claim undefended ...” Rsp. at 27. FNI concludes with its original premise, “Nor is there any factual dispute over the policy terms identifying the insured as **Automated Home Solutions, Inc.**” Rsp. 42.

⁸ This statement contradicts the Complaint, **CP 2**, and FNI’s motion for summary judgment, **CP 209, 210.**

As it did at the trial level, FNI tries to straddle two universes. The Insured may be the defunct corporation, “**AHS, Inc.**” (to show the Insured was dissolved and could not be sued) – or it may be **V&E** (to quote hearsay evidence from V&E’s registered agent, or to show that the Insured abrogated FNI’s legal rights in the litigation). The identity of the Insured depends on FNI’s advantage in the argument.⁹

Without truthful argument, a court cannot find the facts. Thus courts require truth from litigants. RAP 18.7 citing CR 11, and RPC 3.3.

All the evidence of the Insured’s identity shows that V&E was insured through its legally registered trade name, “Automated Home Solutions.” Since the Judgment below is based on a mistaken identification of the Insured, it cannot be affirmed, regardless of FNI’s carefully ambiguous arguments in the Court of Appeals.

Truly, the identity of the Insured, V&E, is unambiguously clear. This Court should consider the question settled beyond doubt. In the alternative, it

⁹ FNI contradicts itself in other ways, too. For example, Rsp. at 15: “First National’s first notice of a possible lawsuit came on July 14, 2010...” But then Rsp. at 17, quoting Tonn: “I telephoned Lester Ellis, the contract person for AHS on April 23, 2010. I then learned that AHS was **possibly being sued**...” See also **CP 213**: “FNI then learned [on April 23, 2010] that AHS was **probably being sued**.” Emphasis added. Ellis also told Tonn that he had received “arbitration notices.” Anyone in Tonn’s position knows that arbitration “notices” indicate mandatory arbitration, which strongly suggest a lawsuit. Recent notices would indicate the arbitration hearing was imminent. In addition, there was the 3/31/2010 letter from DeCourseys to Bordelon, **CP 238-241**, which included cause number, caption, and venue.

should agree that the identity of the Insured was an issue of material fact that precluded granting summary judgment to FNI.

XI. DID THE INSURED TENDER THE CLAIM?

In summary judgment, the burden of proof is upon the moving party to show there is no material question of fact. In the judgment below, FNI is the movant and has the burden to show that the claim was not tendered. FNI's declarants are willing to make universal statements that the Insured "never" tendered the claim, but according to their own statements,¹⁰ none of the declarants has personal knowledge of the case before 2010.¹¹ FNI has not shouldered its burden of proof for summary judgment.

XII. WAS FNI PREJUDICED?

FNI admits that it is not relieved of its coverage obligations "unless the failure to give notice resulted in actual prejudice to FNI." (Resp. page 22.) Prejudice is not matter of finding a loophole in the claim tendering.

To establish actual prejudice, the insurer must demonstrate some concrete detriment, some specific advantage lost or disadvantage created, which has an identifiable prejudicial effect on the insurer's ability to evaluate, prepare or present its defenses to coverage or liability."

Unigard Ins. Co. v. Leven, 983 P. 2d 1155, WA: Ct. App., Div I, 1999.

FNI cannot show that it was prejudiced under that standard. From Lester Ellis and Bordelon Insurance Agency, FNI knew its client was "probably be-

¹⁰ See Appellants' Brief at 19 et seq.

¹¹ DeCourseys filed counterclaims against V&E in April 2006. **CP 12.**

ing sued,”¹² that it was ongoing, and that Bordelon had a letter with the details.¹³ **CP 243.** The letter FNI produced in evidence includes cause number, caption, and venue. **CP 238-241.** FNI did not “lose the right” to investigate and defend. *Resp. at 22 et seq.* If FNI obtained the letter from Bordelon in April 2010 (the simplest form of investigation), it had sufficient detail for FNI to learn about the case before lunch time. If FNI had intervened, it could have participated and possibly prevented the result it now bemoans. But by FNI’s own testimony, it accepted instructions from V&E’s Lester Ellis “not to investigate.” **CP 243, Resp. at 15.** FNI was “prejudiced” only by its own negligence, and negligence is not a “concrete detriment” (quoting the *Uni-gard* standard).

FNI argues the Insured’s “failure to tender prejudiced FNI as a matter of law.” *Resp. at 31.* But the argument is not in accord with the cases it cites, nor with FNI’s own argument (*Resp. at 22*), evidence, or the law.

XIII. CONCLUSION

FNI waived all its defenses in both the underlying lawsuit and in this one.

1. In the underlying lawsuit, FNI chose not to investigate and participate in

¹² FNI knew about the suit from a number of indicators. See footnote 9.

¹³ FNI has only an impeached witness to testify that it did not actually have that letter in April 2010. Patricia Corns testified that “Bordelon did not forward to us the DeCourseys’ letter of March 31, 2010 ... until February 2011.” Her testimony is based on “personal knowledge,” but she confesses her personal knowledge began on February 3, 2011. **CP 235 ¶4.** FNI calls this “speculation” (*Resp. at 20*) but those are the witness’s words.

the arbitration, though it had the opportunity to do so.

2. FNI had DeCourseys' counterclaims in this lawsuit since January 12, 2011, but FNI waived its defenses by not filing a timely answer.
3. Even in the untimely answer, FNI did not raise or preserve any affirmative defenses.

In issuing the Policy, FNI joined its fortunes with V&E and agreed to indemnify it for certain perils and claims. Those claims have now arisen and been demonstrated in a court of law. Though FNI might have had valid arguments, it sought to obfuscate the facts and ambush DeCourseys with those arguments rather than submitting the case to a fair hearing.

The order granting FNI's motion for summary judgment should be reversed. It has no basis in fact. The order denying DeCourseys' motion to strike FNI's late answer to the counterclaim should be reversed; the answer should be stricken. The order denying DeCourseys' motion for summary judgment should be granted as a matter of law.

FNI provides no basis in law by which it could be awarded costs. DeCourseys, when represented by counsel, incurred costs and request an award of costs under CR 11 and RCW 19.86, the Consumer Protection Act.

RESPECTFULLY SUBMITTED this 10th day of September, 2011.

By Carol DeCoursey By Mark DeCoursey
Carol DeCoursey, *pro se* Mark DeCoursey, *pro se*

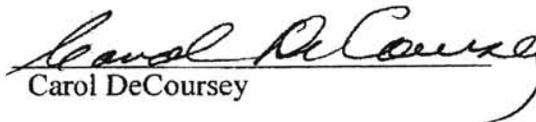
67906-6

CERTIFICATE OF SERVICE

I hereby certify that on September 10, 2012, I caused to be served a copy of the **APPELLANT'S REPLY BRIEF** by **email per agreement** on the following person(s) in the manner indicated below at the following address(es):

Russell Love
Thorsrud Cane & Paulich
1300 Puget Sound Plaza
1325 Fourth Ave.
206-386-7755 (tel.)
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rlove@tcplaw.com

- by **CM/ECF**
- by **Electronic Mail**
- by **Facsimile Transmission**
- by **First Class Mail**
- by **Hand Delivery**
- by **Overnight Delivery**


Carol DeCoursey

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RE	Certificate of Service

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No. 67906-6-I, First Nat'l Ins. v. DeCoursey

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