

No. 71214-4-I

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

NO BOUNDARIES, LTD., a Washington corporation, and NBL II,
LLC, a Washington limited liability company,

Respondents/Cross-Appellants

v.

PACIFIC INDEMNITY COMPANY (a member of the CHUBB GROUP
OF INSURANCE COMPANIES), an insurer authorized by the
Washington Insurance Commissioner,

Appellant/Cross-Respondent

***PACIFIC INDEMNITY COMPANY's REPLY BRIEF OF
APPELLANT/CROSS-RESPONDENT***

2016.11.15 10:03
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ORIGINAL

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SUMMARY OF THE GROUNDS FOR PACIFIC'S APPEAL

NBL's brief in opposition to Pacific's appeal has failed to rebut the following propositions, each of which supports the relief Pacific seeks on appeal:

1. The record on review, together with the jury's verdict, establishes that Pacific accepted coverage for the June 2005 collapse damage in the basement of the Metropole Building, including coverage for any code upgrades required in order to complete necessary repairs.

2. The record and the jury's verdict also establish that no code upgrades ever were required to complete those repairs and that Pacific did not breach the insurance policy. Pacific paid NBL a full and fair amount for its claim, months before NBL filed its complaint in March 2009. NBL's complaint alleged that code upgrades were required, and that the insurance policy required Pacific to pay millions more for the June 2005 collapse loss to fund those code requirements. NBL was wrong and it failed to prove any of those claims.

3. As a result, NBL failed to prove its IFCA claim, as a matter of law, and the trial court should have entered judgment for Pacific on that claim, notwithstanding the jury's IFCA award. To establish an IFCA violation, NBL was required to prove that Pacific denied insurance coverage or payment of benefits, and that the denial was unreasonable. Pacific never denied coverage or payment of benefits due under the policy. Contrary to

NBL's argument, Pacific did not "deny coverage" in 2009 when it paid the claim in full; or in 2011, when it confirmed that it had already paid the claim in full; or in July 2013, shortly before trial, when it asserted a defense against NBL's IFCA and bad faith claims under the Concealment and Misrepresentation provisions of the insurance policy. NBL claimed that Pacific acted unfairly and inequitably. Pacific had the right to defend on the grounds that NBL's hands were not clean, because it had not truthfully presented its insurance claim to Pacific – and it had the right to do so without incurring liability under IFCA, or for the tort of bad faith, for "denying coverage" for a claim it properly had paid in full four years earlier.

4. NBL has no right to an award of attorney fees and costs under IFCA, because it failed to prove that Pacific denied coverage or payment of benefits – the essential elements of the IFCA cause of action. Furthermore, the fees and costs the trial court awarded under IFCA were incurred before NBL had ever asserted an IFCA claim. Those fees were incurred in NBL's failed effort to prove that Pacific had not paid full value for the claim because code upgrades were required – not to prosecute an IFCA claim.

5. NBL also had no right to an award of attorney fees and costs under the *Olympic Steamship* doctrine. Pacific did not compel NBL to bring legal action to obtain the full benefit of its insurance policy – NBL had already obtained the full benefit of the insurance policy before NBL filed this lawsuit. Furthermore, under *Dayton*, even if NBL had succeeded in proving

that Pacific was required to pay for code upgrades, NBL would have no right to recover *Olympic Steamship* fees, because that question goes to the valuation of a claim that Pacific agreed to cover - - not a coverage question to which *Olympic Steamship* applies. Even if NBL did have a right to recover *Olympic Steamship* fees for litigating the value of its claim, NBL could not properly obtain an award of such fees for the simple reason that it *lost*, and the losing party does not obtain an award of fees under any theory, ever.

6. As NBL itself now concedes, NBL asked the jury to award damages for the tort of bad faith and under IFCA because Pacific allegedly “acted unreasonably when it belatedly attempted to deny NBL’s claim on the basis of a contrived and groundless accusation of fraud.”¹ If the trial court had properly instructed the jury under *Cox*, as Pacific requested, and if the jury had followed the court’s instructions, it could not have awarded damages to punish Pacific for raising its affirmative defense in the course of this litigation. As NBL concedes, that is quite likely what the jury did here.

If Pacific’s affirmative defense had been frivolous and unfounded – and on this record, it unquestionably was not – that would have been a matter for the trial court to address under the Civil Rules. It was not, as NBL argues, a proper basis for a jury award of damages for the tort of bad faith or under IFCA. *Cox* and the insurance anti-fraud statutes evidence a strong public policy to root out and prevent insurance fraud for the protection of honest, premium-paying insureds. That policy would be seriously undermined if an

¹ Brief of Respondent at 24.

insured could obtain damages in tort, or under the CPA and IFCA, based on an insurer's assertion of a well-founded misrepresentation defense.

7. Finally, over Pacific's repeated objection, the jury was improperly told that NBL would be required to repay Pacific if it found that NBL misrepresented its insurance claim. This was not relevant to the jury's proper fact-finding function, and it was not established in the pleadings, as Pacific did not assert a counterclaim for recovery of sums already paid and did not ask the jury for an affirmative monetary award. This was unquestionably inflammatory and prejudicial; it was an improper basis for the jury's rejection of Pacific's well-founded affirmative defense; and it improperly contributed to the jury's award of bad faith and IFCA damages predicated on Pacific's allegedly "contrived and groundless accusation of fraud."

SUMMARY OF THE RELEVANT RECORD

In its opening brief, Pacific presented a neutral Statement of the Case, amply supported by the record on review and consistent with RAP 10.3(a)(5).² In its opposition, NBL has taken the opportunity to present a "Counterstatement of the Case," replete with innuendo and often contrary to the record.³ NBL's argumentative Counterstatement cannot pass without a response.

² Brief of Appellant at 5-27.

³ See, e.g., Brief of Respondent at 13 ("Sure enough, behind the scenes, Chubb's consultants concluded that Chubb owed NBL almost no additional coverage..."); at 15 ("NBL was hopeful that the Court's ruling would cause Chubb to rescind its 2009 denial. It didn't...")

1. Pacific accepted coverage for the collapse loss and paid NBL the full replacement cost value of the loss – before NBL filed this lawsuit.

In 1998, NBL bought the century-old, 23,500 square foot Metropole Building in Seattle’s Pioneer Square for \$1.325 million. NBL borrowed \$1 million to make the purchase.⁴

A 60-square foot portion of the flooring in the corner of the Metropole basement collapsed in June 2005. Pacific accepted coverage for that loss. NBL demolished the area in anticipation of repairs, first applied for a building permit in February 2007 and obtained a permit to perform the repairs in March 2007.⁵ Pacific paid in full for those repairs, in advance.⁶

In May 2007 -- before NBL had started to repair the collapse that had occurred nearly two years earlier -- there was a fire in the above-ground floors of the Metropole.⁷ The fire damage was extensive. To repair it, NBL would be required to bring the entire Metropole Building into compliance with the current Seattle Building Code.⁸ Pacific promptly accepted coverage for the fire loss and paid NBL over \$4.75 million for the damage – the full

Perhaps not surprisingly, they reached the same conclusion as before”); and at 17 (“Despite its dubious premise, the trial court permitted Chubb to assert its previously unplead fraud defense at trial...”).

⁴ Ex. 154; RP 10/2/2013 at 178:6 – 181:15.

⁵ RP 10/3/13 at 315:24-317:23; Ex. 17.

⁶ Ex. RP 10/7/13 at 521:1-25; Ex. 26.

⁷ RP 10/7/13 at 522:9-526:4.

⁸ RP 10/2/13 at 120:9-23; Ex. 21 and Ex. 19. NBL’s \$8 million post-fire renovation plans also included a number of expensive cosmetic upgrades to the old Metropole. RP 10/7/2013 at 548:23 – 555:22.

limits of the applicable coverages under the Pacific insurance policy in force when the fire occurred.⁹

By March 2009, NBL had received over \$5.5 million in insurance money from Pacific to repair and renovate a building it had purchased for \$1.325 million just a decade earlier. Nevertheless, NBL had barely begun to repair the damage from the collapse or the fire.¹⁰ Few repairs had been completed when this case went to trial in October 2013.¹¹ NBL did use over \$800,000 of the insurance money it received from Pacific to pay off the remaining balance on its \$1 million mortgage loan.¹² Nevertheless, NBL claimed that it could not perform any building repairs because Pacific had “pulled the plug” by declining to exhaust the \$3.2 million limits of coverage applicable to the collapse loss, in order to fund an \$8 million, nose to tail renovation of the Metropole Building.

At trial in October 2013, the jury found that Pacific had not breached the insurance policy – it had paid the claim in full before NBL sued Pacific.¹³ The jury also found that repairing the collapse loss did not ever require NBL

⁹ RP 10/7/13 at 525:15-25.

¹⁰ Ex. 17 (2007 permit for structural repairs expired September 2008, “no work done”); Ex. 34 (photos of demolished basement and second floor structure taken in 2013 shortly before trial); Ex. 161 at 6-8 (photos of building in 2011 – 2013); Exs. 13 and 19 (2007 permit work fully funded by Pacific).

¹¹ *Id.*

¹² Exs. 148 and 152; RP 10/2/2013 at 80:9-18.

¹³ In fact, even though the policy did not require Pacific to do so, because NBL had never completed the collapse repairs, Pacific paid the full Replacement Cost Value of the claim, rather than the depreciated Actual Cash Value. Ex. 26.

to incur millions of dollars to perform code upgrades throughout the building – as NBL had been claiming since late 2008.¹⁴

NBL spent over five years, and over \$1 million in attorney and expert fees, attempting to prove that millions of dollars in code upgrade work was required to repair the collapse of a 60-square foot portion of the basement floor of the 23,500 square foot, three-story Metropole Building. Pacific’s adjustment of the claim was right all along – no matter what version of the SBC applied, under every building permit issued for Metropole repair work.¹⁵

2. *Pacific never waived the provisions of the insurance policies applicable to the June 2005 collapse and the 2007 fire; and it never agreed to pool the limits of the two policies to pay for an extensive renovation of the entire Metropole Building.*

Before the May 2007 fire, NBL had obtained a building permit from the City of Seattle to repair structural damage from the June 2005 collapse. The permit was issued under the 2003 SBC, did not require any code upgrade work, and specifically found that structural repairs in the basement and the floor above it did not constitute a “substantial alteration” of the Metropole under the 2003 SBC.¹⁶

A year after the May 2007 fire, NBL submitted a single application for a building permit, subject to the recently adopted 2006 SBC, for extensive repair and renovation plan for the entire 23,500 square foot building, including work related to the still-unrepaired, 60-square foot June 2005

¹⁴ CP 2009-2014.

¹⁵ CP 2009-2014 at 2010-2011.

¹⁶ Ex. 17.

basement floor collapse.¹⁷ When NBL told Pacific it would combine the collapse and fire related work into one contract and permit -- “for efficiency and ease”¹⁸-- Pacific did not object because from the outset of the collapse claim, it had always been NBL’s prerogative and responsibility to handle its own building permit applications and construction contracts for the renovation of its own building.¹⁹

The City issued a building permit for the combined repairs in October 2008. The \$5.5 million Pacific had already paid was not enough to fully fund the \$8 million project.²⁰

Around the same time, NBL proposed that Pacific should allocate the code upgrades between the June 2005 collapse and the 2007 fire for insurance purposes.²¹ This appeared to mean using the limits of the 2005 policy to cover code upgrades required because of the fire that occurred in 2007 – well after the 2005 policy had expired.²²

The jury saw and heard no evidence that Pacific ever told NBL that it would pool the limits of coverage under the two separate insurance policies. When NBL suggested that Pacific should do that, Pacific promptly said no.²³

¹⁷ Ex. 21; RP 10/3/2013 at 425:17 – 426:3, 427:14 – 428:7.

¹⁸ RP 10/2/13 at 120.

¹⁹ *See, e.g.*, RP 10/3/13 at 23:1–13 (“we wanted to make sure... that it was clear... that we weren't party to the contract” for renovation after the fire).

²⁰ Ex. 21; RP 10/3/2013 at 427:14 – 428:7.

²¹ Ex. 84.

²² Exs. 23, 24, 25, and 26; RP 10/3/2013 at 423:11 – 433:5.

²³ *Id.*

3. *Pacific promptly and properly responded when NBL proposed “allocation” of post-fire code upgrade costs to the policy in force in June 2005.*

Pacific promptly advised NBL that it would refer NBL’s allocation proposal to its consultants, Wiss Janney Elstner (“WJE”) to determine whether any of those costs were attributable to the collapse-related work.²⁴ Pacific promptly shared the results of WJE’s analysis with NBL and explained in writing why there were no required upgrades related to the covered collapse claim.²⁵

WJE evaluated NBL’s proposal using the 2006 SBC as its benchmark, because NBL’s application for the 2008 permit and the permit the City issued both were subject to the 2006 SBC.²⁶ That seemed consistent with a reasonable reading of the policy, which provides that it will pay for code upgrades mandated by a law or ordinance that “affects the repairs.”²⁷

4. *NBL tried and failed to prove that it had incurred a multimillion dollar loss, based on its theory that the 2003 SBC would have required extensive code upgrades to repair damage from the June 2005 collapse.*

On February 27, 2009, NBL responded to Pacific’s conclusion that the collapse repairs would not require code upgrades. NBL insisted that the collapse should be evaluated under the 2003 SBC that was in force on the

²⁴ Ex. 25.

²⁵ Ex. 183.

²⁶ RP 10/10/13 at 1116:10 – 1119:5 (Dethlefs used 2006 SBC because that was the Code the City was using to evaluate the permit for combined collapse and fire repairs in 2008, after the 2007 permit for collapse-related structural repairs, granted under the 2003 SBC, was allowed to expire).

²⁷ CP 70-79; CP 191-193.

date of the loss, not the 2006 SBC that governed work under the October 2008 permit. NBL insisted that under the 2003 SBC, extensive code upgrades would be required as a result of the collapse, and that about \$3 million in repair costs incurred after the May 2007 fire should be paid under the insurance policy in force in June 2005.²⁸ NBL sued Pacific days later.²⁹

5. ***NBL's demand for payment of code upgrade costs for the June 2005 collapse relied heavily on its claimed total loss of a commercial kitchen worth over \$600,000; and Pacific produced substantial evidence that NBL knew that kitchen did not exist.***

To support its new claim for millions in code upgrade payments, NBL told Pacific it had lost a well-equipped, high-end commercial kitchen in the Metropole basement collapse. In February 2009, NBL specifically demanded that Pacific pay about \$532,000 to restore the commercial kitchen -- in addition to about \$100,000 Pacific already had paid for kitchen restoration and equipment at NBL's request.³⁰

This was not the result of inattention or faded memory; it was not an innocent mistake; and it was not "immaterial." Under the 2003 SBC or the 2006 SBC, code upgrades would be required if the cost of repairs exceeded 60% of the value of the building. Written communications between NBL's counsel and its consultant, David Murphy, showed that the \$532,000 commercial kitchen claim was an essential element in NBL's effort to push

²⁸ Ex. 158.

²⁹ CP 1-55.

³⁰ Ex. 158.

the value of the collapse repairs over the 60% trigger.³¹ The commercial kitchen was not just a \$532,000 misunderstanding -- millions of dollars of code upgrade costs were in the balance.

NBL's \$632,000 "commercial kitchen damage" claim did not waiver until July 2013, when Pacific challenged NBL to prove up its claim and invoked its rights under the Concealment and Misrepresentation ("void for fraud") provisions of the policy.³²

NBL responded to the challenge in two ways. First, NBL substantially reduced the claimed value of the commercial kitchen.³³ Second, NBL's president, Reyn Yates, testified he did not pay attention to details about the kitchen in the Metropole, or in any of the numerous buildings he owns; he told Pacific he did not know the contents or layout of the kitchen; and NBL therefore was not responsible for the firm, detailed \$532,000 commercial kitchen claim it made in 2009. Instead, if the claim had been exaggerated, NBL suggested that Pacific should bear responsibility because Pacific's consultants had prepared specs and drawings for the replacement kitchen NBL asked Pacific to buy.³⁴

³¹ Using the assessed value of the building as the benchmark – the lowest value the DPD will use to assess the need for code upgrades, Murphy calculated that repair costs over about \$1 million would open the door to code upgrade coverage. His worksheet shows that NBL planned to combine the \$532,000 in costs to restore the alleged commercial kitchen with \$789,000 in structural and finish work to leap over the \$1 million barrier. Ex. 212 at NWP 000022, Ex. 158 at PI-Flood 000413-414.

³² CP 803-813; 1334-1335.

³³ Compare Ex. 158 at PI-Flood 000413 (February 27, 2009 demand for \$532,000 to restore commercial kitchen), with Ex. 76 at 000004 (July 2013 collapse repair estimate showing reduced amounts for kitchen equipment and buildout).

³⁴ Brief of Respondent at 16-17.

The consultants relied on the information NBL provided about the pre-collapse contents and layout of the basement kitchen, because NBL had destroyed the physical evidence before it first asserted the commercial kitchen claim.³⁵ The jury examined photographs NBL and Pacific had taken shortly after the collapse, and design drawings on file with the City, that proved the basement collapse area could not possibly have contained a spacious, luxuriously finished \$632,000 commercial kitchen.³⁶

More importantly, NBL did have direct knowledge about what was in the damaged corner of the basement on the day of the collapse. NBL's own on-site building manager, Sue Everett, inspected the collapse area with Yates on the day the damage was discovered. Everett testified the space NBL called "the kitchen" consisted of a small room with a sink and possibly a dishwasher – nothing like the \$600,000 kitchen showplace NBL told Pacific it had lost.³⁷ Her testimony was consistent in all respects with the photos NBL and Pacific had taken, as well as the other documentary evidence.³⁸

In short, if Yates did not know what was damaged in the collapse, the plaintiff and insured NBL did know. NBL never explained why it didn't rely on Everett's direct personal observation and knowledge to present an informed, truthful insurance claim to Pacific back in February 2009. Instead,

³⁵ *See, e.g.*, RP 10/9/13 at 1042:4-9. NBL also made it clear that Yates would control the flow of information to Pacific and all final decisions concerning the scope of repair work at the Metropole. RP 10/7/13 at 531:4 – 532:2; Ex. 215.

³⁶ Ex. 212 at NWP 000022; Ex. 158 at PI-Flood 000413-414.

³⁷ RP 10/9/13 at 889:18 – 901:15, Exs. 104, 106, 127, and 191.

³⁸ Ex. 60; Exs. 221 - 222. RP 10/9/13 at 891:3 – 892:21 and 896:1-17.

NBL tendered a firm demand to Pacific for \$532,000 in restoration costs for a commercial kitchen – but when the veracity of that demand was questioned years later, NBL claimed the demand was merely the innocent product of Yates’s inattention and lack of memory; reduced the demand; and argued that everyone -- apparently including the lawyers and consultants who proffered that \$532,000 demand to Pacific on behalf of NBL -- should have known the claim was based on conjecture, if not an outright fabrication.³⁹

Pacific’s affirmative defense was supported by the weight of the evidence and was not, as NBL asserts, a “baseless tactic to exert leverage over NBL on the eve of trial,”⁴⁰ it did not rely on a “dubious premise,”⁴¹ and it was not a “contrived and groundless accusation.”⁴² Indeed, the jury must have agreed the kitchen did not exist, because Pacific’s \$750,000 collapse loss payment could not possibly have paid for collapse repairs Pacific agreed to fund *and* the \$632,000 kitchen it did not.

The jury must have rejected Pacific’s defense for some other reason, and two improper reasons appear in the record. The first was unfair prejudice

³⁹ Brief of Respondent at 16-17. NBL also attempts to argue that because Pacific had already paid \$100,000 for the so-called kitchen, Pacific must not have considered NBL’s representations about the kitchen loss to be “material,” and therefore had somehow waived its right to object to NBL’s \$532,000 misrepresentation in 2009. *Id.* at 42-43. NBL’s argument is directly contrary to the law before and after *Cox*. Compare *Herron v. Millers Nat’l Ins. Co.*, 185 F.Supp. 851, 854 (D.Or.1960): “By the very nature of things the insurance company is obliged to look to the insured for the ascertainment of the actual loss and hence, it is required of the insured that he, under the penalty of forfeiture of his right to enforce the contract, faithfully and truly answer questions touching the amount of the loss.” (Quoted in *St. Paul Mercury Ins. Co. v. Salovich*, 41 Wn. App. 652, 656, n.2, 705P.2d 812 (1985)); see also authorities cited in Brief of Appellant at 47, n.120.

⁴⁰ Brief of Respondent at 16.

⁴¹ *Id.* at 17.

⁴² *Id.* at 24.

and sympathy as a result of testimony that told the jury NBL might forfeit coverage and, worse still, be required to return money to Pacific if it found that NBL misrepresented the claim.⁴³ The second was that the jury was not instructed, consistent with *Cox*, that Pacific had no legal duty to discover or to assert its affirmative defense earlier than it did.⁴⁴ Instead, NBL was permitted to argue that Pacific's defense was a "belated denial of coverage" and grounds for an award of damages for bad faith and under IFCA.

ARGUMENT AND AUTHORITY

1. NBL's IFCA claim failed, as a matter of law, and this Court should direct the trial court to enter judgment for Pacific on that claim.

An essential prerequisite to a claim under the Insurance Fair Conduct Act is an "unreasonable *denial* of coverage or payment of benefits."⁴⁵

In this case, there is no room for dispute: Pacific did not *deny coverage* it was required to accept or *deny payment* of insurance benefits that were due to NBL for the June 2005 collapse loss. The record is clear: Pacific accepted coverage, including code upgrade coverage, and paid all benefits, on a full "Replacement Cost Value" basis, for the covered basement collapse damage that occurred at the Metropole in June 2005. Pacific also paid out the full limits of coverage available under a second insurance policy, for the unrelated fire damage that occurred in May 2007. All told, Pacific paid NBL

⁴³ Brief of Appellant at 44-50.

⁴⁴ CP 1841-1846 at 1842; Brief of Appellant at 40-43.

⁴⁵ RCW 48.30.015(1).

over \$5.5 million – and it made all of those payments *before NBL commenced this lawsuit*.

This cannot be called a “denial of coverage” or a “denial of benefits,” no matter how NBL attempts to contort the meaning of the words. As a result, NBL failed, as a matter of law, to prove the essential elements of a claim for damages under IFCA.⁴⁶

The jury nevertheless awarded IFCA damages to NBL. The jury did so in error and, by virtue of its own findings, contrary to the evidence. The trial court erroneously declined to grant judgment to Pacific as a matter of law on NBL’s IFCA claim, notwithstanding the verdict. The court compounded that error by awarding \$280,000 in attorney fees, plus \$33,750 in costs, to NBL under IFCA.⁴⁷ Although the court did not explain the basis for this award, the order states that it “includes costs of successful interlocutory appeal” – all incurred before NBL had amended its complaint to include an IFCA cause of action, and thus not incurred in the prosecution of its IFCA claim.

⁴⁶ When IFCA was enacted, a statutory private remedy for alleged misconduct in the claims handling process, such as undue delay or violation of claims handling regulations, was already available under the CFA. As NBL acknowledges, the jury considered NBL’s CPA claim and properly rejected it. Brief of Respondent at 32, n.5.

⁴⁷ On appeal, NBL has not challenged the amount of the trial court’s award of attorney fees and costs, although the court awarded only a fraction of NBL’s request for over \$1.7 million. CP 2140-2148; CP 2765-2766.

a. A bona fide dispute concerning the valuation of an insurance claim is not an IFCA violation.

NBL asserts that Pacific did “unreasonably deny” coverage and payment because it used the 2006 SBC to evaluate the need for code upgrades – ignoring the fact that the trial court found Pacific’s valuation method sufficiently reasonable to rule, as a matter of law, that Pacific was correct.⁴⁸ According to NBL, when this Court reversed, the Court established that Pacific’s adjustment of NBL’s claim was “unreasonable” – despite the fact that a jury has decided that no code upgrades were ever required and that Pacific paid the collapse loss in full.

NBL is wrong. The plain wording of the IFCA statute says that an unreasonable *denial* of insurance coverage or *denial* of payment of insurance benefits is an essential prerequisite to a valid IFCA claim. That is what virtually every court asked to interpret the statute has concluded.⁴⁹ In fact, this Court recently reached the same conclusion in *Ainsworth v. Progressive Cas. Ins. Co.*:

[IFCA] describes two separate acts giving rise to an IFCA claim. The insured must show the insurer unreasonably denied a claim for coverage *or* that the insurer unreasonably denied payment of benefits.⁵⁰

⁴⁸ Brief of Respondent at 22-23 (arguing that “Chubb denied NBL coverage on three occasions”).

⁴⁹ See Pacific’s Brief of Appellant at 34, n.87 (citing cases); see also *Beasley v. State Farm Mut. Auto. Ins. Co.*, 2014 U.S. Dist. LEXIS 53205 at *17 (W.D.Wash., April 16, 2014) (similarly holding that a denial of coverage or payment of insurance benefits is an essential element of an IFCA claim, citing prior consistent decisions).

⁵⁰ 180 Wn. App. 52, 79, 322 P.3d 6 (2014) (emphasis in original).

Ainsworth also demonstrated how this two-part test should be applied. In *Ainsworth*, the insurer Progressive conceded that the wording of the first-party wage loss provisions of its automobile insurance policy was unambiguous. The record showed that Progressive disregarded the wording of the policy by declining to investigate and by rejecting the insured's well-documented, clearly covered wage loss claim.⁵¹

Unlike *Ainsworth*, here Pacific had already paid NBL's collapse claim in full before NBL brought this lawsuit, under a reading of the policy the trial court held correct as a matter of law. When this Court construed the policy's code upgrade provisions on discretionary review, it noted that if anything, Pacific had gifted coverage to NBL. However, the Court held that because there may be more than one reasonable interpretation of the Ordinance or Law provisions of the policy, the Court would adopt the interpretation that NBL urged would require Pacific to pay for code upgrades:

We note that Pacific does not contend that No Boundaries forfeited its right to coverage for the increased cost of code compliance when it failed to repair the water damage to the Metropole while the old code was still in force. *Pacific points out that it has stipulated to extending Ordinance or Law coverage to No Boundaries for the cost of compliance, if any, with code upgrades mandated by the new code, Ordinance 122528. The stipulation, however, is extraneous to the coverage issue in this appeal, and it appears to be a gift.*

We conclude that the Ordinance or Law provision should be interpreted in accord with the policy's explicit provision for valuing the cost of repairing damaged property "at the time of loss or damage." *To the extent the provision is susceptible*

⁵¹ *Id.*, 180 Wn. App. at 79-80.

*to more than one reasonable interpretation because of its use of the term “affect,” the ambiguity must be resolved in favor of No Boundaries. As a matter of law, the valuation of the cost to repair the water damage to the Metropole must include the cost of meeting the minimum standards of Ordinance 121519.*⁵²

However, NBL was wrong. Pacific did not owe NBL payments under the policy’s code upgrade coverage under *either* reading of the policy or *either* version of the SBC. The jury’s verdict proves that Pacific’s valuation of the claim was correct in 2009 under the 2006 SBC, correct in 2011 under the 2003 SBC, and still correct today. Under any reasonable reading of the insurance policy, NBL’s code upgrade claim has never had any merit – and NBL did not “prevail” on its claim for additional payments under the policy’s code upgrade provision.

There was a *bona fide* dispute concerning the version of the SBC that should be applied to determine the need for code upgrades as a result of the covered collapse loss; and a *bona fide* dispute concerning the necessity for code upgrades, whatever version of the SBC is applied. The jury resolved the dispute by concluding that Pacific and its expert consultants were right, and NBL and its expert consultants were wrong.

An insurer does not act in bad faith or in violation of the CPA when it relies on a reasonable interpretation of the insurance policy, or when it seeks to resolve a *bona fide* dispute over the legal interpretation and application of

⁵² *No Boundaries, Ltd. v. Pac. Indem. Co.*, 160 Wn. App. 951, 958-59, 249 P.3d 689 (2011) (emphasis added).

policy wording like the one that was presented to this Court on discretionary review.⁵³ The same holds true under IFCA.

- b. IFCA provides a private right of action for an insurer's wrongful conduct in the adjustment of insurance claims; it does not regulate the conduct of litigation, and an insurer's assertion of affirmative defenses in response to an insured's bad faith lawsuit is not an IFCA violation.*

NBL also points to Pacific's allegedly "contrived and groundless" assertion of misrepresentation as an affirmative defense, shortly before trial, as the basis for its IFCA claim and the jury's IFCA award – as well as a proper basis for the award of damages for the common law tort of bad faith.⁵⁴

Once again, NBL is wrong. IFCA applies to an insurer's adjustment of an insurance claim, and then only to a *denial* of coverage or benefits for the claim – not to alleged misconduct in the claims handling process, much less to conduct in litigation. IFCA does not authorize an insured to obtain an award of damages and legal fees because an insurer has asserted an affirmative defense for the first time in the course of an insurance coverage lawsuit, years after its adjustment and full payment of a claim. IFCA regulates the adjustment of insurance claims, not the conduct of litigation,

⁵³ As this Court stated in *Capelouto v. Valley Forge Ins. Co.*, 98 Wn. App. 7, 22, 990 P.2d 414 (1999): "Our courts have rejected attempts to base bad faith and CPA claims on legal arguments when... there is a debatable question regarding coverage for the loss, and the denial of coverage is based on a reasonable interpretation of the insurance policy."

⁵⁴ Brief of Respondent at 24.

which is a matter for the court under the Civil Rules, not for the jury, whether under IFCA or the common law tort of bad faith.⁵⁵

In essence, NBL's argument would transform IFCA from a statutory remedy for wrongful denial of insurance claims, to a mechanism for obtaining damages for allegedly improper "litigation tactics." Under NBL's reading, an insurer would risk liability for damages, treble damages *and* attorney fees under IFCA whenever it unsuccessfully asserts an affirmative defense to an insured's claims in a bad faith lawsuit. This would represent an unprecedented restraint on the adversarial process that the legislature did not intend when it enacted IFCA. It would be bad public policy, empowering the jury to police the conduct of parties in litigation, which is the purview of the court, not the finder of fact. Furthermore, permitting an insured to obtain IFCA remedies whenever an insurer asserts an affirmative defense under a void for fraud provision, and does not prevail, flies in the face of the strong public policy reflected in the *Cox* line of authorities and in the insurance anti-fraud statutes.⁵⁶ This is an area where our courts and the legislature have recognized an insurer must be able to ferret out fraudulent insurance claims, not only to protect the insurer's own interest, but to protect the overwhelming

⁵⁵ NBL asserts that Pacific's affirmative defense was "a baseless tactic to exert leverage over NBL on the eve of trial." (Brief of Respondent at 16). If that were true – and it definitely is not – Civil Rule 11 would have been the remedy, not a jury award of damages under IFCA.

⁵⁶ The relevant cases are cited in Brief of Appellant at 47, n.120. The legislature has addressed fraudulent insurance claims in a number of its enactments, including Ch. 48.50 RCW (Insurance Fraud Reporting Immunity Act); Ch. 135 RCW (Insurance Fraud Program); RCW 48.30.230 (misrepresentation of an insurance claim is a gross misdemeanor if under \$1,500, and a Class C felony if the misrepresentation exceeds \$1,500, punishable by imprisonment of up to five years under Ch. 9A.20 RCW).

majority of premium-paying, truthful insureds, whose premiums could subsidize fraud on the part of the few.⁵⁷

IFCA regulates the adjustment of insurance claims – it does not regulate lawyers and litigation and empower a jury to punish an insurer for its conduct in the defense of an insured’s bad faith claims. The Civil Rules govern the conduct of litigation, including insurance litigation. IFCA does not.

c. The authorities do not support NBL’s argument that an actual denial of coverage or payment of benefits is not an essential element of an IFCA claim.

NBL has told the Court, incorrectly, that “many federal decisions” hold the mere violation of an insurance claims handling regulation, or some other alleged misconduct short of a *denial* of coverage or payment of benefits, will establish an IFCA violation.⁵⁸ For example, NBL cites Judge Marsha Pechman’s 2010 decision in *Bronsink v. Allied Prop. & Cas. Ins. Co.*,⁵⁹ but does not disclose that less than a year later, Judge Pechman overruled the *Bronsink* ruling.

In *MK Lim, Inc. v. Greenwich Ins. Co.*,⁶⁰ Judge Pechman held that a denial of coverage *is* an essential prerequisite to an IFCA claim. In *MK Lim*, the court further held that “denial” means what it says; and that delay in

⁵⁷ *Id.*

⁵⁸ Brief of Respondent at 25, n.3.

⁵⁹ 2010 WL 2342538, *2 (W.D.Wash., June 8, 2010).

⁶⁰ 2011 U.S. Dist. LEXIS 126395 (W.D.Wash., May 23, 2011).

investigation and payment of a claim does not constitute a denial or a violation of IFCA:

[A] violation of one of the enumerated WAC provisions alone is not sufficient to sustain a cause of action under IFCA. There must be an unreasonable denial of coverage or payment.

The Court is aware that it has previously suggested a different reading of IFCA. In *Bronsink v. Allied Prop. and Cas. Ins. Co.*, the Court wrote:

There are two ways by which an insurer can violate the IFCA. One is by "unreasonably" denying coverage. . . . The IFCA also enumerates several sections of the Washington Administrative Code ("WAC"), the violation of any one of which will trigger a violation of the statute.

The Court is not convinced this is a proper reading of IFCA. The Legislature only provided a cause of action to one who has suffered an unreasonable denial of coverage...

MK Lim incorrectly argues that the delay in payment by Greenwich amounts to an effective denial of payment, sufficient to satisfy RCW 48.30.015(1). MK Lim has not convinced the Court that a delay in payment is the same as a denial.⁶¹

NBL also says that *Merrill v. Crown Life Ins. Co.*,⁶² held that a denial of coverage or payment is not required to establish an IFCA violation. However, the *Merrill* court was not actually asked to decide that question. The plaintiff in *Merrill* based his claim on the insurer's outright denial of coverage under his disability insurance policy. The *Merrill* court had no

⁶¹ *Id.* at *7-8 (citations omitted).

⁶² 2014 WL 2159266 at *9, 2014 U.S. Dist. LEXIS 71417 at *24-25 (E.D.Wash., May 23, 2014).

reason to consider whether something other than a denial of coverage would support an IFCA claim.⁶³

Finally, NBL points to *Isilon Sys., Inc. v. Twin City Fire Ins. Co.*,⁶⁴ arguing that *Isilon* held “the manner in which an insurer denied coverage” can form the basis of an IFCA claim.⁶⁵ But *Isilon* merely affirms that *denial of coverage* is still the essential prerequisite to an IFCA violation. In *Isilon*, the insured tendered defense of securities fraud claims to its insurer Twin City. Twin City issued a blanket denial of coverage on the grounds the insured was aware of the claim prior to policy inception. *Isilon* sued Twin City. With the lawsuit pending, Twin City changed course, accepted the claim and stated it would pay defense and indemnity upon receipt of loss documentation. Judge Pechman denied Twin City’s motion for summary judgment on *Isilon*’s IFCA claim, finding there were questions of fact concerning the reasonableness of Twin City’s pre-suit denial of coverage, and that Twin City’s post-suit payment of the claim did not render the IFCA claim moot. Despite the fact that Twin City later changed its mind and agreed to pay the claim, if *Isilon* could prove the original denial was not well founded, and that it had incurred damages as a result of the denial, it could state a viable IFCA claim.⁶⁶

⁶³ *Id.*

⁶⁴ 2012 U.S. Dist. LEXIS 50320, 2012 WL 1202331 (W.D.Wash., April 10, 2012)

⁶⁵ Brief of Respondent at 25.

⁶⁶ *Isilon*, 2012 U.S. Dist. LEXIS 50320 at *16.

Our case is completely different from *Isilon*. Pacific never denied coverage or full payment for the collapse loss – it accepted coverage and paid the full value of the claim *before* NBL brought suit. Unlike *Isilon*, which denied summary judgment, here the case went to the jury, which determined there was never a denial of coverage or payment of benefits. *Isilon* does not provide any support for NBL’s contorted reading of IFCA.

In sum, the authorities speak with one mind, consistent with the plain wording of the IFCA statute. To prove an IFCA violation, NBL had to prove that Pacific denied coverage. Pacific never did that. In the alternative, NBL had to prove that Pacific denied payment of benefits. Again, Pacific never did that. The jury said so.

The jury’s verdict is that Pacific paid NBL’s claim in full and did not breach the insurance policy by denying coverage or payment of benefits that were due under the policy. That is the law of the case. The jury’s IFCA award is contrary to the evidence as the jury saw it, and contrary to the law properly set forth in the court’s IFCA instructions. The trial court should have granted judgment for Pacific notwithstanding the jury’s verdict on the IFCA count.

d. Pacific did not “waive” its right to seek judgment notwithstanding the verdict on NBL’s IFCA claim

Prior to and during trial, Pacific repeatedly argued, and the trial court agreed, that an unreasonable “denial of coverage or payment of benefits” is

an essential element of an IFCA violation.⁶⁷ The trial court's IFCA instructions to the jury made that crystal clear.⁶⁸ Pacific did not lie in the weeds, await the verdict and then seek a "do-over," as NBL argues.⁶⁹ When the jury returned a special verdict on NBL's IFCA claim that was contrary to the evidence and the law as stated in the court's instructions, Pacific properly sought judgment notwithstanding the verdict or a new trial.⁷⁰

Nevertheless, in an effort to convince the Court that Pacific "waived" the right to seek relief from the erroneous award of damages and attorney fees under IFCA, NBL attempts to characterize Pacific's assignment of error as a belated objection to the verdict form, or as an attempt to resolve an "inconsistent" verdict.⁷¹ It is neither.

NBL also attempts to distinguish this case from *Cox*.⁷² In fact, our case and *Cox* are very much alike.

In *Cox*, as here, the verdict form did not direct the jurors to "stop, and go no further" if their answer to the first question on the form – whether the insured had misrepresented his claim – was "yes." The jurors did find a misrepresentation, but went on to answer subsequent questions and to award the insured damages for bad faith and under the CPA. The insurer did not object to the verdict form, but before and during the trial, consistently argued

⁶⁷ CP 372-395; CP 1880-1999 at 1986. RP 10/9/2013 at 1066:5 – 1067:24.

⁶⁸ CP 1847-1479 at 1874.

⁶⁹ Brief of Respondent at 19-22.

⁷⁰ CP 2032-2057; CP 2079-2113.

⁷¹ Brief of Respondent at 21.

⁷² *Mut. of Enumclaw Ins. Co. v. Cox*, 110 Wn.2d 643, 757 P.2d 499 (1988).

that a finding of misrepresentation should preclude the jury from awarding damages for bad faith and under the CPA – just as Pacific consistently argued that *denial* of coverage or benefits was a prerequisite to an IFCA claim. In *Cox*, the trial court granted judgment for the insurer on the extracontractual claims, notwithstanding the verdict – just as the trial court *should* have done here. In *Cox*, the Supreme Court affirmed, holding that the insurer had apprised the trial court of its position before the jury returned its verdict, and that the trial court had properly corrected the error.⁷³

Here, Pacific consistently told the court, in pretrial briefing and in open court during its review of the jury instructions, that there could be no IFCA violation unless the jury found that Pacific had denied coverage or payment of benefits for a covered claim that were due to NBL under the policy.⁷⁴ The trial court agreed with Pacific and the jury was so instructed. Just as the jurors' finding of fraud in *Cox* rendered their subsequent award of extracontractual damages erroneous, here the jurors' finding that Pacific performed the insurance contract and that no code upgrades were required precluded a subsequent finding that Pacific violated IFCA, and rendered their award of damages under IFCA erroneous, as a matter of law.

NBL also argues that under *Wickswat*,⁷⁵ Pacific forfeited the right to object to the jury's IFCA award because it did not object and ask the court to insert a direction to "stop" in the verdict form. In fact, *Wickswat* is precisely

⁷³ *Cox*, 110 Wn.2d at 651-652.

⁷⁴ See footnote 67, above.

⁷⁵ *Wickswat v. Safeco Ins. Co.*, 78 Wn.App. 958, 904 P.2d 767 (1996).

to the contrary. In that case, the insurer denied the insured's property damage claim after a theft loss. The insured sued for breach of contract, bad faith and violation of the CPA. The insurer asserted breach of the void for fraud clause as an affirmative defense. The verdict form first asked whether the insured had misrepresented his claim and instructed the jury not to consider the insured's affirmative claims if it answered "yes." The jury found a misrepresentation and did not consider any of the insured's claims. The insured appealed. His "primary contention on appeal [was] that the trial court erred by giving the jury a legally deficient verdict form."⁷⁶ However, the insured had not proposed a proper verdict form of his own below, and the record "reveal[ed] virtually no discussion about the special verdict form."⁷⁷ Nevertheless, this Court considered the insured's appeal on the merits, because the record did indicate the question whether a finding of fraud would preclude the insured's recovery had been discussed with the trial judge at some point before the case went to the jury.⁷⁸

Here, Pacific argued that NBL must prove that Pacific improperly denied insurance coverage or payment of insurance benefits – in its pretrial briefing, proposed instructions and in argument on the record concerning the court's instructions. The trial court adopted Pacific's position and instructed the jury accordingly. Neither NBL nor the court could have been caught by surprise when Pacific sought judgment notwithstanding the verdict on the

⁷⁶ *Id.*, 78 Wn.App. at 966.

⁷⁷ *Id.*, 78 Wn.App. at 968.

⁷⁸ *Id.*, 78 Wn.App. at 968-969.

IFCA claim, when the jury verdict, on its face, was contrary to the jury's fact finding and the law properly stated in the court's instructions.

3. ***Pacific's proposed Cox instruction was a proper statement of the law, and without that instruction, NBL was able to argue – and still improperly argues – that Pacific committed bad faith and violated IFCA by asserting the void for fraud defense at trial.***

NBL makes the novel argument that the *Cox* rule only applies when an insurer successfully proves fraud. NBL candidly states its position: “the jury was entitled to find that Chubb acted ‘unreasonably’ when it belatedly attempted to deny NBL’s claim on the basis of a contrived and groundless accusation of fraud.”⁷⁹ NBL’s own argument shows why the jury should have been properly instructed on the law established in *Cox*; and why the trial court’s failure to instruct the jury taints the jury’s award of damages under IFCA (as well as the tort of bad faith) and constitutes reversible error.

The assertion of a defense that is supported by ample case law and substantial evidence – for the first time, in the course of litigation, years after the insurer has completed the adjustment of a claim and properly paid the claim in full – is neither a tort nor a violation of IFCA. Yet NBL openly admits that it urged the jury to award bad faith and IFCA damages because of Pacific’s allegedly wrongful assertion of its *Cox* defense, and admits the proposed *Cox* instruction would have “thwart[ed] the jury” from doing so.

⁷⁹ Brief of Respondent at 24; *see also, id.* at 26 (Pacific’s proposed instruction attempted to “thwart the jury from considering whether it acted in bad faith when it accused NBL of fraud”).

The proposed instruction was indeed an attempt to “thwart the jury” from deciding the case on grounds directly contrary to the law as stated in *Cox*. Because the jury was not properly instructed, the jury awarded NBL \$768,000 for NBL’s bad faith claim and \$200,000 for violation of IFCA – for supposedly wrongful “litigation tactics,” committed after NBL’s claim was paid in full and after NBL sued Pacific despite that payment. The trial court then awarded NBL over \$250,000 in attorney fees and costs under IFCA. In short, by NBL’s own admission, it is likely NBL has been awarded over \$1 million in damages and attorney fees – imposed by the jury as a sanction for Pacific’ assertion of an allegedly “contrived and groundless” affirmative defense.

That outcome is precisely what Pacific sought to avoid, both with its proposed *Cox* instruction and its objection to testimony and argument concerning the legal implications of a finding of misrepresentation. NBL urged the jury to punish Pacific for asserting a defense under the void for fraud clause, particularly because the jury learned that defense also could have required NBL to pay Pacific the money it had already disbursed to NBL for the claim.⁸⁰

⁸⁰ This was not only irrelevant to the jury’s fact-finding function, it was not completely accurate. Pacific asserted the void for fraud provision of the policy as an affirmative defense. It did not assert a counterclaim for affirmative relief seeking to recover the insurance payments it had previously made to NBL for the *bona fide* damages resulting from the June 2005 collapse. CP 255-270; CP 1334-1335. Nor did Pacific ask the jury for an affirmative monetary award.

This was not merely a question of “waiver” of the defense, as NBL also attempts to argue.⁸¹ The holding in the *Cox* case is broad and unequivocal: “we hold that [the insurer] had *no affirmative duty* to inform [the insured] that it believed he had committed fraud...”⁸² NBL’s claim is that Pacific did, indeed, have an affirmative duty to inform NBL, and that it breached that duty by “belatedly attempting to deny NBL’s claim.” The court declined to tell the jury what the law required Pacific to do, and Pacific’s counsel was not free to supplement the court’s instructions during closing argument – as NBL suggests.⁸³ The court instructs the jury on the law, not counsel.⁸⁴

NBL’s attempt to align our case with *Kallevig*⁸⁵ merely demonstrates why it was so important to instruct the jury under *Cox*. The insurer in *Kallevig* issued an outright denial of the insured’s fire loss claim, asserting the insured had intentionally set the fire. The insurer then filed an affirmative declaratory judgment action, which required the insured to incur the cost of litigation to obtain insurance coverage. The insured counterclaimed for breach of contract and violation of the CPA. The jury found that the fire was not intentionally set, that the claim was covered, and that the insurer had

⁸¹ Brief of Respondent at 26-29.

⁸² *Cox*, 110 Wn.2d at 650.

⁸³ Brief of Respondent at 29-32.

⁸⁴ See, *Fuentes v. Port of Seattle*, 119 Wn. App. 864, 868, 82 P.3d 1175 (2003) (existence of legal duty a question for the court); see also, *State v. Mak*, 105 Wn.2d 692, 726, 718 P.2d 407, cert. denied, 107 S. Ct. 599 (1986) and *State v. Davenport*, 100 Wn.2d 757, 760-61, 675 P.2d 1213 (1984) (both holding that counsel’s statements to the jury on the law must be confined to the law set forth in the court’s instructions).

⁸⁵ *Indus. Indem. Co. v. Kallevig*, 114 Wn.2d 907, 792 P.2d 520 (1990); Brief of Respondent at 29.

violated fair claims handling regulations, and thus violated the CPA, in refusing to pay the claim without performing a reasonable investigation.⁸⁶

Here, Pacific did not deny NBL's claim. NBL was not required to bring suit to obtain the full benefit of the insurance contract – it already had obtained the full benefit in January 2009. Pacific's affirmative defense was not discovered during the pre-suit adjustment and payment of the claim and did not stand in the way of Pacific's full payment to NBL.⁸⁷ Pacific's void for fraud defense was in the nature of an equitable defense of "unclean hands" – a claim that if NBL did not act fairly and honestly in presenting its claim to Pacific, NBL should not be permitted to pursue remedies based on Pacific's allegedly unfair handling of the claim. It was not a denial of coverage; and on this record, no one could say the defense was raised without a sound factual and legal basis.

Absent a legal instruction from the trial court to the contrary, NBL was free to argue to the jury that Pacific had committed a tort, and violated the CPA and IFCA, by making a "belated" and "groundless accusation" against NBL in the lawsuit. That was precisely what NBL admits it told the jury, and precisely why the jury awarded NBL nearly \$1 million in bad faith and IFCA damages.⁸⁸

⁸⁶ *Kallevig*, 114 Wn.2d at 915-917.

⁸⁷ CP 1443-1454.

⁸⁸ Brief of Respondent at 24 ("the jury was entitled to find that Chubb acted 'unreasonably' when it belatedly attempted to deny NBL's claim on the basis of a contrived and groundless accusation of fraud").

The trial court's refusal to advise the jury of the controlling law was outcome determinative, reversible error.

4. Evidence concerning the "legal implications" of a finding that NBL misrepresented its claim was irrelevant and prejudicial; and Pacific consistently objected to such evidence and preserved its objection for appeal.

To make matters worse, the trial court permitted the jury to consider testimony that NBL would be forced to repay Pacific if it found that NBL intentionally misrepresented its commercial kitchen claim.

NBL first claims that Pacific "waived objection" and failed to preserve its right to appeal the trial court's error – an incredible claim indeed, given the many times Pacific raised this objection and asked for relief before, during and after the trial.⁸⁹ Pacific brought a motion for mistrial on the issue, at which time the trial court observed this issue remained on the table and would be addressed.⁹⁰ The court later opined that the evidence was relevant and admissible – hardly an agreement by the court to give the jury a "limiting instruction" not to consider the testimony.⁹¹ Furthermore, once the jury knew – or thought it knew – that finding a misrepresentation was tantamount to awarding a money judgment to Pacific, that was a bell that could not be unrung with a limiting instruction.

⁸⁹ In its effort to show that Pacific "waived" this assignment of error, NBL has even invited the Court to rewrite the Report of Proceedings to put words in the mouth of Pacific's counsel that are attributed to NBL's own lawyers in the reporter's transcript. Brief of Respondent at 35, n. 6. The Court should decline NBL's invitation. If NBL wished to correct the record, the Rules provided a mechanism for doing so. RAP 9.9, 9.10, 9.13. NBL cannot change the record by *fiat* to manufacture a "waiver" of Pacific's rights on appeal.

⁹⁰ RP 10/9/13 at 871:13-874:8

⁹¹ RP 10/10/13 at 1203:25 – 1205:15.

Finally, what the jury believed it knew and what had been joined in the pleadings were two different things. In fact, Pacific did not assert an affirmative counterclaim to recover funds previously paid on NBL's collapse claim.⁹² Pacific could have chosen to seek that relief from the bench in a separate proceeding, or not. On this record, the testimony about Pacific's possible right to obtain recovery of prior insurance payments also may have led jurors to believe that NBL could be required to repay Pacific for NBL's fire claim as well as its collapse claim – more than \$5 million.

In short, the admission of this evidence essentially asked the jury to adjudicate a claim that was not in the case – whether NBL should be required to repay Pacific, possibly over \$750,000, possibly over \$5 million. This served as a potent adjunct to NBL's argument that the jury should award damages because Pacific “unreasonably denied coverage” by “belatedly asserting a contrived and groundless accusation of fraud,” which Yates told the jury was a “baseless tactic to exert leverage over NBL.”⁹³

The trial court's rationale for permitting the jury to consider testimony concerning Pacific's supposed claim for repayment also did not add up. NBL concedes that it was unaware of the void for fraud provisions of

⁹² NBL's brief at 37, n.8, points to the jury instructions in *Delvo v. St. Paul Travelers Ins. Co.*, 2007 WL 2601030 (E.D.Wash., Sept. 10, 2007), which told the jury the insurer was seeking to recover a specific amount of money from the insured as a result of a misrepresentation. However, the insurer in *Delvo* “counterclaimed against [the insured] to recover the \$ 453,136.16 it had paid... under the policy” and asked to take that counterclaim to the jury. That did not happen here; and what amount NBL would have to repay Pacific – if any – was not a question Pacific had asked the judge or the jury to decide.

⁹³ Brief of Respondent at 16, citing RP 10/02/13 at 174.

the policy or the implications of the *Cox* case until July 2013.⁹⁴ The misrepresentations at issue were made in January 2009 and thereafter. The trial court reasoned, as NBL does in response to Pacific’s appeal, that NBL’s financial risk was relevant because NBL might have walked away from this lawsuit if it perceived a risk Pacific’s defense might prevail.⁹⁵ But Pacific’s rights under *Cox* would not terminate if NBL abandoned its contract and extracontractual claims in this lawsuit. The issue properly before the jury was what damage was actually done at the Metropole, what NBL knew and what NBL told Pacific – *before* Pacific asserted the void for fraud defense.

The trial court’s error merely aided NBL in its improper effort to turn the jury into a judge of “litigation tactics,” rather than the finder of fact as to the relevant damage at the Metropole, NBL’s presentation of its insurance claim and Pacific’s adjustment of that claim.

5. *The trial court erroneously awarded attorney fees and costs to NBL under IFCA and Olympic Steamship; and NBL should not be awarded fees on appeal.*

a. *Olympic Steamship does not apply because Pacific did not deny coverage and did not compel NBL to commence or pursue litigation to obtain the full benefit of its insurance policy.*

NBL acknowledges our Supreme Court’s stated rationale for an award of attorney fees under the *Olympic Steamship* doctrine – and then ignores that rationale entirely. As NBL states, *Olympic Steamship* permits an award of

⁹⁴ Brief of Respondent at 38.

⁹⁵ See n. 91, above.

attorney fees “where the insurer compels the insured to assume the burden of legal action to obtain the full benefit of his insurance contract.”⁹⁶

That is not what happened here. NBL obtained “the full benefit of the insurance contract” before NBL filed this lawsuit, and it obtained nothing more under the insurance contract at the conclusion of trial. This was not a case in which the insurer denied coverage and required the insured to file suit, or to respond to an insurer’s affirmative declaratory judgment action in order to obtain coverage. It was always a valuation dispute – and a valuation dispute does not entitle a prevailing insured to recover attorney fees and costs under *Olympic Steamship. Dayton v. Farmers Ins. Group* made that clear long ago.⁹⁷ NBL filed this action to obtain millions of additional dollars in insurance payments for a loss Pacific accepted as a covered claim and paid years earlier. NBL did not prevail on its claim; and *Olympic Steamship* would not apply – even if NBL had prevailed on its claim for additional payment.

The most that can be said in NBL’s favor is that it prevailed, on interlocutory review, in obtaining a ruling that the valuation of the loss should be performed under the 2003 SBC rather than the 2006 SBC. But that was a moot point, because the valuation of NBL’s claim was no more favorable to NBL under the 2003 SBC than it was under the 2006 SBC. NBL simply did not prevail on its code upgrade claim, whether characterized as a

⁹⁶ Brief of Respondent at 44-45, quoting *Olympic S.S. Co. v. Centennial Ins. Co.*, 117 Wn.2d 37, 54 811 P.2d 673 (1991).

⁹⁷ 124 Wn.2d 277, 280, 816 P.2d 896 (1994).

“coverage dispute” or a “valuation dispute.” Under either characterization, the trial court erred in awarding fees under the *Olympic Steamship* doctrine.

For the same reason, NBL is not entitled to fees under *Olympic Steamship* on appeal, because even if it “prevails” on appeal, it will not have succeeded in obtaining any insurance coverage or insurance payments it did not already receive before this lawsuit began, many years ago. Even if this Court denies Pacific all requested relief and grants NBL’s cross-appeal, NBL will have gained nothing more than another try at proving the *valuation* of its code upgrade claim. Thus far, *Pacific* has never denied coverage and it has prevailed on the valuation issue – yet Pacific has been forced to spend many hundreds of thousands of dollars to prove that it was right all along. Pacific should not also be required to pay the fees that NBL incurred because it would not accept Pacific’s reasonable valuation of its claim and chose, instead, to pursue years of futile litigation to prove and lose a point.

b. The trial court erred in awarding attorney fees and costs under IFCA, because to establish a right to such an award, IFCA required NBL to prove that NBL denied coverage or payment of benefits – and NBL failed to do so.

Pacific has already shown that IFCA required NBL to prove that Pacific denied insurance coverage or payment of insurance benefits as an essential element of an IFCA violation – and that NBL failed to do so.

Under IFCA, the trial court awarded NBL attorney fees and costs incurred in its interlocutory appeal on the “2003 SBC or 2006 SBC” question. But that question did not address a denial of coverage or payment of benefits

– Pacific accepted coverage and paid the claim in full before NBL commenced litigation. The choice between the two versions of the SBC was a moot question all along.

NBL argues that Pacific “denied coverage” by asserting its affirmative defense in July 2013 – but the trial court awarded fees that NBL incurred more than two years earlier, and those fees were incurred litigating a completely unrelated issue – whether the 2003 SBC or 2006 SBC should be used for the valuation of NBL’s claim, not whether NBL had unclean hands because it breached the void for fraud provision of the policy and was therefore barred from obtaining extracontractual remedies against Pacific. NBL attempts and fails to bridge that logical disconnect with this conclusory assertion:

[T]his Court’s ruling that Chubb should have applied the 2003 SBC was one of the predicates of NBL’s IFCA claim and a key reason why the jury found Chubb’s 2009 denial to be “unreasonable.” Plainly, the fees NBL incurred on appeal were necessary – integral – to NBL ultimately prevailing at trial.⁹⁸

Rather than attempt to apply NBL’s illogic, the Court should follow a straightforward, logical course. NBL failed to prove that Pacific denied any coverage or failed to pay any money NBL was entitled to receive under its insurance policy. NBL therefore failed to prove an IFCA violation, and it therefore is not entitled to IFCA damages, or an award of fees as a prevailing party under IFCA.

⁹⁸ Brief of Respondent at 44, n.10.

There are two fundamental rules that apply to the award of attorney fees and costs: (1) the party claiming fees must *prevail*; and (2) even if the party prevails, it cannot recover fees and costs incurred in wasted and futile endeavors.⁹⁹ It would be difficult to imagine a more wasted and futile endeavor than NBL's fruitless five-year crusade to prove that Pacific was required to pay for millions of dollars in code upgrades, as a result of a 60-square foot flooring collapse, in a corner of the basement of the 23,500 square foot, three-story Metropole Building, after the City had already issued a permit for structural repairs that did not require any code upgrades at all. NBL tried and failed. It cannot be declared the winner and awarded fees and costs.

Unfortunately, Pacific has no means to recover the substantial attorney fees and costs it was forced to incur to respond to NBL's claims and to prove it was right all along. Surely Pacific should not be required to pay the fees and costs that NBL incurred *failing* to prove that Pacific was wrong – not in the trial court and not on appeal.

⁹⁹ See, e.g., *Chuong Van Pham v. Seattle City Light*, 159 Wn.2d 527, 538, 151 P.3d 976 (2007) ("The court should discount hours spent on unsuccessful claims, duplicated or wasted effort, or otherwise unproductive time," citing *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 597, 675 P.2d 193 (1983)).

ARGUMENT IN OPPOSITION TO NBL'S CROSS-APPEAL

- I. The City concluded that structural repairs to the basement and the first floor above the collapse area did not constitute a “substantial alteration” to trigger code upgrades under the 2003 SBC; and the trial court properly declined to ask the jury to second-guess the City’s application of the SBC to collapse-related structural repairs.***

NBL’s cross-appeal addresses a single assignment of error: the trial court’s allegedly erroneous decision not to ask the jury to decide whether the basement collapse repairs would constitute a “substantial alteration” within the meaning of the 2003 SBC.

The trial court properly declined to send the “substantial alteration” question to the jury. Unlike the “60% trigger” for code upgrades under the 2003 and 2006 versions of the SBC -- an objective criterion capable of reasonably precise calculation based on building value and the cost of repairs -- the substantial alteration criterion gives the City of Seattle DPD discretion to require limited code upgrades, even when the 60% threshold is not met. When it issued a permit for collapse-related structural repairs in 2007, the City found such repairs would not be treated as a substantial alteration. The court correctly declined NBL’s proposal to ask the jury to contradict the City’s binding, discretionary administrative determination that the collapse-related structural work was not a “substantial alteration” and did not trigger code upgrades under the 2003 SBC.

The City never decided to treat collapse repairs at the Metropole as a “substantial alteration” under the 2003 SBC. When the 2003 SBC was still in force, NBL applied a permit to perform “*structural repair to sinking/collapsed floors, basement and first floor levels*” at the Metropole. The City reviewed the application and concluded it did not call for “substantial alteration” of the building and did not require code upgrades.¹⁰⁰

When NBL submitted an application to obtain a permit for combined fire and collapse repairs in 2008, the City did not need to consider whether the substantial alteration criterion would apply to repairs related to the collapse, because the repairs required as a result of the fire were so extensive, there was no doubt the fire repairs alone would constitute a “substantial alteration,” and would require extensive code upgrade work under the 60% trigger as well. While NBL argues that the collapse repairs the City considered for the original 2007 permit were merely “temporary, emergency repairs,” the 2007 permit was for completion of \$300,000 worth of structural repairs to the basement and added support for the floor above it. The City said no substantial alteration and no code upgrades required. The trial court could not ask the jury to overrule the City.

¹⁰⁰ Ex. 17. NBL asserts that “every witness agreed” the 2007 permit “did not include all the work necessary to repair the basement.” Not true. For example, Richard Dethlefs reviewed the 2007 permit and relevant design specifications and drawings, and called the structural repairs included in the permit application “comprehensive.” Dethlefs said “they addressed not only the area of the collapse, but all of the other old wood decay... plus they strengthen the floor above, which is completely unrelated to the collapse... No, these were not temporary repairs... Those are 100 percent repairs.” RP 10/10/13 at 1109:1-24 and 1111:1-13; Ex. 226. Dethlefs also testified that Pacific later agreed to pay substantial additional repair costs that were not causally related to the collapse, apparently as an accommodation to its insured. RP 10/10/13 at 1144:4-1145:18 and 1156:10-1157:10.

NBL further argues that the 2007 permit did not dispose of the question whether “structural repairs” under the 2008 permit constituted a “substantial alteration” because the scope of structural repairs had been expanded in the later permit application. But the record reflects that at the end of the day, even the expanded scope of repairs Pacific agreed to fund in January 2009, for a total of about \$750,000, included only \$88,816 in new money for temporary shoring and permanent structural support work for the first floor.¹⁰¹ About \$300,000 worth of similar work had already been included in the 2007 permit – and Pacific had already paid for it. The City never decided this marginal increase in the cost of structural repairs changed the “no substantial alteration” decision it had already made concerning the basement repair. The City had no reason to revisit that decision when it was considering the nearly \$8 million renovation NBL presented in its 2008 permit application, when the basement collapse repair work was a tiny fraction of a massive job that unquestionably would require upgrading the entire Metropole to meet modern building code requirements.

Unable to show that the City ever decided the collapse repairs were a substantial alteration under the 2003 SBC, NBL points to the testimony of Cornell Burt, who is one of many City employees involved in reviewing building permit applications. Burt broadly stated that the City would treat anything but “very minor repairs” as “substantial alteration,” and according

¹⁰¹ Ex. 64 at YA-005335 (line items for ground floor framing and “Work at Simba’s Floor Structure” totaling \$88,816).

to NBL, he “testified unequivocally that the work necessary to repair the Metropole basement collapse cleared that threshold.”¹⁰²

Not true. Instead, Burt’s testimony established that he had never been asked, in his official capacity, to consider whether the proposed collapse repairs should be treated as a substantial alteration under the 2003 SBC.¹⁰³ When shown photos of the Metropole basement after substantial demolition work had been done, Burt stated that he thought it appeared “expensive.”¹⁰⁴ But when asked whether he was familiar with any of the details concerning the collapse damage or the scope of work required to repair it, Burt admitted he was not.¹⁰⁵ Furthermore, Burt did not review and approve the 2007 permit application; and when Burt became involved in reviewing the 2008 permit application, he had no reason to consider whether the basement repairs proposed in that application constituted a “substantial alteration” – the extensive fire repairs unquestionably met that criterion anyway.¹⁰⁶

While Burt never considered whether the structural repairs proposed to respond to the collapse damage would constitute a substantial alteration under the 2003 Code, other authorized representatives of the City did consider that precise question, with specific reference to structural repairs to the basement *and* the flooring system above the basement collapse area that would cost about \$300,000 – a fact we know because NBL had a bid for the

¹⁰² Brief of Respondent at 48.

¹⁰³ RP 10/3/13 at 408:25 – 410:2.

¹⁰⁴ RP 10/3/13 at 397:18 – 398:24.

¹⁰⁵ RP 10/3/13 at 408:25 – 410:2; 411:25 – 412:13.

¹⁰⁶ *Id.*; Ex. 21.

work and Pacific paid for it.¹⁰⁷ The City concluded structural repairs to the collapse area and the ground floor *did not constitute “substantial alteration” of the building.*¹⁰⁸

The City never reached any other conclusion. NBL could have performed structural work under the permit issued in 2007 – and it never did. Instead, it wrapped the same repairs into a permit, subject to the 2006 SBC, that covered millions of dollars of work required by the fire and completely unrelated to the structural issue in the basement. That sleight of hand did not change the fact that the structural work directly related to the collapse – and already evaluated by the City under the 2003 SBC – had already been the subject of a building permit issued without any code upgrade requirements.

The City’s own formal determination that these structural repairs did not constitute a “substantial alteration” directly contradicted Burt’s testimony. Burt’s statement was made without reference to any specific damage or scope of repair, and his broad brush testimony that the City would treat all but “very minor repairs” as “substantial alteration” was contrary to the 2007 permit the City issued, after careful review of the structural repairs NBL submitted for approval after the collapse.¹⁰⁹ The record demonstrated that what Burt said, and what the City actually did in this case, are two

¹⁰⁷ Ex. 13.

¹⁰⁸ Ex.17.

¹⁰⁹ Compare RP 10/3/13 at 396 (Burt states that under the SBC anything more significant than a “very, very minor repair” would be a substantial alteration) with Ex. 17 (City issues permit for \$300,000 in structural repairs to basement and floor above it and formally determines “no substantial alteration” requiring code upgrades under 2003 SBC).

completely different matters. Furthermore, Burt's personal opinion directly contradicted official City guidance – and it had no evidentiary value whatsoever.

Exhibit 146 is a City guidance document, in which the City advises building permit applicants of its interpretation and application of the “substantial alteration” criterion under the SBC. That document makes two points abundantly clear. First, the City makes the substantial alteration determination only after internal review of the specifics about a particular scope of work at a particular building, not in broad strokes after viewing a photograph of a portion of a building, as NBL asked Burt to do on the stand:

In many cases it will be difficult to determine whether or not a project is substantial and a presubmittal meeting is advised so DPD can gather the information it needs to make a determination.¹¹⁰

Furthermore, the City's own official guidance to applicants about the “substantial alteration” criterion defeats Burt's statement – a purported interpretation of the SBC that the City has never authorized him to disseminate on its behalf -- that “anything beyond very minor repairs” would automatically be treated as a “substantial alteration” requiring code upgrades.¹¹¹ The City's guidance document states:

¹¹⁰ Ex. 146. The City made that “difficult determination” here – *in the 2007 permit*.

¹¹¹ Compare RP 10/3/13 at 396 (Burt states that anything more significant than a leaking roof or “a series of broken windows” would be a substantial alteration); Ex. 146 (City's official guidance document, stating that repair of rotted roof beams would not be a substantial alteration); and Ex. 17 (City's permit, issued under 2003 SBC, concluding that \$300,000 structural repair in basement and on ground floor above collapse area is not a substantial alteration of the Metropole Building).

A building which suffers severe damage in a [sic] earthquake or fire is likely to require extensive structural repair and therefore would trigger the requirements for a substantial alteration. Typical projects which would not be considered extensive include replacement of an exterior stair *or repair/replacement of water damaged beams in a roof structure.*¹¹²

To sum up, the City specifically determined that structural repairs, to the basement collapse area *and* to the floor above it, did not constitute a substantial alteration. The City issued a permit in 2007, applying the 2003 SBC, which found that \$300,000 in collapse-related structural repairs in the basement and the floor above it, did not require any code upgrades. NBL could have performed the repairs under that permit at any time, but it did not. Instead, NBL let that permit lapse and wrapped the previously approved repairs into a second permit, issued under the 2006 SBC, that included millions of dollars' worth of fire repairs and that unquestionably required code upgrades without regard to the basement repair work.

Even accepting NBL's dubious claim that the 60-square foot basement collapse incident affected the floor above, and its 2008/2009 proposal for an expanded scope of structural support work as prepared and priced by NBL's own construction contractor, the new structural work added only \$88,618 to the total -- just over 10% of the \$750,000 or so that Pacific

¹¹² Ex. 146 (emphasis added). The City's official disposition of NBL's 2007 permit application for repair of structural elements in the basement and on the floor above is entirely consistent with the City's guidance document; and directly contradicts Burt's purported interpretation of the term "substantial alteration" as used in the SBC.

paid to repair the collapse damage in full, including all structural and finish work and about \$100,000 of kitchen equipment.¹¹³

The City's 2007 permit for collapse-related structural repairs, and its determination that structural repairs would not be treated as a substantial alteration, was a conclusive decision by the agency empowered to interpret and apply the SBC, subject only to limited judicial review. NBL's proposed instruction and verdict form were improper because they would have asked the jury to contradict the City's binding administrative determination that collapse-related structural work – including work to support the floor above the basement -- was not a "substantial alteration" and did not trigger code upgrades under the SBC.

2. ***The interpretation and application of the SBC was a proper question for the administrative agency charged with enforcing the SBC, or for the trial judge, but not a question for the jury.***

There was a more basic reason why NBL's substantial alteration instruction and special interrogatory never should have been sent to the jury. As Pacific argued throughout the proceedings below, the interpretation and application of the SBC was never a proper question for the jury in the first place.¹¹⁴

¹¹³ Ex. 64. This amount was also on the order of 1% of the vast \$8 million renovation NBL wanted Pacific to fund as part of the collapse claim.

¹¹⁴ The trial court considered whether the code upgrade questions should be presented to the bench in a bifurcated proceeding, before a jury trial of NBL's claims, but rejected that idea for scheduling and case management reasons. RP 10/1/13 at 67:15 – 81:9. The trial court may have erred by sending the question to the jury under the "60% trigger," but as the outcome favored Pacific, it has no reason to assign error on that basis. Nor has NBL assigned

Pacific argued below that the question whether upgrades are required under the SBC is first a question for the City's code enforcement agency, the DPD, subject to limited review by the Court without a jury, and should not be part of the fact-finding function of the jury.¹¹⁵ Pacific's argument was based on settled law.

Our Supreme Court long ago held, in *Ball v. Smith*,¹¹⁶ that the interpretation and application of a City ordinance like the SBC is a question of law for the Court, not a question for the jury at all:

It is the established and unquestioned rule that it is in the province of the court, and not the jury, to interpret a statute or ordinance and to determine whether it applies to the conduct of a party.¹¹⁷

The issue in *Ball v. Smith* was the interpretation and application of the Seattle Electrical Code which, like the Seattle Building Code, was adopted as a City ordinance. A City employee offered testimony in which he purported to interpret the Code -- like Burt's sweeping generalization that anything beyond a "very minor repair" would constitute a "substantial alteration" under the 2003 SBC. The Supreme Court held such testimony should be given no

error to the jury verdict on the code upgrade issues it did decide, and NBL could not do so, because NBL insisted those issues were for the jury. *Id.*

¹¹⁵ CP 1598-1607; 1827-1832. This is why the insurance policy only requires Pacific to pay for code upgrade work that is actually required by the building department and completed by the insured. In the typical case, the insured will obtain a permit, which will reflect the code upgrades the issuing agency requires, if any, promptly perform the work, and then obtain final payment. *Id.*

¹¹⁶ 87 Wn.2d 717; 556 P.2d 936 (1976).

¹¹⁷ *Ball v. Smith*, 87 Wn.2d at 722 (citations omitted); see also *Tukwila Sch. Dist. No. 406 v. City of Tukwila*, 140 Wn. App. 735, 743, 167 P.3d 1167 (2007) ("The interpretation of statutes and municipal ordinances is a question of law.")

weight, but that official action taken by the City in the interpretation and application of an ordinance should control:

The ordinance involved here provides that it shall be interpreted by the building superintendent, from whose decisions appeals can be taken to the Board of Appeals. The appellant did not offer to show how these persons had interpreted the ordinance in practice, but offered only the personal opinion of one employee as to its meaning. It is true that the inspector is authorized to give information to contractors, owners, or users about the meaning of the code but he is not authorized to interpret it. *Thus the testimony of this witness would have been of no substantial value to the court had the code been offered and instructions requested, and had the testimony been offered for the legitimate purpose of aiding the court in its interpretation of the ordinance.*¹¹⁸

Under *Ball v. Smith*, the interpretation of the 2003 SBC and its application to collapse repairs was a question for the City, subject to limited judicial review by a trial court -- not a jury question at all. The trial court acknowledged as much.¹¹⁹ Furthermore, *Ball v. Smith* provides that “the personal opinion of one employee as to [the] meaning” of the SBC – like the testimony of Cornell Burt – had “no substantial value to the court” in this case. Instead, under *Ball v. Smith*, the only relevant evidence was how the City “interpreted the 2003 SBC in practice.” And, the only direct evidence of the City’s interpretation and application of the 2003 SBC in practice consisted of (1) the City’s own guidance document, Ex. 146; and more importantly, (2) the 2007 building permit the City issued for \$300,000 worth of structural repairs to the Metropole basement and the floor directly above it.

¹¹⁸ *Ball v. Smith*, 87 Wn.2d at 724 (emphasis added).

¹¹⁹ RP 10/1/13 at 62:3 -17; 67:5 – 19.

The 2007 permit, which unequivocally stated those repairs were not a “substantial alteration” under the 2003 SBC, was the only direct evidence of the City’s interpretation and application of the 2003 SBC to NBL’s proposed collapse repairs.

In short, the substantial alteration question was for the court, not the jury. Even if it had been a jury question, there was no probative evidence for the jury to consider, other than the City’s official determination that structural repairs in the collapse area of the Metropole basement – including additional work to support the floor above the collapse area -- were *not* “a substantial alteration” under the 2003 SBC and did not require any code upgrades.

CONCLUSION

For the reasons set forth above, the Court should order entry of judgment for Pacific on NBL’s IFCA claim; or, in the alternative, should order a new trial on that claim. Pacific also asks the Court to order a new trial on the NBL bad faith claim and Pacific’s void for fraud defense. Finally, NBL’s cross-appeal has no merit and should be denied, because the City determined that structural repairs in the Metropole basement and first floor to respond to the June 2005 collapse did not constitute a substantial alteration under the 2003 SBC. The trial court properly declined to ask the jury to revisit that question.

DATED and respectfully submitted this 8th day of December, 2014.

/s/John D. Wilson, Jr. & /s/David M. Jacobi

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No. 71214-4-I

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

NO BOUNDARIES, LTD., a Washington corporation, and NBL II,
LLC, a Washington limited liability company,

Respondents/Cross-Appellants

v.

PACIFIC INDEMNITY COMPANY (a member of the CHUBB GROUP
OF INSURANCE COMPANIES), an insurer authorized by the
Washington Insurance Commissioner,

Appellant/Cross-Respondent

CERTIFICATE OF SERVICE

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CERTIFICATE OF SERVICE BY LEGAL MESSENGER

I, Natasha Johnston, certify that I caused to be served a copy of the Pacific Indemnity Company's Reply Brief Of Appellant/Cross Respondent via Legal Messenger, on the 8th day of December, 2014, to the following counsel of record at the following address:

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