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No. 71424-4-I

COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

CHERYL STREMKE, a single person; TYE PANZONE and
JAMI PANZONE, husband and wife; and UNITRIN, INC.,
dba UNITRIN AUTO AND HOME INSURANCE
COMPANY, dba KEMPER, a foreign corporation,
Plaintiffs/Respondents,

v.

FISHER & PAYKEL APPLIANCES, INC.,
Defendant/Appellant,

and

LOWE'S HIW, INC., a Washington corporation,
Defendant.

COURT OF APPEALS DIV I
STATE OF WASHINGTON
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I. INTRODUCTION

This brief responds to Appellant's opening appeal brief. Respondents have elected to not pursue their cross-appeal. To the extent a formal motion is required, Respondents hereby move to withdraw review of their cross-appeal. RAP 18.2 (describing procedure for voluntary withdrawal of review).

II. ASSIGNMENTS OF ERROR

F & P raises these assignments of error: (1) the trial court erred by refusing F & P's requested jury instruction regarding alleged spoliation; (2) the trial court erred by denying F & P's motion for judgment as a matter of law against Plaintiffs' Consumer Protection Act ("CPA") claim; (3) the trial court erred by awarding attorney fees to Plaintiffs under the CPA; (4) the trial court erred in determining the amount of the attorney fee award; (5) the trial court erred by denying F & P's motion for judgment as a matter of law against Plaintiffs' claim for damages for destroyed personal property; (6) the verdict for destroyed personal property is not supported by substantial evidence; (7) the trial court improperly excluded testimony from

F & P's proposed damages expert witness Steven Larkin;
(8) the trial court's jury instruction concerning the measure of damages for damage to improvements to real property was legally erroneous; (9) the trial court erred by refusing to give F & P's proposed instruction regarding the measure of damages for damage to improvements to real property.

III. STATEMENT OF THE CASE

A. **F & P has presented a closing argument instead of a statement of facts.**

F & P's statement of facts is improper and unacceptable in several ways:

Rearguing irrelevant issues of fact. F & P's statement of facts belabors factual issues that the jury resolved against it and which are no longer in dispute. For example, F & P presents a protracted discussion of the evidence supporting its theory about whether the dryer caused the fire. But the jury resolved that issue against F & P, and no issue on appeal challenges the jury's finding.

Presenting the facts in the light most favorable to F & P. Because Plaintiffs prevailed at trial, on most issues they are entitled to have the facts viewed in the light most

favorable to them. F & P neither acknowledges nor complies with this standard of review, instead presenting the facts in the light most favorable to it. For example, F & P states that the evidence conclusively established that “the dryer could not possibly have been producing heat at the time of the fire.” (Appellant’s Brief at 11.) But F & P knows that the parties vigorously disputed whether the dryer’s heating elements were functioning at the time of the fire, and that issue was resolved against it.

Omitting material facts. F & P’s statement of facts contains astounding omissions. For example, despite dwelling on the fire’s cause and origin, F & P never mentions that the investigating governmental authority determined that the fire started in F & P’s dryer.

Misrepresenting the evidence. F & P asserts that Plaintiffs’ case was so weak that their evidence of the fire’s cause and origin consisted of nothing more than some charred dryer parts and closing argument rhetoric. (Appellant’s Brief at 9-10.) This misrepresents the record because F & P knows that Plaintiffs presented expert testimony placing the origin

of the fire inside the dryer and explaining that the fire was caused by lint ignited by the dryer's heating element.

Because F & P's statement of facts resembles their closing argument more than "[a] fair statement of the facts . . . without argument" (RAP 10.3(a)(5)), Plaintiffs present this counter-statement of facts.

B. Counter-statement of facts.

1. The F & P dryer caught on fire.

Cheryl Stremke lived with her son Tye Panzone, daughter-in-law Jami Panzone, and Tye and Jami's children. (RP 59:17-19, 60:5-6, 64:11-12, 140:18-22, 610:4-10.) The home's laundry room contained an F & P washing machine and an F & P dryer, which were purchased in December 2005. (RP 67:4-13, 69:2-5, 72:9-11.)

At nearly midnight on July 1, 2008, while preparing for bed, Jami Panzone smelled smoke inside the home. (RP 108:4-5, 109:9-11.) She investigated the source of the smell and discovered smoke coming from the dryer. (RP 109:12-25.) She then called for her husband and her mother-in-law. (RP 110:1-6, 111:2-4-9, 154:1-5.) Both responded to Jami's calls for help and went to the laundry room, where they found

the dryer was smoking. (RP 154:6-8, 155:20-25, 623:21-23, 624:1-2.)

Although they attempted to extinguish the fire with water, the fire continued burning and flames emerged from behind the dryer and continued growing until the whole room was engulfed. (RP 111:2-25, 157:3-22, 158:17-22, 159:1-6, 624:23-25, 625:1.) The dryer was the only source of flames. (RP 160:1-12, 625:16.) As the fire grew out of control, Jami called 911. (RP 112:6-10.) With the heat and smoke too much to endure, the family fled from the home. (RP 112:23-25, 159:7-14.)

2. Investigators determined that the fire started inside the F & P dryer.

Fritz Wininger is a fire and explosives investigator for the City of Kent fire department. (RP 421:21-25, 422:1-13.) Wininger concluded that the fire had originated inside the dryer. (RP 455:16-25, 459:10-14.)

In addition to identifying the source of the fire, Wininger considered and eliminated other possible sources, including the dryer's electrical cord (RP 459:15-25, 460:1-6), the electrical outlet near the dryer (RP 460:7-17), clothing

inside the dryer drum (RP 460-62), cigarettes (RP 462:2-17), and the dryer's ventilation system (RP 462-64).

Thomas Miller is also a fire investigator. (RP 348:22-25, 349:1-13.) He also concluded that the fire started inside the dryer. (RP 391:4-18, 397:5-7.)

In addition to identifying where the fire originated, Miller considered and ruled out other possibilities, including the dryer's electrical cord (RP 386:2-5), the washing machine (RP 384:17-25, 385:1), inside the dryer's drum (RP 386:7-20), the lint tray (386:21-25, 387:1-2), the dryer's ventilation system (RP 388:1-10), and the power outlet near the dryer (390:9-16).

Plaintiffs also presented testimony from Michael Fitz to address both the fire's cause and origin. (RP 664.) Fitz agreed the fire started inside the dryer. (RP 682:11-18, 685:18-22.) Fitz testified the fire began when lint was ignited by the dryer's heating element, and then the fire spread to the other combustible materials inside the dryer. (RP 736-38, 817-18.)

Although F & P describes evidence about the dryer's manual reset thermostat having tripped before the fire began

and about the dryer's heating elements not functioning when the fire started, F & P omits any mention of Fitz's testimony that the manual reset thermostat opened only after the fire had started (RP 693:4-6) and that one of the dryer's heating elements was working at the time of the fire. (RP 693:7-25.)

3. Miller retained the evidence he determined was relevant to the fire investigation.

After completing his onsite investigation, Miller arranged for the dryer to be shipped to his company's storage facility for further analysis. (396:7-15.)

Miller did not preserve everything in the laundry room. One item he did not retain was the dryer's venting system. (RP 388:23-24.) As F & P has noted, at trial Miller testified he "probably would" preserve the venting system if he had it to do again. (RP 388:25, 389:1-2.) But in explaining why he might now preserve the venting system, he responded (with apparent sarcasm) "[s]o I wouldn't have to answer questions." He also added that he could look for a blockage farther away from the dryer. (RP 389:3-9.) Significantly, Miller did not say he would preserve the venting system because he had any suspicion that the fire originated in the venting system. And

F & P's fire-cause expert *agreed* the fire did not start in the venting system—yet another fact omitted from F & P's statement of facts. (RP 1116:18-24.) Thus, while F & P complains at length about Miller's failure to preserve the venting system, no one—including *F & P's expert*—believes the fire started in the venting.

Miller also did not take custody of the washing machine, the water in the washing machine, the light switches, wiring, and outlets in the laundry room, or the clothing from inside the dryer. (RP 407:2-9, 416:18-19.) He did not preserve the washing machine because “it clearly was not the source of ignition.” (RP 417:3-8.) And he had similarly ruled out the other items as possible places where the fire originated.

The decisions about what evidence to preserve and what to leave behind were made by Miller. There is no evidence that any of the Plaintiffs—Cheryl Stremke, Ty Panzone, Jami Panzone, or anyone from Unitrin—participated in any decision about what evidence to retain, nor is there any evidence that any Plaintiff participated in disposing of any evidence. In fact, there is no evidence about who

disposed of the evidence that is the focus of F & P's spoliation complaints.

4. F & P received notice of the fire no later than August 5, 2008, but did nothing to investigate the fire scene or attempt to preserve the evidence it now claims was essential to a thorough investigation.

Not later than August 5, 2008, F & P received written notice of the Stremke fire.¹ (RP 1231:17-19.) F & P was informed the fire had caused significant fire damage to the Stremke home, and the fire had been caused by a failure of an F & P dryer. (RP 1231:18-22.) Despite having been informed of the fire and the suspicion that F & P's dryer was the cause, F & P neither promptly investigated the fire scene nor took any steps to ensure preservation of the various items of evidence that F & P now claims were essential to a thorough investigation. (RP 487:14-24, 488:6-7, 560:13-25, 561:1-9.) Furthermore, since the letter specifically notified F & P that the dryer was the suspected cause of the fire, there is no basis for F & P's statement that "F & P had no reason to believe that a more extensive investigation of the home was

¹ F & P states it received notice of the fire on August 5, 2008. (Appellant's Brief at 6.) That misstates the evidence. The parties stipulated that F & P received notice *no later than* August 5. (RP 1231:25, 1232:1). Thus, F & P might have had notice earlier.

necessary until after the August 20, 2008 dryer examination.”
(Appellant’s Brief at 7.)

F & P also states it was not allowed to see the dryer until August 20. (Appellant’s Brief at 6.) The evidence does not support that statement. It is more accurate to state that F & P inspected the dryer on the earliest date it proposed: August 20, 2008. (RP 868:8-17.)

5. Before the fire occurred, F & P knew the dryer’s heating element was prone to failure.

Long before its dryer destroyed the Stremke home, F & P knew its dryer was defective.

In August 2005 F & P modified the dryer to remove the dryer’s blocked-air-flow warning system. (Ex. 76; RP 529-30.) F & P did not inform its customers that its dryers no longer had this warning system—even though its user manuals said it did. (RP 531:1-4; Ex. 004-026.) Thus, Plaintiffs’ dryer lacked the system designed to warn consumers when air flow was restricted. Restricted air flow is dangerous because it can result in inadequate air flow over the heating elements. (RP 706:11-18.)

The problems continued in December 2005 when F & P implemented a design change related to the size of the wire used in its heating element inside the dryer. Understanding this change requires some explanation F & P omitted from its brief.

The dryer had two heating elements: a 1.4 kilowatt element and a 3.6 kilowatt element. The smaller element used .61 millimeter gauge wire and the larger element used .091 millimeter gauge wire.

Over time, F & P realized the smaller element was susceptible to “sagging and shorting out” (Ex. 79.) F & P addressed the problem by changing the design specifications in December 2005 so that newly manufactured dryers had had a thicker, .091 millimeter gauge wire. (Ex. 79.) Customers, such as Plaintiffs, who had already purchased dryers with the smaller gauge wire, were not warned of the dangers created by the inadequate design. (RP 535:1-3.) Approximately 69,000 units had been manufactured before the design was changed. (RP 835:10-12.)

That was not the end of design changes to the dryer. By May 2006, F & P had experienced such “a high number of

repeat warranty claims as a result of the thermostat failures” that it implemented a design change such that when an F & P dryer failed, repair technicians were supposed to replace all of the dryer’s three thermostats as well as both of the dryer’s heating elements. (Ex. 80.) At that time, F & P estimated there would be another 1,800 product failures. (Ex. 80.) F & P did not, however, recall dryers already in use or issue warnings about heating elements overheating and failing. (RP 578:14-16.) Nor did F & P disclose to the Consumer Product Safety Commission the problems occurring with its dryer. (RP 576:15-25.)

About the same time, and before the Stremke fire, F & P received at least two reports of dryer fires. (RP 553-59.) F & P did nothing to investigate the fires or warn consumers of the risk of fire. (RP 553-59.)

6. The home required extensive restoration work.

The fire extensively damaged the home. There was smoke and soot on almost every wall in the home. (RP 171:5-22.) One witness testified “[e]verything was smoke damaged. Everything was either smoke damaged or fire damaged in the

house and garage.” (RP 327:10-16.) Fire investigator Wininger testified that the damage was “fairly extensive” (RP 464:15-18), and “[j]ust about every surface that was in the house was affected by heat, smoke, or flame to some degree.” (RP 465:10-11.) Fred Roesch, who works for the general contractor that performed the repairs, said the home had suffered “a pretty intense fire” with resulting “heavy smoke throughout the whole house.” (RP 222:24-25, 226:4-10.) Smoke penetrated inside the walls and into the attic. (RP 171:8-22, 187:18-25, 188:1-10, 233:6-10.) The woods floors suffered fire and water damage. (RP 167:10-13, 169:21-23.) Cabinets were damaged. (RP 177:22-24, 179:9-15.) The fire ruined the home’s electrical system. (RP 179:18-25, 180:1-2.) Most, if not all, of the house had to be gutted down to the bare framing. (RP 238:7-8.) The roof had to be replaced. (RP 188:14-24, 236:3-8.) All of the windows and slider doors were replaced. (RP 235:12-13.)

Demolition work began five or six weeks after the fire. (RP 237:1-2.) The restoration work was so extensive that the family could not return until March 2009. (RP 188:25, 189:1-4.)

IV. ARGUMENT

A. The trial court properly exercised its discretion to refuse to give F & P's requested spoliation instruction.

1. The trial court's refusal to give a spoliation jury instruction is reviewed for abuse of discretion.

F & P's first assignment of error is that the trial court erred by refusing to give F & P's requested spoliation jury instruction. (Appellant's Brief at 18-27.) F & P incorrectly argues that the trial court's decision is reviewed de novo. De novo review applies where the issue arises from a summary judgment. *Tavai v. Walmart Stores, Inc.*, 176 Wn. App. 122, 135, 307 P.3d 811 (2013) ("because the issue was decided through summary judgment, our review is de novo."). Where the issue arises in connection with a trial court's decision whether to give a spoliation instruction, the decision is reviewed for abuse of discretion. *Henderson v. Tyrrell*, 80 Wn. App. 592, 612, 910 P.2d 522 (1996).

2. Where spoliation has occurred, whether to impose a sanction depends on the importance of the evidence and the culpability of the party who destroyed the evidence.

“Spoliation is the intentional destruction of evidence.” *Tavai*, 176 Wn. App. at 134; *Ripley v. Lanzer*, 152 Wn. App. 296, 326, 215 P.3d 1020 (2009). Where spoliation has occurred and the court decides that a sanction is justified, the court has a range of options available. “[T]he common remedy is an inference ‘that the adversary’s conduct may be considered generally as tending to corroborate the proponent’s case and to discredit that of the adversary.’” *Henderson*, 80 Wn. App. at 605 (quoting 2 John W. Strong, *McCormick on Evidence* § 265, at 192 (4th ed. 1992)).

F & P contended spoliation had occurred through the destruction of evidence relevant to the cause of the fire and it was entitled to a jury instruction telling the jury “[i]f you find that Fisher & Paykel has shown that a plaintiffs [sic] have destroyed evidence which was in their control, and they have not provided a satisfactory explanation for doing so, the only inference you may draw is that the evidence, if produced, would have been unfavorable to them.” (CP 2322.)

“In deciding whether to apply a sanction, courts consider the potential importance or relevance of the missing evidence and the culpability or fault of the adverse party.” *Ripley*, 152 Wn. App. at 326 (footnote omitted).

3. There was no spoliation.

F & P’s spoliation argument is that its investigation was impeded by its inability to examine certain evidence. F & P specifically mentions the dryer’s ventilation system but is otherwise vague about what evidence is the subject of its spoliation argument, alluding to washing machine water, unspecified “parts of the dryer,” “other items in the laundry room,” and “electrical components in the laundry room.”

Plaintiffs dispute there was spoliation at all. Spoliation is the intentional destruction of evidence. *Tavai*, 176 Wn. App. at 134. There is no evidence that any Plaintiff had any role in disposing of the burned and damaged remains of the laundry room. Although the record is silent as to who disposed of those items and when, the most likely scenario is that the contractors hired to restore the Stremke house disposed of the damaged property as part of their routine process of preparing the house for new construction. There is

no evidence that any Plaintiffs had anything to do with disposing of the property or that any evidence was destroyed because it was considered unhelpful to future litigation. This is not a spoliation case.

4. A negative inference jury instruction was not warranted.

Even if Plaintiffs were responsible for the contractors' disposal of property, a negative inference instruction was not warranted.

As noted, there are two general factors relevant to whether any remedy is justified: "(1) the potential importance or relevance of the missing evidence and (2) the culpability or fault of the adverse party." *Tavai*, 176 Wn. App. at 135.

a. The missing evidence is neither important nor relevant.

Preliminarily, it is difficult to address the importance and relevance of specific evidence because, for the most part, F & P has not disclosed what evidence should have been preserved and why it was important to the case. F & P's position seems to be that *everything* should have been preserved, and it is possible something might have helped

F & P prove the fire started somewhere other than inside the dryer. That is an unpersuasive argument.

F & P does specifically complain about the disposal of the dryer's ventilation system. But any contention that the ventilation system was especially important to the causation inquiry is easily defeated since, in a rare instance of agreement, both Plaintiffs' experts and F & P's expert agreed the fire did not start in the ventilation system.² (RP 388:3-10, 682:11-18, 1116:18-24.) Given that F & P does not dispute that the fire started outside the ventilation system, preserving the ventilation system would not have substantially contributed to F & P's investigation.

Although F & P points to other property that was not preserved, F & P is unable to offer more than speculation about how that evidence would have altered the investigation. In short, F & P is unable to identify any missing evidence that was essential to conducting a thorough fire-cause investigation.

² In addition, when defendant Lowes, which installed the dryer to the ventilation system, moved for summary judgment on the ground there was no genuine issue of material fact implicating the ventilation system as a cause of the fire, F & P submitted no opposition.

Further undermining F & P's argument are the numerous photographs of the fire scene. (Exs. 8, 45, 48, 49, 53, 128, 130, 223, 225, 232, 242, 243, 244, 245, 246, 247.) Photographic evidence militates against imposing any sanction for missing evidence since the photographs are often an adequate substitute. *Henderson*, 80 Wn. App. at 608 (noting that photographs documented the condition of the destroyed evidence).

Another relevant factor in determining the importance of missing evidence is whether "the loss or destruction of the evidence has resulted in an investigative advantage for one party over another, or whether the adverse party was afforded an adequate opportunity to examine the evidence." *Id.* at 607. Here, experts Fitz and Low worked from the same universe of evidence since neither expert was retained until long after the fire. (RP 677:18-24, 680:18-20, 976:15-20.)

Moreover, a party that had an opportunity to preserve the evidence but failed to do so should not be heard to complain when it is not preserved. *Homeworks Construction, Inc. v. Wells*, 133 Wn. App 892, 902, 138 P.3d 654 (2006) (defendants' own conduct in failing to preserve the evidence

undermined their spoliation claim); *see also Marshall v. Bally's Pacwest, Inc.*, 94 Wn. App. 372, 382-83, 972 P.2d 475 (1999). No later than August 5, F & P knew its dryer was suspected of having caused the fire. (RP 1231:17-22.) Yet F & P neither inspected the fire scene nor requested that evidence be preserved. Since demolition did not begin until at least five or six weeks after the fire, F & P could have examined the fire scene had it acted promptly.

b. Plaintiffs were not at fault in destroying any of the evidence.

In assessing culpability, the court examines “whether the party acted in bad faith or conscious disregard of the importance of the evidence or whether there is some innocent explanation.” *Tavai*, 176 Wn. App. at 135.

Culpability is relevant because of the policy underpinnings for condemning spoliation. The basic concept is that a negative inference is warranted where a party intentionally destroys evidence because a party would not destroy helpful evidence. *Henderson*, 80 Wn. App. at 609-10. But where a party does not intentionally destroy evidence, or

act with conscious disregard for its evidentiary value, the justification for the negative inference is absent. *Id.*

Here, there is no basis for finding that Plaintiffs destroyed evidence either in bad faith or with conscious disregard that the evidence would be important to some subsequent litigation. First, as already discussed, Plaintiffs had nothing to do with disposing of the property. There is no evidence that any property was destroyed in order to hinder F & P's investigation or that any Plaintiff had any appreciation whether the property had evidentiary importance.

Disregarding a request to preserve evidence can be evidence of bad faith. *Henderson*, 80 Wn. App. at 610. But that did not happen here, where F & P never asked that anything be preserved. Instead, at the (unknown) time when the evidence was disposed of, there was no lawsuit and no pending request to preserve the evidence. Those factors undercut F & P's request for a spoliation instruction. *Ripley*, 152 Wn. App. at 326 (noting absence of lawsuit or request to preserve evidence when the missing evidence was discarded).

Finally, disposing of evidence in violation of a duty to preserve the evidence can be an indication of bad faith. *Henderson*, 80 Wn. App. at 610. But potential litigants have no general duty to preserve evidence, *Homeworks*, 133 Wn. App. at 901, and F & P makes no such argument. Instead, F & P contends that NFPA 921 imposed a duty on Miller to preserve the unspecified evidence that F & P contends was essential to preserve. But as a mere guide to fire investigation, NFPA 921 imposes no duties at all. (RP 407:7-9.)

For all of these reasons, the trial court acted well within its permissible range of discretion by refusing to give F & P's requested spoliation instruction.

B. The Consumer Protection Act verdict and attorney-fee award should be affirmed.

1. Substantial evidence supports the jury's verdict that F & P violated the CPA.

F & P contends that the trial court should have granted judgment as a matter of law against the Consumer Protection Act (CPA) claim because there was no evidence that the fire was caused by the dryer's defective thermostats and heating elements, which were the subject of F & P's engineering

changes described in exhibits 79 and 80. Again, F & P presents the evidence in the light most favorable to it, rather than applying the correct standard of review. *Guijosa v. Wal-Mart Stores, Inc.*, 144 Wn.2d 907, 915, 32 P.3d 250 (2001) (evidence is viewed most favorably to the nonmoving party).

There is no dispute that F & P was aware of the dryer's defects; indeed, Plaintiffs' evidence came from F & P's own files. The issue, then, is whether the fire was caused by those defects. Causation is ordinarily an issue for the jury.

Fabrique v. Choice Hotels International, Inc., 144 Wn. App. 675, 683, 183 P.3d 1118 (2008). And that was true here because there was substantial evidence from which the jury could find the fire was caused by the problems with the heating elements and thermostats.

Three experts testified the fire originated inside the dryer. (RP 391:4-18, 397:5-7, 459:10-14, 685:12-22.) Fitz testified the manual reset thermostat did not trip, cutting power to the heating elements, until after the fire started. (RP 693:4-25.) Evidence showed the dryer's heating elements were badly damaged, with some elements having melted and

severed and others having become distorted such that they sagged and touched other heating coils. (Exs. 48-14, 48-15, 48-17, 48-19; RP 695:12-24, 696:21-24, 697:1-19, 704:4-12, 14-19.)

In order to melt, the heating coils had to have reached at least 2500 degrees Fahrenheit—far hotter than the dryer's hottest normal operating temperature of approximately 700 degrees. (RP 705:10-24.) Thus, there was indisputable evidence the heating coils inside the Stremke dryer were overheating.

One reason heating elements can become damaged, as found in the Stremke dryer, is that the size of the heating coil is not adequate to maintain its integrity. (RP 706-23-25, 707:1-2.) Exhibit 79 shows F & P was aware of that problem, but it did nothing to correct the problem for dryers already in use.

Furthermore, Fitz testified that a dryer should be designed so its heating coils do not become damaged as happened with the Stremke dryer. (RP 714:25, 715:1-3.) But in the Stremke dryer, the thermostats did not work properly to prevent the elements from overheating, deteriorating, and

falling apart. (RP 717:5-7.) And because the smaller element's wire gauge was too small, the overheated element coils sagged and arced. (RP 717:8-19.) The problem of inadequate gauge wire was addressed by the engineering change notice in exhibit 79. (RP 717:20-25, 718:1-24.) Thus, the problems that led to exhibit 79 are precisely the problem found with the Stremke dryer. (RP 718:21-24.) Furthermore, exhibit 80 shows that F & P knew its heating elements were overheating and failing because the thermostats were not working properly to keep the temperature within normal operating ranges. Fitz's testing confirmed that the manual reset thermostat failed to activate properly, allowing the heating elements to overheat. (RP 734:18-20.) Finally, Fitz testified the dryer was not safe because of the risk the damaged heating element could ignite lint, leading to a fire. (RP 797:15-20.) He also testified that blocked airflow can cause the heating elements to overheat. (RP 706:11-18.) Exhibit 76 describes F & P's decision to remove the blocked-air-flow warning system, but F & P did not change its user's manual, leading consumers such as Stremke to mistakenly believe the dryer had a safety feature that it, in fact, lacked.

In summary, the very problems described in exhibits 76, 79, and 80 causally contributed to the dryer fire. Accordingly, the trial court properly denied F & P's motion for judgment as a matter of law against the CPA claim.

2. The attorney-fee award was warranted because Stremke prevailed on her CPA claim.

F & P argues that the attorney-fee award should be reversed because (1) Unitrin was not entitled to an award of fees under the CPA, (2) F & P, and not Plaintiffs, prevailed on the CPA claim, and (3) the amount of fees awarded (\$537,612) was disproportionate to the amount at issue in the CPA claim (\$0).

This Court should not consider any of these arguments because none of these arguments was presented to the trial court. Although F & P objected to Plaintiffs' fee petition (CP 4071), those objections did not argue (1) Unitrin was not entitled to a fee award, (2) F & P (and not Plaintiffs) prevailed on the CPA claim, or (3) the value of the CPA claim was \$0. Accordingly, those arguments have not been preserved. RAP 2.5(a); *Bankston v. Pierce County*, 174 Wn.

App. 932, 942, 301 P.3d 495 (2013) (declining to consider argument not preserved in the trial court).

Furthermore, F & P's argument that it prevailed on the CPA claims is based on misinterpreting the verdict and resulting judgment.

The 12-person jury unanimously found that F & P had violated the CPA and that F & P's violation of the CPA had caused total damages of \$537,612. (CP 2399; RP 1300-02.) The jury also found for Plaintiffs on their product liability claim and awarded the identical amount of damages (\$537,612). (CP 2398-99.) The court then entered judgment in favor of Plaintiffs for \$537,612. (CP 4214.) The judgment does not specify that it is based on either the product-liability claim or the CPA claim.

Thus, it is undisputed that Plaintiffs prevailed on their CPA claim and were awarded \$537,612 in damages on that claim. F & P argues that Plaintiffs did not really prevail on the CPA claim since they also prevailed on the product-liability claim and were awarded damages under that claim. F & P presents no authority for its novel proposition that a party who prevails on more than one alternative claim, and is

awarded damages under more than one claim, really does not prevail on each claim. The absence of authority is because that argument is, in a word, silly and deserves no further response.

3. The attorney-fee award is supported by the trial court's unchallenged findings of fact.

Finally, F & P mounts two additional challenges to the amount of the attorney-fee award. First, F & P complains that the fee award included time unrelated to the CPA claim.

Plaintiffs moved for attorney fees in the amount of \$564,811 based on a lodestar computation (reasonable hourly rate multiplied by reasonable number of hours expended). (CP 4187, ¶ 4.) In addition, Plaintiffs requested application of a 1.5 multiplier to reflect the contingency of any fee recovery. (CP 4192, ¶ 14.) F & P's objections argued that Plaintiffs were not entitled to recover fees for work on issues not related to the CPA claim. (CP 4083-88.)

The trial court found that some of the work did not pertain to the CPA claim. (CP 4188-92.) Accordingly, the trial court reduced the fee petition by \$140,729.50 to eliminate time devoted to non-CPA issues. (CP 4188-92.)

It is difficult to understand what F & P is complaining about since the trial court did exactly what F & P says it should have done: decline to award fees for time devoted to non-CPA claims. Furthermore, two procedural obstacles defeat F & P's argument. First, F & P is challenging the trial court's finding of fact that \$140,729.50 is the proper amount by which to reduce Plaintiffs' fee petition to reflect work devoted to non-CPA claims. But F & P has not specially assigned error to that finding of fact, as required by RAP 10.3(g) ("A separate assignment of error for each finding of fact a party contends was improperly made must be included with reference to the finding by number."). "Unchallenged findings of fact are verities on appeal." *Nguyen v. City of Seattle*, 179 Wn. App. 155, 163, 317 P.3d 518 (2014). Furthermore, F & P has not identified which time entries are improper, and F & P has not told this Court the amount by which the fee award should be further reduced. Instead, F & P invites the Court to scour the record for evidence supporting F & P's argument. The Court has no obligation to do so. *In Re Matter of Lint*, 135 Wn.2d 518, 532, 957 P.2d 755 (1998). Because F & P has not presented a proper argument

challenging the trial court's findings, the issue should be disregarded.

F & P also complains that the trial court should not have applied a 1.5 multiplier to the lodestar amount. Washington follows the lodestar method of determining reasonable attorney fees. *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 597-99, 675 P.2d 193 (1983). The lodestar method involves two steps. The court first determines the lodestar amount by multiplying a reasonable hourly rate by a reasonable number of hours expended on the matter. *Id.* at 597. Then the court may adjust the lodestar amount upward or downward to account for factors not already taken into consideration. *Id.* at 598-99. "Adjustments to the lodestar are considered under two broad categories: the contingent nature of success, and the quality of the work performed." *Id.* at 598. A trial court's decision to apply a multiplier is reviewed for abuse of discretion. *Broyles v. Thurston County*, 147 Wn. App. 409, 452, 195 P.3d 985 (2008).

The trial court made the following findings of fact, none of which F & P has challenged on appeal: (1) Plaintiffs'

attorneys handled the case on a contingent basis (CP 4192, ¶ 15);³ (2) Plaintiffs’ attorneys “put in thousands of hours necessitated by the parties’ thorough litigation” and “carried the fees for over three years with no assurance of recovery.” (CP 4192, ¶ 15.); (3) “Plaintiffs’ and their counsel undertook a great deal of risk in this case.” (CP 4193, ¶ 17); (4) The case’s long duration “complicated the case for Plaintiffs’ counsel and kept Plaintiffs’ counsel from working on other less risky cases.” (CP 4193, ¶ 17); and (5) Plaintiffs’ fee petition sought fees at an hourly rate “well below the rates charged in the Seattle legal market for the type of case here.” (CP 4187 ¶ 6.)

These unchallenged⁴ findings support the trial court’s decision to apply a 1.5 multiplier to the lodestar amount. There was no abuse of discretion.

³ F & P asserts that Plaintiffs’ attorneys worked on an hourly basis and not a contingent basis. (Appellant’s Brief at 39.) That representation is false. As the trial court found, Plaintiffs’ counsel worked on a contingent-fee basis. (CP 4192, ¶ 15; *see also* CP 3653 ¶ 5.)

⁴ F & P has not assigned error to any of the court’s findings of fact. RAP 10.3(g) (describing requirements for assigning error to findings of fact).

C. There is no basis for reversing the verdict for destruction of personal property.

F & P raises three challenges concerning Plaintiffs' claim for damages for personal property destroyed in the fire.⁵ None has merit.

1. F & P was not entitled to judgment as a matter of law against Plaintiffs' claim for destroyed personal property.

F & P argues that the trial court should have granted judgment as a matter of law against Plaintiffs' request for damages for destroyed personal property. This argument should not be considered because it is impossible to grant the relief F & P seeks.

F & P argues "the claim for personal property damages should have been dismissed as a matter of law" (Appellant's Brief at 39.) Although F & P does not explain exactly what relief it seeks *now*, presumably it is asking this Court to reduce the verdict by the amount of damages awarded for destroyed personal property.

⁵ Plaintiffs understand F & P's arguments to pertain solely to Plaintiffs' claims for damages for personal and household items destroyed in the fire. F & P's arguments do not challenge Plaintiffs' separate proof concerning personal property that was damaged, but repaired and restored to them.

But it is impossible to grant that relief. The verdict form asked the jury to decide the *total* amount of damages proximately caused by F & P. (CP 2399.) The verdict form did not ask the jury to segregate its damages award into specific categories such as personal property, real property, and additional living expenses. The jury awarded a lump sum of \$537.612, but it is unknown how much of that award was for personal property destroyed in the fire.

This problem was avoidable since F & P could have demanded a verdict form that provided that information. But F & P neither objected to the verdict form on that grounds nor proposed a verdict form that asked the jury to allocate damages into the various categories. (CP 2325.)

F & P's inaction has made it impossible to grant the relief F & P seeks, namely, reduction of the judgment by the amount of damages awarded for destruction of personal property. We cannot assume the jury awarded damages for destroyed personal property in the full amount requested by Plaintiffs. The jury did not award all of the damages that Plaintiffs sought. Because it is not known where the jury awarded less than all of the damages sought, it would be

guesswork to assign any particular amount to any category of damages. Consequently, this Court should not consider F & P's argument that the trial court should have granted judgment as a matter of law against the claim for destruction of personal property.

On the merits, F & P's argument is based on an erroneous reading of the applicable law. Plaintiffs' claim for destroyed personal property involved their household goods, apparel, and personal effects kept for personal use and not for sale. In *Kimball v. Betts*, 99 Wash. 348, 350-51, 169 P. 849 (1918), the court held that the amount recoverable for loss of such items

ought not to be restricted to the price which could be realized by a sale in the market (or market value), but he should be allowed to recover the value to him based on his actual money loss, all the circumstances and conditions considered, resulting from his being deprived of the property, not including, however, any sentimental or fanciful value he may for any reason place upon it.

In *Kimball*, the court further explained that

a proper method of arriving at their value at the time of loss is to take into consideration the cost of the articles, the extent of their use, whether worn or out of date, their condition at the time, etc., and for them to determine what they were

fairly worth. The cost alone would not be the correct criterion for the present value, but it would be difficult to estimate the value of such goods except by reference to the former price in connection with wear, depreciation, change of style, and present condition.

Id. at 352.

In *Herberg v Swartz*, 89 Wn.2d 916, 578 P.2d 17 (1978), hotel tenants sued for loss of personal property destroyed in a fire. The court held that the tenants had adequately supported their claims by presenting evidence concerning the condition of the property, the approximate date of purchase, and the approximate purchase price. *Id.* at 931-32.

F & P misreads *Kimball* and *Herberg* as requiring evidence on each factor those cases identified as potentially relevant to valuing lost personal property. But neither case has constructed such an imposing barrier to proving the value of destroyed personal property. *Kimball* and *Herberg* identify factors relevant to proving the value of destroyed personal property, but neither case mandates that there *must be* evidence as to each relevant factor. Consequently, F & P's argument for judgment as a matter of law fails on its merits.

2. Substantial evidence supports the verdict for destroyed personal property.

F & P argues in the alternative that the case should be remanded for a new trial regarding the value of Plaintiffs' destroyed personal property because the jury's verdict is not supported by substantial evidence.

Again, this argument suffers from the fundamental problem that it is impossible to know what amount of damages the jury awarded for destroyed personal property. This problem creates two obstacles to granting the relief F & P seeks. First, it is impossible to know the amount by which to reduce the judgment if the Court were to grant a new trial limited to the claim for destroyed personal property. Second, the Court cannot evaluate whether the amount of the verdict is supported by substantial evidence when the amount of the verdict is unknown.

If this Court reaches the merits, the starting point is the daunting standard of review F & P must scale to obtain a new trial. "The amount of damages is a question of fact and the fact finder has the ultimate authority to weigh the evidence and determine the amount of damages in a particular case."

Sherman v. Kissinger, 146 Wn. App. 855, 874, 195 P.3d 539 (2008). Juries have considerable latitude in assessing damages. *Palmer v. Jensen*, 132 Wn.2d 193, 197, 937 P.2d 597 (1997). The law strongly presumes the adequacy of a damages verdict. *Cox v. Charles Wright Academy, Inc.*, 70 Wn.2d 173, 176, 422 P.2d 515 (1967); *Green v. McAllister*, 103 Wn. App. 452, 461, 14 P.3d 795 (2000). In evaluating the sufficiency of the evidence to support the verdict, the evidence is viewed in the light most favorable to the jury's verdict. *Herriman v. May*, 142 Wn. App. 226, 232, 174 P.3d 156 (2007).

The jury received the following evidence concerning Plaintiffs' claim for destruction of personal property:

Witness Shawn Slings works for Enservio, an inventory and appraisal company, that goes into houses after fires and other catastrophes and prepares inventories of damaged property. (RP 315:4-16.) Slings helped prepare an inventory of damaged property in the Stremke home. (RP 318:1-7, 319:1-6.) He prepared the inventory based on a room-by-room inspection of the house along with input from Plaintiffs. (RP 321:21-25, 323:13-17, 639:15-25, 640:1-10.) The inventory

ultimately had 946 items of personal property (RP 323:18-21, 324:9-12), including household items for personal or family use such as lawn furniture, a sewing machine, shoes, blankets, books, clothing, toys, movies, and housewares. (RP 324:16-25, 325:1-10, 636:5-7.) The inventory noted the approximate age of each item of personal property. (RP 325:11-25, 326:1.)

The contents of the house were depicted in the many photographs taken inside the house after the fire. The photographs in exhibits 8, 17, 45, and 223 provided graphic evidence of the personal property damaged by the fire, including lawn furniture (Ex. 8-002), stereo equipment (Ex. 8-006), DVDs (Ex. 8-006), furniture (Exs. 8-011, 8-018), children's toys (Ex. 8-011), bedding (Ex. 8-013), clothing (Exs. 8-014, 8-062), linens (Exs. 8-015, 45-013), kitchenware (Ex. 8-016), kitchen appliances (Exs. 8-016, 45-017), artwork (Ex. 17), and food (Ex. 45-007).

Cheryl Stremke testified that flame and smoke damaged the personal property inside the home. (RP 634:8-15.)

Unsurprisingly, Stremke did not recall the purchase prices for the hundreds of items on the inventory, and the

receipts she had were destroyed in the fire. (RP 636:13-25, 637:1-2.) The property had normal wear and tear but had been well cared for. (RP 646:7-11.)

Stremke replaced the destroyed items listed on the inventory. (RP 637:3-12.) The inventory and appraisal company assisted her in estimating the cost of the damaged personal property. (RP 640:11-13.) Stremke testified that the destroyed personal property had a value of approximately \$176,000. (RP 641:11-16.)

An owner is qualified to testify about the value of her property; no further expertise is required. *McCurdy v. Union Pac. R.R. Co.*, 68 Wn.2d 457, 468-69, 413 P.2d 617 (1966); *Wicklund v. Allraum*, 122 Wash. 546, 547-48, 211 P. 760 (1922). The source of the property owner's knowledge goes to the weight, but not the admissibility, of the testimony. *Wicklund*, 122 Wash. at 547.

The testimony from Slings and Stremke, plus the photographic evidence of the home's damaged contents, provided sufficient evidence for the jury to determine the amount of damages for destroyed personal property.

3. The trial court did not abuse its discretion by excluding testimony from proposed expert Steven Larkin.

F & P also challenges the exclusion of proposed expert witness Steven Larkin.

F & P's argument concerning Larkin is dense with red herrings and misstatements. For example, F & P implies the trial court's decision to exclude Larkin's testimony was related to the death of F & P's initial expert. (Appellant's Brief at 43.) In fact, there was no connection at all because the court excluded Larkin's testimony for entirely different reasons, as discussed below. Then F & P accuses the trial judge of reneging on a promise by which she "assured" F & P that it "would have the opportunity to present damages evidence at trial" Of course, the trial judge never promised F & P that it would be allowed to present any evidence whatsoever, regardless of its inadmissibility. F & P further misstates what happened by claiming that the trial court barred F & P "from presenting any evidence whatsoever about Stremke's claim for lost personal property." (Appellant's Brief at 44.) The trial court did no such thing; instead, the trial court refused to allow Larkin to present

inadmissible expert testimony. F & P remained at liberty to present other evidence challenging Plaintiffs' personal-property claims. The trial judge is not to blame for F & P's failure to do so.

Finally, F & P misstates why the trial court excluded Larkin's testimony. F & P asserts that "the trial court prohibited Expert [sic] Larkin from testifying because the basis for his opinions was the same information from Unitrin insurance claim file." (Appellant's Brief at 44.) But that is not what happened.

The trial court held an ER 104 hearing to assess the admissibility of Larkin's testimony. (RP 924.) Larkin testified the destroyed personal property had a value of \$40,000. (RP 947:12-16.) He admitted, however, that he did nothing to determine the value of the personal property. (RP 955:15-18.) Instead, his opinion was based on nothing more than his observation that the value of the destroyed property grew larger during the process of developing the inventory, and in his mind there was an inadequate documentary explanation for the changes. (RP 955:19-25, 956:1-3.) Thus, Larkin's expert opinion was based on nothing more than his

decision to believe the earlier inventory over the later inventory.

The trial court excluded Larkin's proposed testimony because he had not made any independent evaluation of the value of the property listed on the inventory. Instead, he had "simply conclude[ed], because it changed over time, that it's problematic" (RP 962:17-18), and because there was more than one inventory, "it can't be reasonable." (RP 962:9-10.) The court refused to allow Larkin to testify because the proposed testimony was "not expert testimony that would be useful to the jury . . . not appropriate . . . not relevant." (RP 962:13-20.)

F & P fails to address the trial court's real reasons for excluding Larkin's testimony, instead assigning blame to a reason never mentioned by the court: that Larkin had referred to the insurance claim file in connection with developing his opinion. But that was not the reason for the court's ruling, which was based on Larkin's inability to offer the jury helpful opinion testimony on a subject outside the jury's expertise. Furthermore, even if the court had ruled on the grounds that Larkin's testimony was barred by its earlier

ruling excluding evidence of Unitrin's participation in the claim process, F & P has no basis for complaining now since it did not appeal the trial court's order excluding evidence about Unitrin.

Trial courts have broad discretion in determining the admissibility of expert testimony, and the trial court's decision should not be disturbed absent an abuse of that discretion. *Philippides v. Bernard*, 151 Wn.2d 376, 393, 88 P.3d 939 (2004). There was no abuse of discretion in excluding Larkin's testimony.

D. The jury was properly instructed on the measure of damages for destruction of improvements to real property.

F & P contends that (1) the jury was improperly instructed about the measure of damages for damage to the Stremke home and (2) the trial court erred by failing to give F & P's requested jury instruction concerning the measure of damages for damage to the Stremke home. (Appellant's Brief at 46-49.)

"Jury instructions are sufficient if they allow the parties to argue their theories of the case, do not mislead the jury and, when taken as a whole, properly inform the jury of

the law to be applied.” *Hue v. Farmboy Spray Co.*, 127 Wn.2d 67, 92, 896 P.2d 682 (1995). “Even if an instruction is misleading, it will not be reversed unless prejudice is shown. A clear misstatement of the law, however, is presumed to be prejudicial.” *Keller v. City of Spokane*, 146 Wn.2d 237, 239-249-50, 44 P.3d 845 (2002). “[A]ll jury instructions must be supported by substantial evidence.” *State v. Ponce*, 166 Wn. App. 409, 415-16, 269 P.3d 408 (2012). The refusal to give a jury instruction is reviewed de novo where the refusal is based on a ruling of law. *Ponce*, 166 Wn. App. at 416. A refusal based on factual reasons is reviewed for abuse of discretion. *Id.*

As noted, F & P complains about both the instruction that was given and the instruction that was not given concerning the measure of damages for damage to improvements to real property.

The jury was instructed:

If you find for plaintiffs, you should consider the following past economic damages elements:

...

Real property. The reasonable value of necessary repairs to any real property that was damaged

and able to be repaired. (RP 1238:24-25, 1239:1-3.)

The trial court declined to give F & P's proposed instruction, which said:

With regard to Plaintiff's real property, you should consider the lesser of the following:

1. The cost of restoring the damaged building to its former condition; or
2. The diminution in value of the damaged building as the result of the fire. (RP 2087-88.)

The crux of F & P's argument is that the jury should have been instructed that damages could not exceed the lesser of either the cost of restoring the home or the diminution of the value of the home caused by the fire (the so-called "lesser than" rule).

The parties agree that *Thompson v. King Feed & Nutrition Service, Inc.*, 153 Wn.2d 447, 105 P.3d 378 (2005) is the most recent case discussing the measure of damages for improvements to real property. In *King Feed* the defendant's negligence caused the destruction of the plaintiffs' barn. On appeal from a verdict for the plaintiffs, the defendant argued that the trial court had erred by failing to instruct the jury that damages could not exceed the lesser of (1) the reasonable

value of necessary replacement of the barn or (2) the difference between the fair cash market value of the property immediately before the fire and the fair cash market value immediately after the fire. *Id.* at 454.

In affirming the verdict, the Washington Supreme Court held that the lesser-than rule was inapplicable. *Id.* at 459. The court expressed skepticism that the lesser-than rule ever applied to cases involving damage to improvements to real property. In *King Feed*, the defendants relied on WPI 30.11, as does F & P here. The court noted that WPI 30.11 did not apply for two reasons. “First, the title of WPI 30.11 states that it is intended as a measure of damages for personal property. Second, the Note on Use specifically states, ‘This instruction may not be appropriate for damages to real estate or improvements thereon.’” *Id.* Furthermore, the court reviewed its cases discussing the lesser-than rule and held that the rule might apply where “property is damaged and capable of repair,” *Id.* at 457, but “it does not apply in the case of negligent destruction of a building” *Id.* at 459.

Here, the lesser-than rule did not apply because the Stremke house was destroyed by the fire and smoke damage

caused by the dryer fire. It is true that the entire structure was not burned to the ground. But it is also true that the fire and smoke affected every part of the home, leading to a complete rebuilding of the home.

The *King Feed* dissenting opinion anticipated the situation presented here, where a building is badly damaged but is not wholly consumed: “If the defendant negligently sets fire to a building that is severely charred but still standing with some structural integrity, is it damaged or destroyed?” *Id.* at 469. The dissent felt the majority’s holding was flawed because it called for the trial court “to defin[e] where on that elusive continuum one crosses the magical line from ‘damaged’ to destroyed’ with a concomitant change in the measure of damages.” *Id.* Thus, the dissent recognized that the *King Feed* decision meant there would be cases where it was debatable whether property was destroyed or merely damaged. Despite that objection, the majority adopted the damaged vs. destroyed paradigm.

Since evidence supported the conclusion that the Stremke home was destroyed by the dryer fire, under *King Feed* the lesser-than rule did not apply.

Furthermore, there was no evidentiary basis for giving F & P's proposed instruction. Instructions must be supported by substantial evidence. *Ponce*, 166 Wn. App. at 416. Plaintiffs' theory was that they were entitled to recover the reasonable cost to restore the destroyed home. Because they presented evidence in support of that theory, it was proper to instruct the jury on Plaintiffs' theory of the case. *Lewis v. Simpson Timber Co.*, 145 Wn. App. 302, 318, 189 P.3d 178 (2008) (jury instructions should allow a party to argue its theory of the case).

By contrast, F & P presented no evidence from which the jury could determine either the diminution in value caused by the fire or whether the diminution in value exceeded the reasonable cost of restoration. At two points in its brief, F & P refers to an appraised value of \$190,000. (Appellant's Brief at 7, 49.) But F & P fails to note that it is referencing an appraisal that was not put into evidence at trial; instead, the jury never heard any evidence of the home's appraised value. Because there was no evidentiary basis for F & P's proposed instruction, it would have improperly invited the jury to speculate. *Chunyk & Conley/Quad C v.*

Bray, 156 Wn. App. 246, 255, 232 P.3d 564 (2010) (jury instruction impermissibly invited jury to speculate about the cause of plaintiff's injury). Therefore, the trial court properly refused to give it.⁶

V. REQUEST FOR ATTORNEY FEES AND EXPENSES

Pursuant to RAP 18.1(b), Respondents request an award of attorney fees and expenses as authorized by the Consumer Protection Act, RCW 19.86.090.

VI. CONCLUSION

The judgment should be affirmed.

DATED: October 16, 2014.

BULLIVANT HOUSER BARNETT PC

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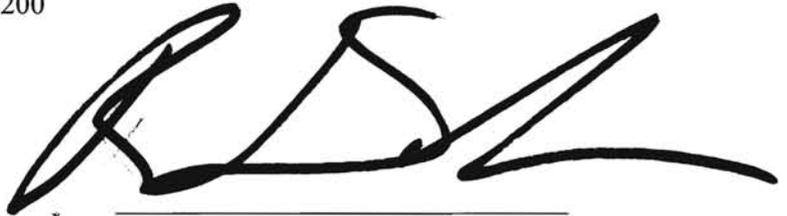
⁶ Although far from clear, F & P's fifth assignment of error hints that F & P is dissatisfied with the trial court including Unitrin as a judgment creditor. Because F & P has presented no argument or citation of authority in support of this assignment of error, Plaintiffs have not addressed it, and this Court should ignore it. *Skagit County Public Hosp. Dist. No. 1 v. State, Dept. of Revenue*, 158 Wn. App. 426, 440, 242 P.3d 909 (2010).

CERTIFICATE OF SERVICE

I hereby certify that on October 16, 2014, I caused to be filed with the Washington Court of Appeals, Division 1, the foregoing RESPONDENT'S BRIEF. I also served the brief on the following parties at the following addresses by United States postal service, first class mail, and by e-mail.

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A handwritten signature in black ink, appearing to read 'R. Daniel Lindahl', written over a horizontal line.

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