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Lynette Camacho

IN THE
SUPREME COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

HIROSHI ISHIMATU,
Plaintiff,

BERNARDO A. HIPONIA, and SERAFIN ESPERANCILLA,
Plaintiffs-Appellees/Cross-Appellants,

v.

ROYAL CROWN INSURANCE CORPORATION,
Defendant-Appellant/Cross-Appellee.

SUPREME COURT NO. 06-0043-GA
SUPERIOR COURT NO. 02-0065

SLIP OPINION

Cite as: 2010 MP 8

Decided June 1, 2010

David G. Banes, Commonwealth of the Northern Mariana Islands, for Plaintiff-Appellee/Cross-Appellant
G. Anthony Long, Commonwealth of the Northern Mariana Islands, for Defendant- Appellant/Cross-Appellee

BEFORE: MIGUEL S. DEMAPAN, Chief Justice; ALEXANDRO C. CASTRO, Associate Justice; and JOHN A. MANGLONA, Associate Justice

CASTRO, J.:

¶ 1 Royal Crown Insurance Corporation ("Royal Crown") appeals the trial court's decision on the grounds that (i) the common law theories of breach of the implied covenant of good faith and fair dealing and breach of contract are preempted by statute; (ii) there is insufficient evidence to support the jury's finding of liability under the common law theories and the Consumer Protection Act ("CPA"); (iii) there is insufficient evidence to support all of the damage awards; (iv) the punitive damage award does not comply with the Due Process Clause of the Fourteenth Amendment; (v) a new trial is warranted for numerous reasons; and (vi) the award of attorney's fees and costs was in error. Serafin Esperancilla ("Esperancilla") and Bernard A. Hiponia ("Hiponia") cross-appeal the decision arguing that the trial court improperly granted judgment as a matter of law on their Unfair Claims Settlement Practices Act ("UCSPA") cause of action, improperly ordered a remittitur, and that punitive damages should be restored to the amount the jury originally awarded. We find that the trial court's decision was correct on all of these issues except for two findings concerning attorney's fees and costs. Accordingly, we AFFIRM in part, REVERSE in part, and REMAND this matter to the trial court to enter judgment consistent with this opinion.

I

¶ 2 The events leading up to this lawsuit occurred when Esperancilla's truck collided with Hiponia's car; Hiponia's car was parked on the side of the road outside of his automotive repair shop, Jen Marz. Esperancilla immediately told Hiponia about the collision, admitted striking the vehicle, and informed him of his insurance policy. Both automobiles sustained damages, but no one suffered any personal injury. At the time of the accident, Esperancilla was Hiponia's employee at Jen Marz, and each man maintained automobile insurance with Royal Crown. Esperancilla had a full policy that included comprehensive coverage, and Hiponia had third-party liability coverage. The police investigated the accident, and did not cite Hiponia or Esperancilla for their roles in the collision. Both men then made claims on Esperancilla's insurance policy, and they each obtained repair estimates from other repair shops and submitted those estimates, together with a repair estimate for each vehicle from Jen-Marz, to Royal Crown. Jen Marz estimated it would cost $3,483.60 to repair Esperancilla's truck, and $2,841.76 for Hiponia's car.

¶ 3 Royal Crown, however, harbored suspicions concerning the validity of the collision. After an investigation, it sent a letter to Esperancilla acknowledging his claim, but advising him that a coverage question existed. Then in a letter sent a week later, Royal Crown informed Esperancilla that it was denying his claim, alleging that he violated the policy's cooperation clause by admitting fault. As an

additional reason for denying the claim, Royal Crown stated in another letter that the damage to the vehicles, and Esperancilla's account of the accident, was inconsistent with its own investigation; at trial it alleged collusion between the parties. Royal Crown also believed that Hiponia was at fault for the accident because he parked on the wrong side of the road. Hiponia's claim was denied under Esperancilla's policy because Royal Crown refused to cover the accident, and under his own policy because it was only for third-party liability coverage. Although Royal Crown denied coverage, it obtained an estimate for the repair of Esperancilla's truck from the Rajamsbelle Auto Repair Shop; the Rajamsbelle quote was for $1,159.00. Royal Crown alleges that it then offered to repair Esperancilla's vehicle at Rajamsbelle, but that Esperancilla denied the offer on grounds that only Jen Marz could make the repairs. Esperancilla and Hiponia, however, claim that Royal Crown never offered to repair their vehicles at Rajamsbelle, but instead, authorized Jen Marz to fix the damage, and subsequently refused to pay for the work after Jen Marz performed the repairs. Royal Crown never paid anything to either Esperancilla or Hiponia.

¶ 4 As a result, Hiponia and Esperancilla brought this lawsuit against Royal Crown to recover the insurance proceeds and other damages related to Royal Crown's handling of the claim. They filed claims for breach of the implied covenant of good faith and fair dealing, breach of contract, violation of the CPA, and violation of the UCSPA. The jury found in favor of Esperancilla and Hiponia on all of their claims and awarded damages in the amount of $129,480.11. After post-trial motions, however, the trial court granted judgment as a matter of law and reversed the jury's findings of liability on the UCSPA claim, and reduced the total damage award to $39,741.71.[1] Royal Crown appealed and Hiponia and Esperancilla subsequently cross-appealed.

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[1]

Esperancilla's Damages

Cause of Action	Jury Verdict	Final Judgment
Breach of Contract	$2,150.00	included in figure below
Breach of Good Faith & Fair Dealing	$3,383.07	$3,383.07
UCSPA	$25,000.00	$0
Consumer Protection Act	$4,300.00	$3,383.07
Total Compensatory Damages	**$34,833.07**	**$6,766.14**
Punitive Damages	$85,000.00	$23,681.49
Grand Total	**$119,833.07**	**$30,447.63**

Hiponia's Damages

Cause of Action	Jury Verdict	Final Judgment
Breach of Contract	dismissed by stipulation	dismissed by stipulation
Breach of Good Faith & Fair Dealing	dismissed by stipulation	dismissed by stipulation
UCSPA	$5,000.00	$0
Consumer Protection Act	$4,647.04	$9,294.08
Total Compensatory Damages	**$9,647.04**	**$9,294.08**
Punitive Damages	not sought	not sought
Grand Total	**$9,647.04**	**$9,294.08**

II

¶ 5 The following issues are before the Court: whether (1) 4 CMC §§ 7302(g) and 7505(h) preempt Esperancilla's and Hiponia's common law claims for breach of the implied covenant of good faith and fair dealing, breach of contract, and punitive damages; (2) there is sufficient evidence to support the jury's verdict finding: (i) a breach of the implied covenant of good faith and fair dealing, (ii) a breach of contract, (iii) a violation of the CPA, (iv) supporting the compensatory damage award, and (v) supporting the punitive damage award; (3) Royal Crown's actions constitute a violation of the CPA; (4) the award of liquidated damages was proper; (5) the punitive damage award complied with the Due Process Clause of the Fourteenth Amendment; (6) the judgment as a matter of law finding that Esperancilla and Hiponia could not maintain their UCSPA claim was proper; (7) a new trial was warranted: (i) for the remark made about Royal Crown's counsel, (ii) for the failure to give certain jury instructions, (iii) because the verdict was against the weight of the evidence, and (iv) because a *Batson* error occurred; (8) Esperancilla and Hiponia may challenge the remittitur on cross-appeal; and (9) the trial court's award of attorney's fees and costs: (i) failed to segregate the fees, (ii) was for an unreasonable amount, (iii) was excessive, (iv) properly determined that the bad faith claim could support the award of fees, and (v) awarded costs that were unreasonable, excessive, and amounted to an abuse of discretion. The Court addresses these issues in turn.

A. Issues Raised for the First Time on Appeal

¶ 6 Royal Crown argues for the first time on appeal that Esperancilla's first party common law bad faith claim is preempted by 4 CMC § 7302(g),[2] his claim for punitive damages is preempted by 4 CMC §

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[2] 4 CMC § 7302(g) Claim Settlement Practices.

(1) No insurer doing business in the Commonwealth shall engage in unfair claim settlement practices. Any of the following acts by an insurer, if committed without just cause and performed with such frequency as to indicate a general business practice, shall constitute unfair claim settlement practices:

(A) Misrepresenting to claimants pertinent facts or policy provisions relating to coverages at issue;

(B) Failing to acknowledge with reasonable promptness pertinent communications with respect to claims arising under its policies;

(C) Failing to adopt and implement reasonable standards for the prompt investigation of claims arising under its policies;

(D) Not attempting in good faith to effectuate prompt, fair and equitable settlements of claims submitted in which liability has become reasonably clear; or

(E) Compelling policyholders to institute suits to recover amounts due under its policies by offering substantially less than the amount ultimately recovered in suits brought by them.

(2) Evidence as to numbers and types of complaints to the Insurance Commissioner against an insurer, and Insurance Commissioners complaint experience with other insurers writing similar lines of insurance, shall be admissible in an administrative or judicial proceeding brought under this division; provided, no insurer shall be deemed in violation of this section solely by reason of the number and types of such complaints.

(3) If it is found, after notice and an opportunity to be heard, that an insurer has violated this section, each instance of noncompliance may be treated as a separate violation of this section for purpose of 4 CMC § 7509.

7505(h),[3] and his common law breach of contract claim is preempted by both 4 CMC §§ 7302(g) and 7505(h). As a general rule, this Court does not consider issues raised for the first time on appeal. *Demapan v. Bank of Guam*, 2006 MP 16 ¶ 9. There are, however, three exceptions to this rule: "(1) a new theory or issue arises because of a change in the law while the appeal was pending; (2) the issue is only one of law not relying on any factual record; or (3) plain error occurred and an injustice might otherwise result if the appellate court does not consider the issue." *Id*. We must determine whether the second and third exceptions from *Demapan* apply[4] and would allow us to consider these issues.

¶ 7 In *Demapan*, the plaintiff customer attempted to cash a check at the defendant bank, but the bank refused claiming that the plaintiff was not an account holder and seized the check. Later that evening, however, the bank recognized its error, went to the plaintiff's house, and provided him with a cashiers' check. The plaintiff brought suit for common law conversion but failed to prove all of the necessary elements. For the first time on appeal, the plaintiff raised a claim for damages under 5 CMC § 4103. We stated "where a purely legal issue is being raised for the first time on appeal, this Court will not review it if it is necessary to refer to the record, even if the facts already exist in the record." *Id*. ¶ 9. In refusing to hear the claim, we found that reaching a decision would require examining the record. *Id*. We additionally found that there was also no plain error that would amount to an injustice by our refusal to determine whether plaintiff had a right to recovery under the statute. *Id*.

¶ 8 In *Santos v. Public School System*, 2002 MP 12, a husband sought workers' compensation benefits when his wife died on a business trip. During an informal conference, the hearing officer recommended awarding benefits; however, at a subsequent formal hearing the officer denied benefits. The parties stipulated that the Workers' Compensation Commission Rules & Regulations ("WCCRR") § 3.102, known as the twenty-four hour rule, did not apply; this was used as the justification for denying benefits. The husband appealed the decision to the full Workers' Compensation Commission (WCC), but he failed to raise the issue of whether the twenty-four hour rule applied; as a result, the WCC denied

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[3] 4 CMC § 7505(h) Failure to Pay Loss: Recovery of Amount Due and Damages.
In all cases where loss occurs and the insurer liable therefor fails to pay the same within the time specified in the policy, after demand made therefor, the insurer shall be liable to pay the holder of the policy, in addition to the amount of the loss, 12 percent damages upon the amount of the loss, together with all reasonable attorney's fees for prosecution and collection of the loss; the attorney's fees to be taxed by the court where the same is heard on original action, by appeal or otherwise, and to be taxed as a part of the costs therein, and collected as other costs are or may be by law collected; and writs of attachment or garnishment filed or issued after proof of loss or death has been received by the insurer shall not defeat the provisions of this section; provided, the insurer desiring to pay the amount of the claim as shown in the proof of loss or death may pay the amount into the registry of the court after issuance of writs of attachment and garnishment, in which event there shall be no further liability on the part of the insurer.

[4] The first exception is inapplicable because there was no change in the law applicable to the issues raised before us.

benefits. The husband then sought review of the decision by the trial court, and he alleged that he was entitled to benefits under WCCRR § 3.102, but the court found that this issue was not properly raised during the full WCC hearing. We found that the parties failed to properly raise the twenty-four hour rule below, and that considering whether it applied required us to make factual findings. *Id*. ¶ 9. Specifically:

> [t]he applicability of WCCRR § 3.102 to this case hinges on factual determinations, which must be made, such as: Susana (1) was an employee of an employer in the Commonwealth; (2) was traveling on behalf of her employer; and (3) was injured or died. Although the requisite facts were either found by the court or admitted by the parties, we will not consider the issue unless it does not rely on any factual record. *Id*. ¶ 11.

Thus, even though these facts were not in dispute, we could not consider them in determining whether the twenty-four hour rule applied because an examination of the record is not allowed.

¶ 9 The Court did, however, find that plain error occurred concerning the stipulation because the parties labored under a misconception of law, *id*. ¶ 13; specifically, the parties thought the law was repealed when they entered into the stipulation, when in reality it was only renumbered and still fully in effect. *Id*. ¶ 18. We found that the hearing officer and the husband committed plain error in stipulating that the twenty-four hour rule did not apply, and that this error, which precluded the plaintiff from asserting his only theory of recovery, might result in an injustice. *Id*. As a result, we allowed the plaintiff to raise the applicability of the twenty-four hour rule for the first time on appeal,[5] and determined that the statute applied to his claim. *Id*. ¶ 43. *See also Commonwealth v. Kaipat*, 1996 MP 20 ¶¶ 8, 9 (allowing appellant to argue for first time on appeal – because plain error occurred that might result in an injustice – that the judge should have recused himself from the case because he had personal knowledge of the facts).

¶ 10 To ascertain whether the two statutory provisions preempt the three common law claims requires this Court to examine the record. Numerous factual findings occurred during the course of the trial concerning the auto accident and Royal Crown's conduct in handling the claim. We would have to consider some of the following facts: whether (1) Royal Crown reasonably or unreasonably refused to fix Esperancilla's automobile; (2) Royal Crown offered to have the car repaired at Rajamsbelle; (3) Esperancilla refused to have the car repaired by Rajamsbelle, and (4) Royal Crown unreasonably denied the claim. This is not an exhaustive list of the facts we would consider in determining whether the Insurance Act preempts the common law claims, but it is illustrative of what we would need to consider in determining whether the facts of this case are sufficient to sustain a cause of action pursuant to 4 CMC §§ 7302 and 7505.[6] Furthermore, unlike *Santos*, some of these facts are in dispute, so not only would we examine the record, but we would also have to make findings of facts as well; this is clearly prohibited by

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[5] Since the twenty-four hour rule was not before the full WCC panel when it reviewed the claim, it was not properly before the lower court and thus not properly before this Court at the time of the appeal.

[6] While we will review these factual findings and others in the context of other claims, like in *Santos*, we cannot examine the record for a claim raised for the first time on appeal.

Demapan. Thus, statutory preemption in this case is not solely a question of law because it requires us to review the record, and therefore, the second *Demapan* exception does not apply.

¶ 11 The other question is whether allowing the suit to proceed under the common law theories of recovery and not considering the statutory preemption arguments constitutes plain error that might result in an injustice. Royal Crown's failure to make an argument of statutory preemption is similar to the plaintiff in *Demapan* failing to sue under the most favorable theory; in both cases, the party failed to make the potentially best arguments at trial. In this instance, Royal Crown argues on appeal that plaintiff's common law theories are statutorily preempted, but failed to make this argument at the appropriate time. Our treatment of an argument that the case should be heard under a new theory, or an argument that the case never should have been heard under the theories pleaded is the same, in both instances the correct time to make these arguments is at trial and not on appeal. Also, the situation is unlike *Kaipat* because the integrity of the judge was not questioned, and it is dissimilar from *Santos* because unlike the plaintiff in that case who would have been denied any chance at a recovery, Royal Crown was able to try its case and utilize every available legal defense at its disposal. If an oversight occurred and counsel failed to assert a potentially valid defense at trial, an appeal to this Court is not the appropriate remedy. *See In re Estate of Teregeyo*, 1997 MP 14 ¶ 17 (failure to raise the affirmative defense of the statute of limitations at trial prevents party from raising it on appeal). We find that no plain error was committed that might result in an injustice as a result of our refusal to hear the preemption arguments. Therefore, we refuse to consider whether the bad faith claim is preempted by 4 CMC § 7302, the punitive damages claim is preempted by 4 CMC § 7505, and the breach of contract claim is preempted by both 4 CMC §§ 7302 and § 7505.

B. Sufficiency of the Evidence, Liability, and the Damage Awards

1. Implied Covenant of Good Faith and Fair Dealing

¶ 12 We first address whether there is sufficient evidence to support the jury's verdict for the breach of the implied covenant of good faith and fair dealing. Sufficiency of the evidence is a question of law which is reviewed de novo. *Isla Fin. Servs. v. Sablan*, 2001 MP 21 ¶ 3. Specifically, when considering sufficiency of the evidence questions the Court determines if the evidence viewed in the light most favorable to the prevailing party is sufficient to support the conclusion of the finder of fact. *Torres v. Fitial*, 2008 MP 15 ¶ 7 (citing *Manglona v. Kaipat*, 3 NMI 322, 329 (1992)).

¶ 13 Since every claim is supported by the same evidence, and the bad faith breach of the implied covenant of good faith and fair dealing must be proven by clear and convincing evidence, whereas the others are proved by a preponderance of the evidence, we will review the sufficiency of the evidence for the bad faith claim first. Every contract imposes a duty of good faith and fair dealing on the parties, and when a party acts in bad faith they breach the covenant and become liable for that breach. Restatement

(Second) of Contracts § 205 cmt. a (1981). Before we can review the sufficiency of the evidence, we must first determine what constitutes bad faith in an insurance contract; this is a question of first impression in the Commonwealth. We will address the parameters of bad faith before determining whether the evidence at trial was sufficient to support the jury's verdict. To prove bad faith in the insurance context, "a plaintiff must show: (1) benefits due under the policy were withheld; and (2) the reason for withholding benefits was unreasonable or without proper cause." *Guebara v. Allstate Ins. Co.*, 237 F.3d 987, 992 (9th Cir. 2001) (interpreting California law). Otherwise stated, bad faith occurs when "'the refusal to pay policy benefits . . . was unreasonable,' and not as a result of mere negligence or bad judgment." *Adams v. Allstate Ins. Co.*, 187 F. Supp. 2d 1207, 1214 (C.D. Cal. 2002) (quoting *Chateau Chamberay Homeowners Ass'n v. Associated Int'l Ins. Co.*, 90 Cal. App. 4th 335, 346 (2001)). Therefore, we will determine whether the evidence was sufficient to support a finding that Royal Crown acted unreasonably in refusing to pay Esperancilla's claim.

¶ 14 Royal Crown first argues that it justifiably denied Esperancilla's claim on the grounds of collusion. It points out that the police report did not find Esperancilla at fault, Hiponia's car was illegally parked, and after the collision Esperancilla told Hiponia that he had full coverage and that they could both claim under his policy. Royal Crown argues that these facts support its position that it acted reasonably in denying the claim on the grounds that the parties colluded. In the alternative, it claims that it did offer to repair Esperancilla's vehicle at Rajamsbelle even though it questioned the legitimacy of the collision. In support of this contention, the record contains an estimate by Rajamsbelle for how much it would cost to repair Esperancilla's vehicle, and one of Royal Crown's employees testified about the offer. Royal Crown also argues that under the policy's terms a party can not insist that a certain auto shop perform the repairs or decide what parts are used; in other words, the insurance company determines who makes the repairs and how the repairs are performed. Therefore, they argue the jury's finding of bad faith was not supported by the record. Esperancilla argues that there is no dispute that a collision occurred, his policy obligated Royal Crown to pay for damage caused by a collision involving his vehicle with another automobile, and since he had full coverage, it did not matter who was at fault. The policy also obligated Royal Crown to pay "all sums which the insured shall become legally obligated to pay as damages . . . caused by [an] accident and arising out of ownership, maintenance or use of the automobile." Appellant's Excerpts of Record ("ER") at 690. Therefore, they argue the decision to deny the claim amounted to bad faith.

¶ 15 The claim was initially denied on the basis that Esperancilla violated "item 15" of the policy by not "cooperating."[7] Esperancilla admitted immediately after the accident and at trial that he hit Hiponia's

[7] "**Assistance and Cooperation of the Insured Except Coverage C.** The insured shall cooperate with the company and upon the company's request, shall attend hearings and trials and shall assist in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of suits. The insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other and for

car. A truthful statement explaining an accident and an acknowledgment of liability coverage, however, does not violate an insurance contract's cooperation clause forbidding a party from admitting liability. *Porter v. Employers' Liability Assurance Corp.*, 104 P.2d 1087, 1095 (Cal. 1940).[8] The jury also heard the testimony of Esperancilla's expert witness, Mr. Kirby, who testified that a party who admits hitting a parked car does not breach the cooperation clause of its insurance contract. *Porter*, *Blake*, and *Wenig* all stand for the proposition that making a truthful statement about an auto accident does not violate a cooperation clause; it would violate public policy to prevent one party from giving an honest factual account to another party, or a police officer, about an auto accident because doing so would void insurance coverage. We will not encourage individuals involved in auto accidents to lie about the surrounding events and about whether they have insurance coverage because they fear voiding their insurance policy. Therefore, the violation of the cooperation clause was not a reasonable basis to deny coverage.

¶ 16 Esperancilla also claims that Royal Crown's shifting justifications for denying the claim amount to bad faith. He points out that in two letters Royal Crown sent in February, it denied the claim on the basis of the cooperation clause, but explicitly stated that it could deny the claims for other reasons. In March, Royal Crown denied the claim on the basis that Esperancilla's statement and sketch of the accident was not congruent with its own investigation, interviews, expert opinions, and its determination of the location of the damage sustained by the cars. Esperancilla, however, never actually drew a sketch of the accident, but instead wrote "see police report." Then in November, Royal Crown provided additional grounds for denying the claim citing that the damage to the vehicles was not consistent with a head-on collision. A witness for Royal Crown testified that a head-on collision would not result in damage to the front center of Esperancilla's truck and the front right of Hiponia's car. Esperancilla's expert, Mr. Kirby, contradicted this evidence and testified that the explanation for denying coverage was nonsensical because regardless of the angle of the collision, the front of Esperancilla's truck hit the front of Hiponia's car. Thus, the numerous letters providing different rationales for denying the claim and the expert testimony provided sufficient evidence for the jury to find that the claim was unreasonably denied.

¶ 17 Esperancilla next argues that Royal Crown's claim of collusion was so unreasonable that it provides support for the finding of bad faith, and that ample evidence presented at trial disputed the collusion accusation. Specifically, when counsel asked the investigating officer if he thought anyone was lying or if anything seemed unreal he answered "no." Additionally, Mr. Kirby testified that there was no

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such immediate medical and surgical relief to others as shall be imperative at the time of the accident." Appellant's ER at 716.

[8] *See Blake v. Continental Cas. Co.*, 278 Ill. App. 232 (Ill. App. Ct. 1934); *Wenig v. Glens Falls Indemnity Co.*, 61 N.E.2d 442 (N.Y. 1945).

evidence indicating that the parties staged the accident, and that nothing hinted at collusion. A Royal Crown employee who testified also stated that she believed that Hiponia was telling the truth. This testimony was sufficient for the jury to reject the collusion argument. Finally, Esperancilla argues that Royal Crown never offered to repair the automobiles at Rajamsbelle, but instead offered to repair the vehicles at Jen Marz only to subsequently refuse to make any payment. [9] At trial Hiponia testified that he had no intention of making the repairs at his shop, but that Royal Crown authorized him to perform the work. The evidence supporting Royal Crown's position consists of the repair estimate and the testimony of one of its employees; whereas the evidence supporting Esperancilla's version of the events is Hiponia's testimony. Viewing this finding in the light most favorable to Esperancilla, and considering the numerous letters denying coverage, there was a sufficient basis for the jury to believe Hiponia's account over Royal Crown's version.

¶ 18 We find that the record contains more than sufficient evidence for the jury to find by clear and convincing evidence that Royal Crown acted in bad faith by unreasonably denying Esperancilla's claim. Our role is to determine if there is sufficient evidence to support the jury's verdict viewed in a light favorable to Esperancilla; our role is not to reweigh the evidence and re-decide the case. *Torres*, 2008 MP 15 ¶ 7. First, Royal Crown had a duty to repair Esperancilla's truck, and there was ample evidence indicating that on numerous occasions it refused to make the repairs, and the Rajamsbelle price quote coupled with the employee's testimony is insufficient for this Court to overturn the jury's verdict. Second, Esperancilla provided evidence explaining that he did not violate the cooperation clause of the contract; as a matter of law, Esperancilla's truthful recitation of what occurred did not void the policy. Third, the record contains ample testimony, such as by the investigating officer, Mr. Kirby, and even Royal Crown's own employee stating that no one appeared to be lying; this casts serious doubt on the reasonableness of the collusion argument. Fourth, Esperancilla made a persuasive argument supported by the record that Royal Crown's letters denying coverage were shifting, groundless, and unreasonable, and its expert provided testimony explaining why these letters did not provide a sound rationale for denying the claim. Therefore, there was sufficient evidence for the jury to conclude that Royal Crown acted in bad faith by unreasonably denying Esperancilla's claim.

2. Breach of Contract

¶ 19 The Court must determine if there is sufficient evidence to support the jury's verdict for the breach of the insurance contract by a preponderance of the evidence. Sufficiency of the evidence is a question of law which is reviewed de novo. *Isla Fin. Servs.,* 2001 MP 21 ¶ 3. An insurance contract is

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[9] We do not rule on whether Royal Crown or Esperancilla had the right to choose where the car was to be repaired under the insurance policy because it is irrelevant to determining whether there was sufficient evidence to support the jury's verdict.

construed liberally in favor of the insured and strictly against the insurer. *Athridge v. Aetna Cas. & Sur. Co.*, 351 F.3d 1166, 1172 (D.C. Cir. 2003). The interpretation of language in an insurance policy is a question of law, *Century Insurance Co. v. Hong Kong Entertainment Investments Ltd.*, 2009 MP 4 ¶ 15, and "[a] policy will be enforced according to its terms by reading it as a whole." *Ito v. Macro Energy, Inc.*, 4 NMI 46, 77 (1993).The exception to this rule is where there is an ambiguity, in which case the ambiguous term is interpreted in favor of coverage. *Id*. Therefore, the evidence must be sufficient to find that under the terms of the contract Royal Crown breached its duties.

¶ 20 Royal Crown argues that it did not breach the insurance contract with Esperancilla because it offered to fix his truck at Rajamsbelle's shop. Royal Crown maintains that "Condition 12" in the contract gave it the option of repairing the vehicle or making a cash payment, and that it opted to have the truck fixed by Rajamsbelle but that Esperancilla refused. It asserts that the evidence presented at trial precludes a finding that it breached the contract because of its offer to repair. The evidence Esperancilla cites to support the jury's breach of contract finding is the same as for the finding of bad faith; we will not recite all of the evidence previously discussed.[10] The only evidence in the record that Royal Crown offered to fix Esperancilla's car was an estimate by Rajamsbelle, and one of the insurer's employee's testimony. No memorialized offer to this effect, however, was put into evidence. On the other hand, the record contains multiple letters denying coverage. Furthermore, neither Esperancilla nor Hiponia testified that they received an offer from Royal Crown for Rajamsbelle to fix their cars, and counsel did not question either of them on this point during cross-examination. Upon reviewing the evidence in the light most favorable to Esperancilla, there is sufficient evidence to support the breach of contract finding.

3. Consumer Protection Act

¶ 21 We must next determine if there is sufficient evidence to support the jury's verdict finding a violation of the CPA, and additionally, whether any of Royal Crown's actions constituted a violation of the Act. Sufficiency of the evidence is reviewed de novo, *Isla Fin. Servs.*, 2001 MP 21 ¶ 3, and whether a specific act complies with or violates the CPA is reviewed de novo. *Id*. ¶ 19.

i. Esperancilla's Claim

¶ 22 In *Isla Financial Services*, 2001 MP 21 ¶ 23, we specified that a violation of the CPA, 4 CMC § 5105,[11] "consists of (1) an unlawful act or practice, (2) in the conduct of trade or commerce." Royal

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[10] *See* ¶¶ 15-17.

[11] 4 CMC § 5105 states in pertinent part:
The following unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared to be unlawful:
…
(m) Engaging in any act or practice which is unfair or deceptive to the consumer;
…

Crown argues that there was insufficient evidence to support a finding that it breached the CPA with respect to its handling of Esperancilla's claim. As established above, Royal Crown breached the insurance contract and acted in bad faith in handling the claim, but a showing that Royal Crown engaged in an unlawful act or practice as specified in 4 CMC § 5105 is necessary for Esperancilla to prevail. Royal Crown contends that it was straightforward and consistent in its reasons for denying Esperancilla's claim, and that it also offered to repair Esperancilla's car at Rajamsbelle. Like the bad faith and breach of contract claims, Esperancilla relies on the same evidence to prove that a violation of the CPA occurred; we will not undertake an in-depth review the evidence discussed *supra*.[12]

¶ 23 In *Isla Financial Services*, 2001 MP 21, a financial services company procured a promissory note from a decedent's daughter that obligated her to make payments on her deceased mother's loan. The financial services company convinced the defendant that her mother would not be able to rest in peace with the loan outstanding, so the daughter took out a loan to pay off the mother's outstanding debt; the daughter made sporadic payments, which eventually stopped with over two-thirds of the balance still due. The financial services corporation brought suit seeking payment, and the daughter counter-claimed that the note was unenforceable and that the company violated the CPA; the trial court found for the daughter. On appeal, the financial services company admitted that its business fell within the meaning of "in the conduct of trade or commerce," so the only issue we faced was whether Isla engaged in an unlawful act or practice; specifically, if it acted unfairly or deceptively. The conversation between the company and the daughter constituted a misunderstanding concerning the daughter's obligation to assume her deceased mother's debt because it carried the implication of moral and legal obligation. *Id.* ¶ 25. We found that "Isla created 'a likelihood of confusion or misunderstanding' or was 'unfair or deceptive to the consumer' when it influenced Ms. Sablan to sign a promissory note and thereby assume her mother's debt." *Id.* ¶ 23 (citing 4 CMC § 5106(1)(m)). As a result, the conversation was sufficient to constitute a violation of the CPA. *Id.* ¶ 25.

¶ 24 In *Agulto v. Northern Marianas Investment Group, Ltd.*, 4 NMI 7, 10 (1993), the plaintiff argued that the defendant violated the CPA by engaging in an unfair or deceptive act by (1) concealing how its poker machines malfunction, (2) refusing to pay him, and (3) denying that he won a certain number of points. In finding that a violation did not occur, we first determined that whether the defendant concealed how its machines malfunctioned was not factually established at trial; next, it was justified in not paying the plaintiff because its technician reported that the machine malfunctioned, which means the transaction was void according to the pre-established rules of the poker parlor; and finally, while it initially disputed the number of points the plaintiff won, it did this because it did not know how many he legitimately won due to the malfunction, and eventually acknowledged the plaintiff's accumulated point total. *Id.*

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[12] *See* ¶¶ 15-17.

Therefore, while there were numerous disputes regarding the defendant's conduct, none amounted to an unfair or deceptive practice because the facts either were not established by the trial court, or legitimate conduct, explanations, and reversals occurred that resulted in no unfair or deceptive acts.

¶ 25 Unlike *Agulto*, there are no necessary factual determinations that were undetermined at trial. There was no dispute concerning Esperancilla's liability to Hiponia, there was sufficient evidence for the jury to find that there was no collusion between the parties, there were numerous letter denying coverage, denying the claim because of the breach of the cooperation clause was not warranted, and the Rajamsbelle price quote does not establish that Royal Crown offered to repair the vehicle. While Royal Crown claims that it reversed its original position denying Esperancilla's claim and offered to fix the car, the record contains no evidence other than an estimate and the testimony of a single witness proving that this occurred. We find it disquieting that an insurer will repeatedly deny a claim in writing over the course of several months, and then come into court claiming that it offered to pay for repairs irrespective of its memorialized refusals to do so and expect an estimate and the testimony of a single employee to be sufficient to support its position, whereas, numerous letters denying coverage, expert testimony, and the testimony from the two plaintiffs is insufficient to prove that an unreasonable, unfair, and deceptive denial of coverage occurred. We find, therefore, that the evidence was sufficient for the jury to reach its conclusion that the denial of coverage was unfair and deceptive and violated the CPA.

ii. Hiponia's Claim

¶ 26 Royal Crown first argues that since Esperancilla breached the insurance policy's cooperation clause by admitting that he hit Hiponia's car, it did not owe him any duty to provide coverage under the policy, and therefore, is not liable to Hiponia because it did not owe him a duty. This argument, however, is without effect because as already discussed, Esperancilla's statements admitting that he hit Hiponia's car did not void the policy. Royal Crown next argues that there was no finding that Esperancilla was liable to Hiponia for the damage to his car, and therefore, it is not liable for violating the CPA with respect to Hiponia. Esperancilla and Hiponia argue that a party becomes liable under the CPA when they become legally obligated to a third-party and not when a court makes a determination that they are legally obligated. There is no need to address this distinction now because the Omnibus Order in Response to Various Post-Trial Motions determined that while the question of Esperancilla's liability to Hiponia "was not squarely presented to the jury, the jury must have necessarily concluded that Mr. Esperancilla was liable to Mr. Hiponia before any damages could be awarded to Mr. Hiponia." ER at 907. We find that there was sufficient evidence, discussed *supra*, for the jury to reach the conclusion that Esperancilla hitting Hiponia's parked car created liability on his part and consequently on the part of Royal Crown. Therefore, there was an implicit factual finding of Esperancilla's liability, and such a finding is sufficient to support a claim under the CPA.

¶ 27 Royal Crown also maintains that it is not liable because the evidence did not establish the existence of "trade or commerce" in connection with Hiponia's claim. It argues that there must be a commercial relationship between Royal Crown and Hiponia for Hiponia to recover under the Act. The Commonwealth CPA states that "[a]ny person aggrieved as a result of a violation of this article may bring an action . . . ." 4 CMC § 5112. In, *Brownell v. State Farm Mutual Insurance Co.*, 757 F. Supp. 526, 533 (E.D. Pa. 1991), the plaintiff's CPA claim was dismissed because she was neither in privity of contract nor in a commercial relationship with the defendant. Pennsylvania's statute, however, is distinct from the Commonwealth's because it states that "[a]ny person who purchases or leases goods or services . . . may bring a private action to recover." 73 P.S. § 201-9.2. Pennsylvania's statute is much more restrictive than ours because it requires the purchase or lease of goods or services, which creates a relationship between the consumer and the seller, whereas, 4 CMC § 5112 states than any aggrieved person may bring suit. This difference in construction is sufficient to distinguish *Brownell*, and we find it unpersuasive in interpreting our CPA.

¶ 28 Washington state's CPA is similar to ours and states "[a]ny person who is injured in his or her business or property by a violation of RCW § 19.86.020 . . . may bring a civil action . . . ." Wash. Rev. Code § 19.86.090. In *Washington State Physicians Insurance Exchange & Association v. Fisons Corp.*, 858 P.2d 1054, 1061 (Wash. 1993), this provision was interpreted to not require that the plaintiff have a commercial relationship with the defendant for the plaintiff to successfully bring suit for a violation of the CPA. Similarly, in *Escalante v. Sentry Insurance Co.*, 743 P.2d 832, 839 (Wash. Ct. App. 1987) (overturned on other grounds), the court allowed a passenger in an auto accident to bring suit under the CPA against the insurance company based on its bad faith in handling the claim even though the injured party was not a party to the insurance contract. We give the language of a statute its plain meaning, *Estate of Faisao v. Tenorio*, 4 NMI 260, 265 (1995), and since our statute states that any person who is aggrieved may bring a claim, our statutory language is more similar to Washington's language than Pennsylvania's language; thus, we find that the plain meaning of 4 CMC § 5112 allows any aggrieved individual, and not just those in privity of contract or in a commercial relationship with the defendant, to have standing under the statute. Since Esperancilla is liable to Hiponia, and his insurance policy obligated Royal Crown to make payment when its insured became liable, Hiponia was aggrieved by Royal Crown's failure to satisfy the claim.

4. Liquidated Damages

¶ 29 The next question before us is whether the award of liquidated damages was proper. We review de novo whether a *sua sponte* award of liquidated damages is justified because it turns on a matter of statutory construction. *Century Ins. Co. v. Guerrero*, 2009 MP 16 ¶ 2 (citing *Town House, Inc. v. Saburo*,

2003 MP 2 ¶ 3). The propriety of the amount of liquidated damages awarded is reviewed for an abuse of discretion. *Local 246 Util. Workers of Am. v. S. Cal. Edison Co.*, 83 F.3d 292, 298 (9th Cir. 1996).

¶ 30 In addition to an award of actual damages under the CPA, "the court shall award liquidated damages in an amount equal to the actual damages in cases of willful violations." 4 CMC § 5112. The "[u]se of the word 'shall' is mandatory and has the effect of creating a duty, absent any legislative intent to the contrary." *Francis v. Welly*, 1999 MP 26 ¶ 9; *see Aquino v. Tinian Cockfighting Bd.*, 3 NMI 284 (1992). If the trier of fact finds that a willful violation occurred, then the statute mandates an award of liquidated damages. While the jury did find that there was a willful violation of the CPA with respect to Esperancilla and Hiponia, it failed to award liquidated damages; instead, the court awarded the damages in the amount of the actual damages plus prejudgment interest. In *Limon v. Camacho*, 1996 MP 18, we determined whether an award of liquidated damages could be made by the Department of Labor or only the trial court because the language of 3 CMC § 4447 states that a "court" shall award liquidated damages. In finding that both the court and an administrative agency could award liquidated damages we adopted "a broad reading of the statute which will accomplish most effectively its remedial purposes of expediting the resolution of workers' grievances." *Id*. ¶ 50. In construing the CPA, and 4 CMC § 5112 in particular, we find that its purpose is to protect the public from unscrupulous business practices, and therefore allowing the trial judge to *sua sponte* award liquidated damages furthers the statute's purpose of discouraging unfair and deceptive business practices. Therefore, the award of liquidated damages was proper.

¶ 31 The trial court also determined that prejudgment interest was part of the actual damages sustained, and the award of liquidated damages was comprised of the cost to repair the cars plus prejudgment interest. It is well established that the purpose of prejudgment interest is to make the plaintiff whole and is a part of the actual damages. *Monessen S. Ry. Co. v. Morgan*, 486 U.S. 330, 358 (1988).[13] The liquidated damages awarded under 4 CMC § 5112 properly included prejudgment interest because prejudgment interest is part of actual damages for the purpose of the statute. Therefore, the amount of liquidated damages awarded, including prejudgment interest, was not an abuse of discretion.

5. Compensatory Damages

¶ 32 We must also determine whether the record sufficiently supports the award of compensatory damages. Our review of the sufficiency of the evidence is de novo. *Isla Fin. Servs.*, 2001 MP 21 ¶ 3. Royal Crown argues that the evidence does not support an award of compensatory damages to Esperancilla, because the point of damages is to make a party whole, and that the Jen-Marz auto shop

[13] *See also W. Va. v. United States*, 479 U.S. 305, 310-11 (1987); *General Motors Corp. v. Devex Corp.*, 461 U.S. 648, 655-656 (1983); *Poleto v. Consol. Rail Corp.*, 826 F.2d 1270, 1278 (3rd Cir. 1987); *Wilson v. Burlington N. R.R. Co.*, 803 F.2d 563, 566 (10th Cir. 1986) (cert. denied, 480 U.S. 946 (1987)).

performed the repairs for free. Royal Crown points to Hiponia's examination at trial when he stated that if the insurance company does not pay for the repairs no one will. This evidence, however, does not support Royal Crown's position because Hiponia acknowledged that Esperancilla can not afford to pay him, and Hiponia kept asking Esperancilla about the insurance proceeds. This testimony establishes that Hiponia did not make the repairs gratuitously, and that he is waiting for Esperancilla to receive the insurance money so he can pay Jen Marz for the work. Therefore, the award of compensatory damages was proper and supported by the evidence.

6. Punitive Damages

¶ 33 The Court must finally determine if there is sufficient evidence to support the jury's verdict for the award of punitive damages; sufficiency of the evidence is a question of law which is reviewed de novo. *Isla Fin. Servs.*, 2001 MP 21 ¶ 3. An award of punitive damages is also reviewed for an abuse of discretion, *Santos v. STS Enters.*, 2005 MP 4 ¶ 29, and whether the amount of punitive damages awarded by the trial court complies with the Due Process Clause of the Fourteenth Amendment is a question of law reviewed de novo. *Commonwealth v. Tinian Casino Gaming Control Comm'n*, 3 NMI 134, 143 (1992). An abuse of discretion occurs when the decision "rests upon a clearly erroneous finding of fact, errant conclusion of law or an improper application of law to fact." *Oddi v. Ford Motor Co.*, 234 F.3d 136, 146 (3rd Cir. 2000).

¶ 34 Punitive damages may be awarded for outrageous conduct due to the "defendant's evil motive or his reckless indifference to the rights of others." *Santos v. STS Enters.*, 2005 MP 4 ¶ 22 (citing *Pangelinan v. Itaman*, 4 NMI 114, 119 n.27 (1994) (quoting Restatement (Second) of Torts § 908 (1979))).[14] The purpose of punitive damages is to deter similar conduct in the future. *Id*. ¶ 29. Royal Crown maintains that the restatement is silent regarding the burden of proof necessary to establish punitive damages, but it is incorrect in contending that there is no standard of proof in the Commonwealth because *Jasper v. Quitugua*, 1999 MP 4 ¶ 8, explicitly upheld the trial court's use of a preponderance of the evidence standard for punitive damages in its jury instructions. In this case, the jury found by clear and convincing evidence that Royal Crown acted in bad faith, and subsequently found that its conduct justified an award of punitive damages. In light of *Jasper*, these jury instructions satisfied the appropriate

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[14] Restatement (Second) of Torts § 908 states:

> (1) Punitive damages are damages, other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future.
>
> (2) Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others. In assessing punitive damages, the trier of fact can properly consider the character of the defendant's act, the nature and extent of the harm to the plaintiff that the defendant caused or intended to cause and the wealth of the defendant.

burden of proof, and our review must only find sufficient evidence for the jury to have found by a preponderance of the evidence that punitive damages were warranted because the jury already found by clear and convincing evidence that Royal Crown acted in bad faith. The evidence used to support the award of punitive damages is the same as to support the bad faith claim.[15] The jury was justified in finding that the evidence established reckless indifference because a driver's liability for hitting a parked car is clear cut, there was no reasonable basis to believe in collusion, numerous baseless justifications for denying coverage were given, and there was no definitive proof that Royal Crown ever offered to repair the car at Rajamsbelle. Therefore, the record contains sufficient evidence to uphold the jury's finding that Royal Crown acted with reckless indifference with respect to Esperancilla's rights under the insurance policy; this evidence also establishes that the award was not an abuse of discretion.

¶ 35 Even though we uphold the finding that the record justified an award of punitive damages, the next question is whether the amount awarded was excessive in light of the Due Process Clause of the 14th Amendment. In reviewing a punitive damage award for excessiveness we consider:

> (1) the degree of reprehensibility of the defendant's misconduct, (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award, and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.

Santos, 2005 MP 4 ¶ 30 (citing *BMW of N. Am. Inc. v. Gore*, 517 U.S. 559, 575 (1996)). We agree with the trial court that Royal Crown acted with reckless indifference in not paying the claim. While there was no personal injury, and the amount of damages was relatively small, an insurance company's unreasonable failure to pay a claim is unconscionable. As the evidence established, no objective indication of collusion existed, Esperancilla's liability was clear cut, the admission did not violate the cooperation clause, and the insurer gave unreasonable justifications for denying the claim. An insured enters into an insurance contract not for commercial advantage but for calamity protection, so the breach of such a contract is unique. *Kransco v. Am. Empire Surplus Lines Ins. Co.*, 2 P.3d 1, 9 (Cal. 2000). While the difference between the punitive damage award and the actual harm was great, the difference between the punitive award and the potential harm suffered was extremely low; specifically, Esperancilla's liability coverage was for $48,500 and the punitive damage award totaled $23,681.49. Finally, 4 CMC § 7301(m) allows the Insurance Commissioner to impose a fine up to $25,000, which further supports the reasonableness of the award because it was comparable to the fine Royal Crown could have faced. Therefore, under the due process requirements elucidated in *BMW of North America*, the award of punitive damages is not excessive.

¶ 36 We must finally consider whether the reduction of the jury's punitive damage award was proper. As a preliminary matter, the reduction of a punitive damage award is not a remittitur, and the plaintiff is

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[15] *See* ¶¶ 15-17.

not entitled to elect a new trial in lieu of a reduction because due process mandates a reduction of excessive damages. *Ross v. Kansas City Power & Light Co.*, 293 F.3d 1041, 1049 (11th Cir. 1999).[16] In *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003), the Court further elucidate the three *BMW* factors in determining an appropriate punitive damage award. While there is still no bright line mathematical formula, a single digit multiplier ratio between compensatory and punitive damages will often satisfy due process. *Id*. at 424-25. Since there is no firm benchmark, a particularly egregious act may warrant a higher ratio. *Id*. We keep these strictures in mind while reviewing the reduction of the punitive damage award. The jury initially awarded $85,000 in punitive damages for actual damages totaling $3,383.07; this is roughly a twenty-five to one ratio. While we uphold the award of $23,681.49 as not being excessive and supported by the evidence, an award of $85,000 violates due process given the facts of this case.

¶ 37 In reaching the appropriate amount of punitive damages, several categories of damages were excluded, and the award was calculated based solely on bad faith. As will be discussed below, the judgment as a matter of law was proper, and Esperancilla and Hiponia agreed to the remittitur; therefore, those amounts were properly excluded when determining an appropriate punitive damage award. The Restatement (Second) of Contracts § 355 states "[p]unitive damages are not recoverable for a breach of contract unless the conduct constituting the breach is also a tort for which punitive damages are recoverable." Thus, the trial court was correct in not including the breach of contract damages in calculating the punitive damage award. Since the CPA does not explicitly require an award of punitive damages, and it is exhaustive in listing the damages that are recoverable, the trial court was not under a duty to consider the violation of the CPA in calculating punitive damages. 5 CMC § 5112. The argument that if all of the damages awarded by the jury were used to determine the punitive to compensatory damage ratio, the ratio would only be two point four to one is incorrect because the bad faith damages were the only damages available to use in calculating the punitive damage award; therefore, determining the punitive damage award based only on bad faith was correct.

¶ 38 While it is reprehensible for an insurer to deny a claim where liability is undisputable, and the record justified a punitive damage award, the seven to one ratio complies with due process and not the jury's twenty-five to one ratio. In *State Farm*, 538 U.S. at 419, the Court reiterated that the most

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[16] *See also Johansen v. Combustion Eng'g, Inc.*, 170 F.3d 1320, 1331-32 (11th Cir. 1999) ("A constitutionally reduced verdict, therefore, is really not a remittitur at all. A remittitur is a substitution of the court's judgment for that of the jury regarding the appropriate award of damages. The court orders a remittitur when it believes the jury's award is unreasonable on the facts. A constitutional reduction, on the other hand, is a determination that the law does not permit the award. Unlike a remittitur, which is discretionary with the court and which we review for an abuse of discretion, *Gasperini v. Center for Humanities*, 518 U.S. 415, 435 (1996), a court has a mandatory duty to correct an unconstitutionally excessive verdict so that it conforms to the requirements of the due process clause. *BMW*, 517 U.S. at 585.")

important factor in determining the reasonableness of a punitive damage award is the reprehensibility of the defendant's conduct. Physical as opposed to economic harm, conduct evincing a disregard for the safety of others, financial vulnerability of the target, conduct involving repeated actions, and harm that is the result of intentional malice all indicate a higher degree of reprehensibility and support a larger punitive damage award. *Id*. In this case, the parties only suffered economic harm, but there is some question as to the economic vulnerability of Esperancilla; the record is ambiguous regarding his actual financial status. In any event, an insurance company's failure to pay a claim when liability is clear cut is also particularly troubling given the nature of the insurance business and the inferior bargaining position of the insured. *See Kransco*, 3 P.3d at 9. With an insurance contract, a party pays for a service they never hope to use, but if they need it, they often need the benefit right away, and if the company refuses to honor a claim the insured is left with little recourse other than a lawsuit; this is why we construe insurance contacts broadly in favor of coverage. *Athridge*, 351 F.3d at 1172 (D.C. Cir. 2003). Therefore, we find that the amount of punitive damages awarded was appropriate, and the reduction was necessary to comply with due process.

C. Judgment as a Matter of Law

¶ 39 Our examination next focuses on whether the trial court erred in overturning part of the jury's verdict by granting judgment as a matter of law with respect to the UCSPA claim, 4 CMC § 7302(g).[17] We review de novo the grant of judgment as a matter of law. *Mendiola v. Commonwealth Utils. Corp.*, 2005 MP 2 ¶ 26; *Santos v. Micronesia, Inc.*, 4 NMI 155, 160 (1994). "Judgment as a matter of law is appropriate when a party fails to establish a legally sufficient evidentiary basis for a reasonable jury to find for that party," and it "is not proper unless all the evidence points one way and is susceptible to no

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[17] (g) Unfair Claim Settlement Practices.

(1) No insurer doing business in the Commonwealth shall engage in unfair claim settlement practices. Any of the following acts by an insurer, if committed without just cause and performed with such frequency as to indicate a general business practice, shall constitute unfair claim settlement practices:

(A) Misrepresenting to claimants pertinent facts or policy provisions relating to coverages at issue;

(B) Failing to acknowledge with reasonable promptness pertinent communications with respect to claims arising under its policies;

(C) Failing to adopt and implement reasonable standards for the prompt investigation of claims arising under its policies;

(D) Not attempting in good faith to effectuate prompt, fair and equitable settlements of claims submitted in which liability has become reasonably clear; or

(E) Compelling policyholders to institute suits to recover amounts due under its policies by offering substantially less than the amount ultimately recovered in suits brought by them.

(2) Evidence as to numbers and types of complaints to the Insurance Commissioner against an insurer, and Insurance Commissioner's complaint experience with other insurers writing similar lines of insurance, shall be admissible in an administrative or judicial proceeding brought under this division; provided, no insurer shall be deemed in violation of this section solely by reason of the number and types of such complaints.

(3) If it is found, after notice and an opportunity to be heard, that an insurer has violated this section, each instance of noncompliance may be treated as a separate violation of this section for purpose of 4 CMC § 7509.

reasonable inferences sustaining the position of the non-moving party." *Anderson v. Indep. Sch. Dist.*, 357 F.3d 806, 809 (8th Cir. 2004) (citations omitted). Before we determine whether the grant of judgment as a matter of law was proper, we must first ascertain if the UCSPA confers a private right of action on litigants; since Esperancilla and Hiponia are positioned differently in this lawsuit, we must further determine whether Esperancilla, the insured, may sue, and if Hiponia, the third-party claimant, may also make a claim under the Act. Whether a statute confers a private right of action is reviewed de novo. *Castro v. Division of Public Lands*, 1997 MP 29 ¶ 2.

¶ 40 In *Castro*, we adopted the Supreme Court's test for determining whether a statute confers a cause of action on private parties. We ask (1) is the plaintiff "one of the class for whose benefit the statute was enacted;" (2) "is there any indication of legislative intent, explicit or implicit, either to create such a remedy or deny one;" and (3) "is it consistent with the underlying purpose of the legislative scheme to imply such a remedy for [the] plaintiff." *Id.* ¶ 14; *See Cort v. Ash*, 422 U.S. 66, 78 (1975).[18] As an additional consideration, when a statute provides a remedy courts should be chary of reading other remedies into the scheme; in *Castro*, the statute had its own administrative remedial scheme. *Id.* ¶ 15; *See Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 148 (1980). In *Castro*, the plaintiff argued that the Public Purpose Land Exchange Authorization ("PPLEA") "authorized this Court to lift the twenty-year statute of limitations on claims against the government for takings of property." *Id.* ¶ 8. Ordinarily, a party would file a claim with the MPLC, including stale claims, but the plaintiff failed to do this and instead sought to redress his grievances directly with the court. *Id.* ¶ 9. Castro failed the *Cort* test because while he was part of the class that the PPLEA sought to protect, there was no indication of legislative intent to create a private right of action, and a private right of action was not consistent with the underlying purposes of the legislative scheme. The PPLEA allowed a party to make a claim with the MPLC, and if they were unhappy with that resolution, they could appeal that administrative decision to the court. *Id.* ¶ 16. Castro failed to file an administrative claim, and the Court refused to create a private cause of action for a redress of his grievances. *Id.* ¶ 17.

¶ 41 Like in *Castro v. Division of Public Lands*, Esperancilla is part of the class that 4 CMC § 7302(g) was designed to protect: (1) Royal Crown is an insurance company within the meaning of 4 CMC § 7103(l); (2) Esperancilla entered into an automobile insurance contract; and (3) his insurance company refused to pay the claim he made when he hit a parked car; these facts give rise to a possible violation of 4 CMC § 7302(g). Whether there is any evidence of legislative intent to create such a remedy, or whether a private right of action would interfere with the legislative scheme, is a more nuanced question. First, neither the UCSPA specifically nor the Insurance Act generally expressly create a private cause of action.

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[18] The fourth consideration is whether the cause of action is one typically relegated to state concern so that it would be inappropriate to infer a cause of action based on federal law; this inquiry has no place in our analysis.

The act creates an Insurance Commissioner, 4 CMC § 7104, who may enforce the provisions of the act, promulgate rules and regulations, and conduct examinations and investigations to determine if a violation occurred. 4 CMC § 7105. The Commissioner may also issue administrative orders, 4 CMC § 7106, and may cause the Attorney General to enforce those orders in court. 4 CMC § 7107. The Commission Comment to 4 CMC § 7107 inserted "Attorney General" instead of "prosecuting attorney," which indicates that only the Attorney General's office is to prosecute claims under the Act. Furthermore, 4 CMC § 7108 allows the Commissioner to delegate his duties, but only to employees of the Department of Labor and Commerce, and not to private individuals. Furthermore, 4 CMC § 7201 creates a detailed examination, investigation, hearing, and appeal scheme; the appeal section allows any aggrieved individual directly or indirectly injured or threatened with injury to file an appeal of the administrative hearing with the trial court. Recoveries are discussed in 4 CMC § 7505(h), which states that the insured will recover the loss as well as "twelve percent damages upon the amount of the loss, together with all reasonable attorney's fees for prosecution and collection of the loss;" the attorney's fee's, however will be "taxed by the court where the same is heard on an original action, by appeal or otherwise, and to be taxed as a part of the costs therein . . . ." This is ambiguous; one interpretation is that it allows an insured's attorney to collect fees stemming from the administrative hearing, another is that a private party may bring suit in the trial court, or another is that if an Assistant Attorney General brings a lawsuit the government lawyer's time is recoverable.[19] In support of the latter interpretation that only the Attorney General's Office may bring suit, 4 CMC § 7508 makes clear that "all fees and costs collected pursuant to this division shall be payable to the Commonwealth Treasury . . . ." Finally, 4 CMC § 7509, the penalty provision, states that a violation of this section constitutes a misdemeanor and violation of any of its provisions carries a $1,000 fine if the offender is not an individual, and a $500 fine or six months imprisonment or both if the offender is an individual.

¶ 42 A full reading of the act seems to envision a government enforcement scheme, the penalties have a criminal component, and the only support for a private cause of action, if any can be found, is under a particular interpretation of 4 CMC § 7505(h) that is inconsistent with the rest of the act. On the other hand, the language of these provisions is permissive, and does not create a mandatory duty that the Commissioner investigate and prosecute complaints; this lack of mandatory enforcement and claim investigation renders the statute less effective without a private right of action. Since we cannot definitively determine whether a private cause of action exists under the second and third prong of *Castro* based solely on a statutory interpretation, we will look to other jurisdictions with similar insurance acts for guidance.

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[19] We will not rule on the contours of 4 CMC § 7505(h) since it is not before us at this time, and the resolution of this issue does not turn on our interpretation of the provision.

¶ 43 In *O.K. Lumber Co. v. Providence Washington Insurance Co.*, 759 P.2d 523 (Alaska 1988), Alaska Statute § 21.36.125,[20] Alaska's UCSPA, explicitly states that there is no private cause of action. The court, however, had to determine whether this language extended to third-party claims as well. The act prohibited conduct that occurred so frequently that it became a trade practice, and it set forth specific remedies for violations. *Id*. at 527. The list of prohibited conduct was extensive, the standards for determining whether a violation occurred were imprecise, and the monetary sanctions were small; this was in contrast with potentially large compensatory and punitive damage awards which would be available in a private cause of action. *Id*. These considerations gave rise to a presumption of exclusivity. *Id*. While the legislature intended for the statute to benefit both insured parties and third-party claimants, inferring a private cause of action was inconsistent with the statutory scheme, and the court concluded that no third-party cause of action existed. *Id*.

¶ 44 In *Earth Scientists (Petro Services), Ltd. v. United States Fidelity & Guaranty Co.*, 619 F. Supp. 1465 (D. Kan. 1985), the Kansas UCSPA was a part of the state's Unfair Trade Practices Act.[21] In

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[20] Alaska Stat. § 21.36.125 provides in pertinent part:

(a) A person may not commit any of the following acts or practices:

(1) misrepresent facts or policy provisions relating to coverage of an insurance policy;

(2) fail to acknowledge and act promptly upon communications regarding a claim arising under an insurance policy;

(3) fail to adopt and implement reasonable standards for prompt investigation of claims;

(4) refuse to pay a claim without a reasonable investigation of all of the available information and an explanation of the basis for denial of the claim or for an offer of compromise settlement;

(5) fail to affirm or deny coverage of claims within a reasonable time of the completion of proof-of-loss statements;

(6) fail to attempt in good faith to make prompt and equitable settlement of claims in which liability is reasonably clear;

(7) engage in a pattern or practice of compelling insureds to litigate for recovery of amounts due under insurance policies by offering substantially less than the amounts ultimately recovered in actions brought by those insureds;

(8) compel an insured or third-party claimant in a case in which liability is clear to litigate for recovery of an amount due under an insurance policy by offering an amount that does not have an objectively reasonable basis in law and fact and that has not been documented in the insurer's file;

. . .

(b) The provisions of this section do not create or imply a private cause of action for a violation of this section.

[21] Kan. Stat. Ann. § 40-2404 provides in pertinent part:

The following are hereby defined as unfair methods of competition and unfair or deceptive acts or practices in the business of insurance:

(9) Unfair claim settlement practices. Committing or performing with such frequency as to indicate a general business practice of any of the following:

(a) Misrepresenting pertinent facts or insurance policy provisions relating to coverages at issue;

…

(d) refusing to pay claims without conducting a reasonable investigation based upon all available information;

…

(f) not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear; and

denying both a first and third party claim, it found that the purpose of the act was to create a well regulated insurance industry, and that the act vested all power in the Insurance Commissioner. *Id*. at 1468. The court went on to analyze the statute finding that it always referenced the commissioner in its enforcement provisions, like our UCSPA, and that the act did not provide for the collection of monetary damages that a private party would seek. *Id*. at 1469. The remedies available, a $100 fine, suspension of insurance license, refund of premiums, and notification to the public were inconsistent with a private right of action. *Id*. In denying the plaintiff a private cause of action, the court stated that the insured could file suit for breach of contract in addition to filing a claim with the Insurance Commissioner. *Id*. at 1470.

¶ 45 In *Farmers Group, Inc. v. Trimble*, 658 P.2d 1370, 1378 (Colo. Ct. App. 1982), the court also found that no private right of action existed for first and third-party claims under the state's UCSPA. The statute did not provide the right to a private civil action, but it did vest the Insurance Commissioner with broad discretion. *Id*. The Commissioner could conduct investigations, order parties violating the act to cease and desist, issue monetary fines, and revoke licenses in addition to other powers. *Id*. at 1377. Considering that the statute was extensive, the court reasoned that the legislature would have included a private right of action if it was their intent to allow private parties the right to sue under the statute. *Id*. at 1378. In *Morris v. American Family Mutual Insurance Co.*, 386 N.W.2d 233, 238 (Minn. 1986), no cause of action existed under the state's UCSPA. The court was concerned that finding a cause of action would seriously expand litigation because private parties would attempt to prove general businesses practices, whereas before, this was the task of the Insurance Commissioner. *Id*. at 236-37. The regulatory scheme was also expansive and provided for numerous remedies including punishing companies based on a single violation. *Id*. Thus, it was not the legislature's intent, based on the statute's language, that a private cause of action exist pursuant to the statute.

¶ 46 In *Moradi-Shalal v. Fireman's Fund Insurance Companies*, 758 P.2d 58, 68 (Cal. 1988), the court overturned its prior opinion, *Royal Globe Insurance Co. v. Superior Court*, 592 P.2d 329 (Cal. 1979), and found that California's UCSPA did not confer a private right of action on either first or third-party claimants; the court went into a lengthy legal and policy analysis for why the Insurance Commissioner is the only person able to enforce the act's provisions. The court found that of the states with similar insurance codes that squarely faced the question of whether the UCSPA created a private right of action, the vast majority found that no private right of action existed.[22] *Id*. at 64. Also, in

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(g) compelling insureds to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in actions brought by such insureds.

[22] *Id*. at 64 n.4 & 5:

See A&E Supply Co. v. Nationwide Mut. Fire Ins. Co., 798 F.2d 669, 673-75 (4th Cir. 1986) (interpreting Virginia law); *Earth Scientists*, 619 F.Supp. at 1470-1471 (D. Kan. 1985); *Tweet v. Webster*, 610 F.Supp. 104, 105 (D.Nev. 1985); *White v. Unigard Mut. Ins. Co.*, 730 P.2d 1014, 1020-1021 (Idaho 1986); *Morris*, 386 N.W.2d at 234-238 (Minn. 1986); *Patterson v. Globe Am. Cas. Co.*, 685 P.2d 396, 397-398 (N.M. 1984); *Swinton v. Chubb &*

Ridgeway v. United States Life Credit Life Insurance Co., 793 A.2d 972, 977 n.1 (Pa. 2002), the court noted that *D'Ambrosio v. Pennsylvania National Mutual Casualty Insurance Co.*, 431 A.2d 966, 969-970 (Pa. 1981), which adopted the majority approach and did not create a private right of action for the state's UCSPA, was superseded by statute because the legislature expressly decided otherwise.

¶ 47 These cases lend support to finding that no private cause of action exists under our UCSPA. Similar to the cases discussed above, our statute only discusses the Insurance Commissioner's duties, the Commissioner enjoys broad enforcement powers, numerous remedies are available, and the Attorney General litigates on behalf of the Commissioner. Even though 4 CMC § 7505(h) is ambiguous as to who would litigate the suit, our statute entitles an insured to recuperate his loss plus twelve percent of that amount as damages. Thus, we will examine jurisdictions where a private cause of action exists. In *Sparks v. Republic National Life Insurance Co.*, 647 P.2d 1127, 1139 (Ariz. 1982), a private cause of action existed under the UCSPA. In finding a cause of action, the court principally relied on the following statutory language: "[t]he provisions of this article shall not bar any claim against any person who has acquired any monies or property, real or personal, by means of any practice declared to be unlawful by the provisions of this article." *Id*. at 1138-39. While the court found a first party cause of action, the case was silent regarding third-party causes of action. In *Griswold v. Union Labor Life Insurance Co.*, 442 A.2d 920, 926 (Conn. 1982), the UCSPA was part of the Unfair Trade Practices Act, and since no practical or adequate administrative remedies existed for the plaintiff to exhaust, because the Commissioner could not award damages to a private person, there was no need to file an administrative complaint before a claim for damages could be made in court. Thus, a private cause of action was the only means for a party to vindicate their rights under the statute.

¶ 48 Our statute creates an extensive regulatory scheme, and it envisions a robust administrative process to sanction offending insurers. Individuals with a complaint can file it with the Insurance Commissioner, and the grounds for appeal from a hearing held by the Commissioner as the result of alleged bad acts are broad and include any aggrieved party. The Commissioner's authority includes awarding damages to insured parties harmed by a violation of the statute. The Act also provides for stiff penalties; each violation can result in a separate fine, and if the offender is an individual, jail time is a possibility. Additionally, the above authority indicates that a majority of states with a UCSPA similar to our own have not found a private right of action. All of these considerations indicate that our legislature

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Son, Inc., 320 S.E.2d 495, 496-497 (S.C. 1984); *Seeman v. Liberty Mut. Ins. Co.*, 322 N.W.2d 35, 40-43 (Iowa 1982); *Wilder v. Aetna Life & Cas. Ins. Co.*, 433 A.2d 309, 310 (Vt. 1981); *Kranzush v. Badger State Mut. Cas. Co.*, 307 N.W.2d 256, 269 (Wis. 1981); *Farris v. U. S. Fidelity and Guaranty Co.*, 587 P.2d 1015, 1018-1023 (Ore. 1978); *Young v. Mich. Mut. Ins. Co.*, 362 N.W.2d 844, 846-847 (Mich. Ct. App. 1984); *Scroggins v. Allstate Ins. Co.*, 393 N.E.2d 718, 723-725 (Ill. App. Ct. 1979); *Lawton v. Great Sw. Fire Ins. Co.*, 392 A.2d 576, 581 (N.H. 1978); *Russell v. Hartford Cas. Ins. Co.*, 548 S.W.2d 737, 742 (Tex. Civ. App. 1977).

intended for the Insurance Act to not create a private right of action. Jurisdictions with a private right of action in their statutes either have enabling language or fail to provide an adequate administrative system for parties to seek redress of their grievances. Therefore, the judgment as a matter of law dismissing the 4 CMC § 7302(g) claim is upheld, not for insufficient evidence, but because no private cause of action exists under the statute.

D. Grounds for a New Trial

¶ 49 We review for an abuse of discretion the denial of a motion for a mistrial. *Commonwealth v. Camacho*, 2002 MP 6 ¶ 21. In *Santos v. Nansay Micronesia, Inc.*, 4 NMI 155, 160 (1994), we were faced with a question of jury instruction error and properly stated that the standard of review differs depending on the nature of the error. *See Oglesby v. Southern Pacific Transportation Co.*, 6 F.3d 603, 606 (9th Cir. 1993). *Santos*, was incorrect, however, in holding that the failure to give a jury instruction triggers our review of all the jury instructions under an abuse of discretion standard "to determine if they are misleading or inadequate." *Id*. (citing *Oviatt v. Pearce*, 954 F.2d 1470, 1481 (9th Cir. 1992)). When error in the formulation of jury instructions is alleged, the instructions are considered as a whole under an abuse of discretion standard to determine if they are misleading or inadequate. *Oglesby*, 6 F.3d at 606 (citing *Oviatt*, 954 F.2d at 1481). Where an appellant claims that the trial court misstated the elements that must be proved, the issue is one of law and our review is de novo. *Id*. at 606 (citing *Caballero v. City of Concord*, 956 F.2d 204, 206 (9th Cir. 1992)). Similarly, the failure to give a proper jury instruction is reviewed de novo for clear error and subject to the harmless error rule. *Hasbrouck v. Texaco, Inc.*, 842 F.2d 1034, 1044 (9th Cir. 1987). Finally, "[t]he credibility findings a trial court makes in a *Batson* inquiry are reviewed for clear error." *Rice v. Collins*, 546 U.S. 333, 338 (2005).

1. Remarks about Royal Crown's Counsel

¶ 50 We must determine whether Esperancilla's and Hiponia's counsel made an inappropriate statement by asking a witness if it was true that Royal Crown's counsel prohibited another witness from testifying; after the question was asked, Royal Crown's lawyer objected vehemently, and the trial court issued a curative instruction, but refused to grant a mistrial. Our mistrial jurisprudence is primarily focused on criminal matters, and our one civil case that discussed the issue decided the matter on other grounds; [23] thus, while we will review some of these cases, we will look to other jurisdictions to fully develop the circumstances that warrant a grant of a mistrial based on inappropriate remarks made by counsel in a civil case. In *Commonwealth v. Rabauliman*, 2004 MP 12 ¶ 16, the defendant moved for a

[23] In *Health Professional Corp. v. Superior Court*, 2004 MP 25, a mistrial was granted when the jury inappropriately held onto an exhibit binder, and had at least fifteen minutes to review the evidence. The trial court found that allowing the jurors access to the evidence for such a long period of time constituted sufficient prejudice to warrant a mistrial; the judge's order was appealed on a writ of mandamus to this Court, but we refused to address the merits because counsel failed to provide an adequate record for our review. *Id*. ¶ 17.

mistrial on the grounds that the prosecutor made several improper statements: (1) about facts not in evidence; (2) unfairly attacking the role of the defense attorney; and (3) making adverse inferences about the defendant's failure to testify. The motion for a mistrial was denied, and we affirmed after reviewing the entire record and determining that no plain error occurred. *Id.* ¶ 38. While these cases are informative, they are not sufficient for this Court to decide the grounds that warrant a civil mistrial given the facts of this appeal.

¶ 51 In *Kehr v. Smith Barney, Harris Upham & Co.*, 736 F.2d 1283, 1285 (9th Cir. 1984), plaintiff "Pearl Kehr, a client of [defendant] Smith Barney, sued the firm and two of its employees in 1981 alleging violations of both federal and state securities laws resulting in losses of over $100,000 to her accounts." The defendant moved for a new trial after closing statements because plaintiff's counsel: "(1) indulged in criminal imagery; (2) commented on the financial disparity between the parties; (3) dwelled upon irrelevant subjects; (4) conducted himself with a lack of decorum; and (5) made unsubstantiated accusations of tampering with documents against Smith Barney and its counsel." *Id*. The trial court was aware of the improper statements, but refused to intervene to prevent further misconduct or even issue a curative instruction to the jury. *Id.* Attorney misconduct warrants a new trial when the "flavor of misconduct [] sufficiently permeates an entire proceeding to provide conviction that the jury was influenced by passion and prejudice in reaching its verdict." *Id*. at 1286 (citations omitted). The remarks were isolated instead of consistent, most of the inappropriate statements were made during opening and closing statements, and the jury's award was not excessive. *Id*. Upon review of the entire record, the court found that the trial court did not abuse its discretion in determining that the jury was not sufficiently prejudiced to warrant a new trial, and as a general matter, a trial court is in a much better position to determine whether statements are prejudicial rather than "an appellate court which reviews only the cold record." *Id*.

¶ 52 Similarly, in *Maday v. Public Libraries*, 480 F.3d 815, 817 (3rd Cir. 2007), a mistrial was not granted even though defense counsel made repeated disparaging remarks about plaintiff's counsel and inappropriate non-verbal communication casting doubt on plaintiff's case and plaintiff's counsel's abilities as a lawyer. One of the most egregious statements, made during a sidebar conference within earshot of the jury, implied that counsel was a liar. *Id*. In affirming the denial of a motion for mistrial, the court noted that under the totality of the circumstances the inappropriate comments did not influence the jury's verdict. *Id*. at 818. The remarks, instead, consisted of "nothing more than verbal (and perhaps also non-verbal) sparring between trial attorneys, an occurrence not uncommon 'in the heat of battle.'" *Id*. In *Forrest v. Beloit Corp.*, 424 F.3d 344, 352 (3rd Cir. 2005), counsel requested a mistrial on numerous grounds including counsel's inappropriate questions; the court denied the motion for a mistrial and instead issued a curative instruction. The appellate court refused to reverse finding that the record did not

contain sufficient evidence indicating that prejudice influenced the jury in reaching its verdict. *Id*. Instead, the curative instruction and the admonitions were sufficient to cure any impropriety that occurred. *Id*.

¶ 53 In this case, Esperancilla's and Hiponia's counsel asked one inappropriate question, Royal Crown's counsel objected, an exchange occurred, and as a result, counsel received an admonition and a curative instruction was issued. Our review of the entire record does not lead us to believe that the statement at issue permeated the entire trial and prejudicially influenced the jury. The facts from the cases above are inapposite to the facts before us on this appeal. The mistrial in *Health Professional Corp.* resulted because the jury obtained and reviewed an entire evidence binder for at least fifteen minutes. In *Kehr*, *Maday*, and *Forrest*, counsel made numerous inappropriate statements over the course of the entire proceeding, and in every instance the trial court refused to grant a mistrial and the appellate court affirmed; in this case, we are only dealing with a single isolated statement.[24] The judge acknowledged that the statement could be construed in several ways, with some of them being inappropriate, and issued a curative instruction and admonished counsel; any prejudice stopped here. The jury's numerous damage awards also do not support the argument that the statement infected the trial because there is more than sufficient evidence indicating that Royal Crown acted in bad faith, acted deceptively, and acted with reckless indifference in its handling of Esperancilla's claim. While we also acknowledge that the remark was inappropriate, a new trial is not the appropriate remedy in this instance. The comment is best characterized as a slip of the tongue during the "heat of battle," which was corrected, and not as a remark that infected the jury with passion or prejudice. Therefore, the refusal to grant a mistrial was not an abuse of discretion.

2. Jury Instruction Regarding Traffic Laws

¶ 54 Royal Crown argues that the trial court failed to give two jury instructions. In *Santos*, 4 NMI at 163, the appellant appealed the failure to give a jury instruction, but since it did not challenge the failure to include the instruction at trial, we did not consider the merits. In this case, however, counsel did properly object, so we must look to other jurisdictions for guidance in determining whether the failure to give the requested instructions constitutes reversible error. A party has a right to a jury instruction when there is a basis in law and the record. *Hasbrouck*, 842 F.2d at 1044. Royal Crown consistently maintained that Hiponia illegally parked his automobile, and requested the following jury instruction, which is a verbatim reproduction of 9 CMC § 5603(a). The requested instruction is as follows:

> No person may park or leave standing any vehicle, either attended or unattended, upon the main traveled portion of any highway outside of a business or residential district, when it is practicable or possible to leave the vehicle standing off the main traveled portion of the highway. In no event may any person park or leave standing any vehicle,

[24] We fully acknowledge that a single inappropriate statement by counsel may trigger a mistrial, but this statement does not warrant that result.

> whether attended or unattended, upon any highway unless a clear and unobstructed width of not less than 15 feet upon the main traveled portion of the highway opposite the standing vehicle is left for the free passage of other vehicles on the highway or unless a clear view of the vehicle may be obtained from a distance of 300 feet in each direction upon the highway.

Royal Crown further sought the inclusion of the following definition of highway, which directly quotes 9 CMC § 1102(p): "Highway means a way or place of whatever nature open to the use of the public for purposes of vehicular traffic, including ways or places that are privately owned or maintained." This language, however, fails to include the opening phrase of 9 CMC § 1102 that states: "In this title, unless the context otherwise requires, the following definitions apply." Thus, while the definition of highway seems particularly broad when reading subsection (p) because it includes virtually every surface available for use by vehicular traffic, the nature of any roadway must be considered in context. This accident occurred on a roadway that served as the entrance to an auto repair shop, and the area contained numerous parked cars either waiting for repairs or beyond repair. Our review of the photos contained in the record show that the curbless dirt roadway is more similar to a long driveway than a highway. We will still determine, however, if a likely violation of the statute occurred sufficient to warrant giving the jury instruction.

¶ 55 The traffic crash report did not cite anyone for violating any traffic law, the officer testified that no one was parked illegally, Hiponia testified that the officer did not warn him that he was parked illegally, there is evidence indicating that Hiponia may have parked completely off the road on the side, and Royal Crown failed to introduce any evidence that Hiponia was parked in a manner that violated the statute. Regarding the direction a vehicle must face when parked, 9 CMC § 5603(e) specifies that when a curb is present, the right-hand wheels must be within eighteen inches of the right-hand curb; the statute is silent regarding parking direction on curbless roads such as this one. Royal Crown also cites cases for the proposition that the failure to instruct the jury on applicable traffic laws in negligence cases constitutes reversible error because violation of an applicable statute is proof of negligence; it failed, however, to argue that Hiponia was negligent during trial, so this argument is without effect.[25] There is no evidence that Hiponia was in violation of 9 CMC § 5603(a) because the roadway is not a highway as the term is defined by 9 CMC § 1102(p), there is evidence indicating that Hiponia was not even parked on the road, and the Commonwealth Code is silent regarding the direction a vehicle must be parked on a curbless road such as this one; therefore, it was not error for the trial court to refuse to include the requested instruction.

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[25] *Seaboard Coastline R.R. Co. v. Addison*, 502 So.2d 1241 (Fla. 1987); *Barkett v. Gomez*, 908 So.2d 1084 (Fla. Dist. Ct. App. 2005).

3. Whether the Verdict is Against the Weight of the Evidence

¶ 56 A new trial is justified when the verdict is against the great weight of the evidence. *Santos*, 4 NMI at 167. The evidence that we discussed *supra*[26] is sufficient to sustain the entire verdict for the same reasons it was sufficient to sustain the individual claims of bad faith, breach of contract, violation of the CPA, and the various damage awards. We will briefly summarize some of the key evidence that supports the jury's verdict, but we acknowledge that the record contains even more evidence in support of the verdict, and that in some instances, it is the lack of evidence in the record that supports the jury's findings. First, the insurance policy obligated Royal Crown to pay for damage caused by a collision involving Esperancilla's vehicle with another automobile, but the company gave numerous unreasonable justifications for denying coverage. As discussed above, Esperancilla did not violate the cooperation clause, the alleged incongruences between Esperancilla's statement and Royal Crown's own investigation, interviews, expert opinions, and determination of the location of the damage to the cars is insufficient, and the evidence sufficiently refuted the allegation of collusion. Furthermore, the argument that Hiponia did not expect to get paid for the repairs is irrational; Hiponia acknowledged that Esperancilla could not afford to pay him, but he kept asking Esperancilla about the insurance proceeds. For the same reasons that the evidence was sufficient to sustain the jury's verdict with respect to each individual claim, it is sufficient to sustain the verdict in its entirety, and it was not an abuse of discretion to refuse to grant a new trial on this ground.

4. Batson Error

¶ 57 The last ground for a mistrial that Royal Crown asserts was for allowing Esperancilla's and Hiponia's counsel to strike a juror because of his race; removing a juror because of race is a violation of the equal protection clause of the Fourteenth Amendment. In *Batson v. Kentucky*, 476 U.S. 79, 83 (1986), the Court applied the equal protection clause of the Fourteenth Amendment to prohibit prosecutors from striking jurors on the basis of race, and *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 630 (1991), extended this rule to civil cases. Royal Crown claims that Esperancilla's counsel impermissibly used a peremptory challenge to strike juror number twenty-one from the jury pool because he was Caucasian; Esperancilla argues that it removed the juror because of his demeanor towards counsel and his education level. A *Batson* challenge requires a three step inquiry: first, the party challenging the peremptory strike must make a prima facie case showing that the totality of the relevant facts gives rise to an inference of a discriminatory purpose; second, if this showing is made, the burden shifts to the party that made the peremptory challenge to provide a race-neutral explanation, but this explanation does not need to be plausible or persuasive, it only needs to not violate equal protection; and third, the court must then determine whether the party challenging the strike met its burden of proof by examining the

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[26] *See* ¶¶ 15-17.

persuasiveness of the justification offered by that party. *Rice*, 546 U.S. at 338 (citations omitted). A prima facie case may be established by providing a wide range of evidence so long as the sum of the evidence gives rise to an inference of a discriminatory purpose. *Johnson v. California*, 545 U.S. 162, 169 (2005) (citations omitted). "The first two *Batson* steps govern the production of evidence that allows the trial court to determine the persuasiveness of the defendant's constitutional claim," and "[i]t is not until the third step that the persuasiveness of the justification becomes relevant – the step in which the trial court determines whether the opponent of the strike has carried his burden of proving purposeful discrimination." *Id*. at 171.

¶ 58 Under the *Clemons* rule, a prima facie case may be established when the party challenging the strike proves that the opposing party removed other potential jurors of the challenging party's race. *United States v. Clemons*, 843 F.2d 741, 745 (3rd Cir. 1988). *Clemons* is not applicable in this instance because Royal Crown is a corporation, its president is Chinese, and the removed juror was Caucasian. Royal Crown's evidentiary argument was that Esperancilla's first peremptory challenge removed the only Caucasian juror, and his removal resulted in a completely non-Caucasian jury pool. This was the extent of the argument made in support of finding a discriminatory intent in removing juror number twenty-one.

¶ 59 Nevertheless, the trial court required Esperancilla's counsel to explain why the challenge was not race-based. The first explanation given was that the potential juror was too educated. In *United States v. Stephens*, 514 F.3d 703, 713-14 (11th Cir. 2008), the district court was incorrect in finding that the government's strategy for striking jurors solely based on a lack of education was impermissible; instead, education was one factor that the government could use in selecting the jury and this tactic was appropriate. Similarly, in *Taylor v. Roper*, 577 F.3d 848, 859 (8th Cir. 2009), the prosecutor was allowed to strike jurors for a lack of education. Removing juror number twenty-one because of his education likely does not offend equal protection, but we will also consider the other proffered reason for removing him from the pool. The other justification given for striking the juror was his negative demeanor and body language during voir dire. In *Snyder v. Louisiana*, 552 U.S. 472, 477 (2008), the Court recognized that "race-neutral reasons for peremptory challenges often invoke a juror's demeanor." Furthermore, *Thaler v. Haynes*, __ U.S. __, 130 S. Ct. 1171, 175 L. Ed. 2d 1003 (2010), recently overturned the Fifth Circuit's rule that a judge must personally observe the alleged demeanor of a juror in finding that a demeanor strike is acceptable. Counsel struck juror number twenty-one for his negative demeanor and body language and such a strike does not offend equal protection. After hearing both arguments, the trial court determined that the juror's removal complied with equal protection and rejected the challenge. In reviewing the record for clear error, we find that the trial court properly decided that the explanations given for removing juror number twenty-one complied with the Equal Protection Clause of the Fourteenth Amendment.

E. Remittitur

¶ 60 Our Rules of Civil Procedure 50 and 59 govern remittitur, *Ishimatsu v. Royal Crown Insurance Corp.*, 2006 MP 9 ¶ 7, and when our rules are patterned after the federal rules it is appropriate to look to federal interpretation for guidance. *Id*. ¶ 7 n.3. Under the federal rules, when a plaintiff accepts a remittitur of a damage award instead of electing a new trial on damages, the plaintiff cannot subsequently appeal the remittitur. *Donovan v. Penn Shipping Co.*, 429 U.S. 648, 649-50 (1977). In *Donovan*, the Court reasoned that a plaintiff cannot accept a remittitur, or a remittitur under protest, and subsequently appeal it; this rule was firmly established in the nineteenth century. *Id*. at 649; S*ee Koenigsberger v. Richmond Silver Mining Co.*, 158 U.S. 41, 52 (1895) (when a plaintiff accepts a remittitur instead of electing a new trial, the plaintiff waives any right to appeal the remittitur). The idea behind this rule is that the court offers the plaintiff a choice: accept a reduced award that the evidence supports or elect a new trial. *Higgins v. Smith Int'l, Inc.*, 716 F.2d 278, 281 (5th Cir. 1983). To allow a plaintiff to appeal a remittitur would allow the party to request a reinstatement of the original verdict when the party already waived its applicability; no one forces the plaintiff to accept the reduced damage award because the plaintiff can elect a new trial. *Donovan*, 429 U.S. at 649. We adopt the Supreme Court's interpretation of the federal rules and find that when a party accepts a remittitur, like Esperancilla and Hiponia did in this case, the party cannot appeal the remitted damage award.

¶ 61 There is disagreement, however, concerning whether a plaintiff may cross-appeal a remittitur when the defendant seeks appellate review of a damage award. Under the federal rules, a plaintiff may not cross-appeal. *999 v. C.I.T. Corp.*, 776 F.2d 866, 873 (9th Cir. 1985); *Fiacco v. Rensselaer*, 783 F.2d 319, 332-33 (2nd Cir. 1985); *Higgins*, 716 F.2d at 282 (5th Cir. 1983). These circuits squarely faced this question, and found that *Donovan* precluded a cross-appeal. In *999*, 776 F.2d at 873, the plaintiff argued "that where a defendant initiates an appeal, and the objective of avoiding further litigation has been negated, the plaintiff should not be precluded from cross-appealing the propriety of the remittitur." The plaintiff cited cases that adopt the other approach, which we discuss *infra*. The court found, however, that the longstanding rule is that a "plaintiff cannot contest the validity of a remittitur to which he has consented, even on a cross-appeal." *Id*. Plaintiff's cross-appeal arguing that the trial court committed an abuse of discretion in ordering a remittitur and in determining the amount of the reduction was denied. *Id*. Similarly, *Higgins*, 716 F.2d at 282 (citations omitted), found that *Donovan* "laid to rest any notion that a plaintiff can appeal the propriety of a remittitur order to which he has agreed," and "*Donovan's* bar extends equally to cross-appeals." The court in *Fiacco*, 783 F.2d at 333 (citations omitted), determined that this question "need not detain us long. A line of decisions stretching back into the past century had established that when a plaintiff has agreed to a remittitur order, he cannot challenge it either on an appeal . . . or on a cross-appeal." The court concluded its analysis by stating, "[h]aving accepted the remittitur

order and thereby consented to the reduced verdict, Fiacco is prohibited from challenging the remittitur order." Thus, the federal courts, in interpreting their rule which mirrors our own, have flatly rejected a party's right to challenge a remittitur on cross-appeal.

¶ 62 Another view, however, holds that when a defendant appeals a damage award the plaintiff may cross-appeal the remittitur. *Plesko v. Milwaukee*, 120 N.W.2d 130, 135 (Wis. 1963); *Rosenau v. Heimann*, 218 Cal. App. 3d 74, 77 (Cal. App. 1990*). Plesko*, still forbids a plaintiff from appealing a remittitur, but is not limited to a plaintiff's cross-appeal. The court reasoned that the plaintiff's objective in accepting a remittitur:

> is to avoid the delay and expense of an appeal or a new trial. In most situations, it is likely that the party will accept judgment for such reduced damages rather than undergo the expense, delay, and uncertainty of result of an appeal or new trial. Nevertheless, if a party found liable to pay damages appeals the judgment resulting from the other party's accepting such reduced damages, this objective has been negatived. When plaintiff is forced to undergo an appeal by the action of an opposing party, after plaintiff has accepted judgment for such reduced damages, it seems unfair to prevent his having a review of the trial court's determination leading to the reduction in damages, especially if plaintiff has accepted same only to avoid the delay and expense attending an appeal.

Plesko, 120 N.W.2d at 221. *Miller v. National American Life Insurance Co.*, 54 Cal. App. 3d 331, 343 (Cal. App. 1976), adopted the *Plesko* rule by reasoning that when the plaintiff accepts a remittitur and the defendant appeals, the case is in a different procedural posture, and the plaintiff is warranted in appealing the remittitur. It focused on the unenviable position that the plaintiff is in when he accepts a remittitur to expedite the litigation, only to see the defendant appeal, thereby incurring additional appellate expenses, and possibly the burden of litigating an entirely new trial. *Id*. at 344-45. *Plesko, Miller,* and Esperancilla and Hiponia acknowledge that this is the minority approach.

¶ 63 We agree with the approach espoused by the United States Supreme Court. The *Plesko* rule, while plaintiff-friendly, goes too far in penalizing defendants by over-emphasizing what the plaintiff seeks to gain by accepting a remittitur. *Plesko* incorrectly asserts that a remittitur brings the damages component of litigation to a close; to the contrary, a remittitur is not offered to coax an end to litigation, but rather it is an option to avoid re-litigating damages because the award rests on insufficient evidence. Claiming that the plaintiff made a bargained for acceptance of the remittitur in exchange for ending the litigation misinterprets the point of remittitur, which to bring the damage award in line with the evidence. The plaintiff bargained away his right to a new trial on the damages by accepting a reduced amount, the plaintiff did not, however, bargain away the defendant's right to appeal. If anything, when part of a verdict rests on insufficient evidence, the plaintiff should more than expect that the defendant will file an appeal even if the award is remitted. We agree with the courts in *999, Fiacco,* and *Higgins*, that if we adopted the *Plesko* rule, it would essentially nullify *Donovan*. Therefore, we hold that a party who accepts a remittitur may not challenge the reduction on appeal or cross-appeal.

F. Award of Fees and Costs

¶ 64 Royal Crown argues that the trial court erred in its award of attorney's fees and costs. Specifically, it should have segregated the fees, which would have resulted in Esperancilla's and Hiponia's counsel only receiving a fee award for their work on the CPA claim instead of for their work on all of the claims. Also, Royal Crown claims that the amount of fees awarded were unreasonable, excessive, and that the bad faith claim cannot be relied on to support the award. Similarly, the costs awarded were unreasonable, excessive, and an abuse of discretion. We review de novo an award of attorney's fees under the CPA, *Isla Financial Services*, 2001 MP 21 ¶ 4, and we look for an abuse of discretion in reviewing the propriety of the amount of fees awarded. *Rayphand v. Tenorio*, 2003 MP 12 ¶ 4. Similarly, we look for an abuse of discretion in reviewing an award of costs. *In re Estate of Aldan*, 1997 MP 3 ¶ 17. *See Studiengesellschaft Kohle mbH v. Eastman Kodak Co.*, 713 F.2d 128, 131 (5th Cir. 1983).

1. Segregation of Fees

¶ 65 We must determine if the trial court could only award attorney's fees for the CPA claim, or if it could award fees for all of the claims on the basis of Esperncilla's and Hiponia's success on their CPA cause of action. In *Hensley v. Eckerhart*, 461 U.S. 424 (1983), respondents brought suit against a Missouri state hospital challenging the constitutionality of their treatment and the conditions at the facility. They prevailed on five of their six claims, and the district court awarded attorney's fees for all of the claims even though only some of the claims provided for a statutory fee award; the circuit court affirmed. In discussing an award of attorney's fees in a suit with multiple claims the Court stated:

> In other cases the plaintiff's claims for relief will involve a common core of facts or will be based on related legal theories. Much of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis. Such a lawsuit cannot be viewed as a series of discrete claims. Instead the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation.
>
> Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. Normally this will encompass all hours reasonably expended on the litigation, and indeed in some cases of exceptional success an enhanced award may be justified. In these circumstances the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit. Litigants in good faith may raise alternative legal grounds for a desired outcome, and the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee. The result is what matters.

Id. at 435. If an attorney achieves only partial success, however, then a reduction of a fee award is warranted, but determining the reduced amount of fees to award can not be based on a mathematical formula. *Id*. at 436. The Court also "reemphasize[d] that the district court has discretion in determining the amount of a fee award." *Id*. When the district court awarded fees, it "declined to divide the hours

worked between winning and losing claims, stating that this fails to consider the relative importance of various issues, the interrelation of the issues, the difficulty in identifying issues, or the extent to which a party may prevail on various issues." *Id*. at 438 (citations omitted). The Court agreed with the lower court's decision finding that the plaintiff's prevailed, achieved significant and important relief, and were entitled to an award of fees. *Id*.

¶ 66 In *Werdann v. Mel Hambelton Ford, Inc.*, 79 P.3d 1081, 1091 (Kan. 2003), the general rule requiring the segregation of fees when several causes of action are joined and tried in a single suit, but only some of the theories allow an award of attorney's fees, was reaffirmed, but:

> [a]n exception to the duty of a prevailing party's attorney to segregate work on several causes of action arises when the attorney fees rendered are in connection with claims arising out of the same transaction, and are so interrelated that their prosecution or defense entails proof or denial of essentially the same facts.

Similarly, in *Nordstrom, Inc. v. Tampourlos*, 733 P.2d 208 (Wash. 1987), plaintiff Nordstroms successfully sued defendant hair salon for violating the Washington CPA for unfair trademark infringement in addition to claims for damaged equipment and property stemming from a lease. The court awarded attorney's fees for the CPA trademark infringement violation, but not for the property damage claims, because distinct and unrelated facts supported each theory. *Id*. at 212.

¶ 67 As discussed above numerous times, the same facts gave rise to all of the causes of action. An auto accident occurred, the parties made an insurance claim, and the insurer denied the claim. As a result, the parties filed this lawsuit for breach of the implied covenant of good faith and fair dealing, breach of contract, violation of the CPA, and violation of the Insurance Act. The theories Esperancilla and Hiponia sought to recover under all "involve a common core of facts," and are also "based on related legal theories." *Hensley*, 461 U.S. at 435. The facts of this case differ from *Nordstrom*, where the plaintiff sued for a violation of the CPA and for property damage, but the recovery of fees was only allowed for the CPA claim. Thus, the exception to the segregation rule applies in this case. The other question, however, is whether they may recover fees for aspects of the case that they were not successful on. In *Camacho v. L&T International Corp.*, 4 NMI 323, 330 (1996), we held that the prevailing party is the party that has been successful on the whole, and not necessarily on every claim, at the end of the litigation. Furthermore, *Hensley* explained that "a lawsuit cannot be viewed as a series of discrete claims" and that in determining a fee award a court "should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation." 461 U.S. at 435. Here, counsel was highly successful from a monetary perspective and in terms of the number of claims he prevailed on relative to the number that he filed; an auto accident with total damages around $6,000 ballooned into a case with tens of thousands of dollars of damages not including attorney's fees and costs. Plaintiff's counsel enjoyed a high degree of success in this particular lawsuit, and we largely uphold that success on

appeal. Therefore, the trial court did not commit error in awarding counsel fees under the CPA for all of the legal work performed because the claims all arose from a common nucleus of facts.

2. Reasonableness of Fees

¶ 68 The CPA authorizes an award of reasonable fees to a prevailing plaintiff. 5 CMC § 5112. "In evaluating the reasonableness of attorney fees, the court considers the time and labor required, the novelty and difficulty of the questions involved, and the skill required to properly perform the legal service." *Pille v. Sanders*, 2000 MP 10 ¶ 25; *See Camacho v. J.C. Tenorio Enter., Inc.*, 2 NMI 509, 511 (1992). In *Pille*, we reversed a refusal to award attorney's fees, pursuant to the Uniform Parentage Act, because the right to counsel furthered the statute's intent of protecting children. *Id*. Without the mother retaining counsel, the father would not have paid child support, and without child support the child's wellbeing would be threatened; therefore, an award of attorney's fees was warranted. *Id*. ¶ 26. Since awarding attorney's fees furthered the law's purpose, we reversed and awarded fees. In *Ferreira v. Borja*, 1999 MP 23 ¶ 12, we found that a fee award must be reasonable, and that the party seeking the award bears the burden of proving the reasonableness of the amount it requests. In disallowing the entire fee award, we took issue with (1) block billings, (2) inter-office conferencing, (3) vague entries concerning the nature of work performed, and (4) excessive research. *Id*. ¶ 13-17. In *Camacho*, an order solely concerning an award of attorney's fees, we looked to Rule 1.5 of the American Bar Association Model Rules of Professional Conduct to determine whether the number of hours charged was unreasonable and excessive. 2 NMI at 511. While the Court awarded some fees, it did not award the appellee fees for reworking appellant's poorly worded and organized brief in order for it to write its own brief. *Id*. We reasoned that there is a limit to what we will award fees for, and appellee reworking opposing counsel's brief into a better form was unwarranted. *Id*. Therefore, an award of fees must be reasonable, and fees for certain practices and conduct will almost always be unrecoverable.

¶ 69 The trial court reviewed the billing summaries, and found the amounts requested for pre-trial and trial work reasonable. It reduced the post-trial fees to two-fifths of the requested amount because it found that the amount requested was unreasonable. In addition to the billing summaries, Esperancilla's and Hiponia's counsel submitted affidavits affirming that the hourly fees charged were reasonable and commensurate with local rates. While the order discussing fees is concise, it discussed the amounts requested, reduced some of those amounts, and found that the evidence was sufficient to establish the reasonableness of the requested fees. The trial court neither relied solely on the billing summaries nor on the affidavits in awarding fees, but instead reviewed all of the evidence in reaching its decision; therefore, the fee award was proper.

3. Excessiveness of Fees

¶ 70 In *Ferreira*, 1999 MP 23 ¶ 16-17, we stated that a party could not recover fees based on vague billing entries or excessive research. Royal Crown claims that Esperancilla inappropriately billed it for routine and mundane tasks and was vague in its billing summaries. The billing summaries are anything but vague as they span over one hundred pages, and contain detailed, if brief, summaries of every item billed. The tasks that it complains are routine and mundane do not even total an hour and a half of billed time, and counsel deleted numerous charges for interoffice communications. Additionally, three days of trial assistance by Mr. Banes was unbilled. Royal Crown also claims that the award of fees failed to exclude duplicative time, but it fails to direct us to any duplicative charges, and we have not found any. Therefore, we find no evidence indicating that the fee award was excessive.

4. Whether the Bad Faith Claim Justifies an Award of Fees

¶ 71 As an alternative theory, Esperancilla and Hiponia argue that Royal Crown's bad faith justifies the fee award. In *Reyes v. Reyes*, 2004 MP 1 ¶ 82, we recognized that a party may be entitled to attorney's fees even though the fees are not authorized by statute in light of equitable considerations such as one party's bad faith.[27] We recognized that Commonwealth courts may award fees irrespective of statutory authority when the common law provides for such awards. *Id*. ¶ 82. "The commonly recognized equitable exceptions to the American Rule[28] include the common fund, substantial benefit, private attorney general, third-party tort, and, applicable here, bad faith." *Id*. ¶ 79 n.16. In that case, we affirmed an award of $5,000 in attorney's fees for the wife's counsel in a divorce proceeding even though she "failed to introduce any evidence of her attorney's fees." *Id*. ¶ 84. We deferred to the trial court's discretion in determining the proper amount and upheld the award because there was no intention to award her fees to cover all of her legal bills, but only enough to compensate her for her husband's bad faith prior to and during litigation. *Id*. ¶ 84-85. While we upheld a non-statutory fee award in contravention of the American Rule for a party's bad faith conduct during litigation, bad faith during litigation is distinct from the common law bad faith cause of action. An equitable award of attorney's fee is inappropriate for a breach of the covenant of good faith and fair dealing claim. This finding, however, has no bearing on the fees awarded here because as discussed above, Esperancilla's and Hiponia's counsel was under no obligation to segregate the fees, the fees awarded were reasonable, and all of the fees awarded are justified under 5 CMC § 5112.

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[27] *Vaughan v. Atkinson*, 369 U.S. 527, 530 (1962); *McEnteggart v. Cataldo*, 451 F.2d 1109, 1112 (1st Cir. 1971); *Bell v. Sch. Bd. of Powhatan County*, 321 F.2d 494, 500 (4th Cir. 1963); *Rolax v. Atlantic Coast Line R. Co.*, 186 F.2d 473, 481 (4th Cir. 1951).

[28] *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y.*, 421 U.S. 240, 247 (1975) (holding that the American Rule requires parties to bear their own costs in litigation).

5. Whether the Costs Awarded were Unreasonable, Excessive, and an Abuse of Discretion

¶ 72 Like its federal counterpart, Commonwealth Rule of Civil Procedure 54(d)(1) allows for the recovery of costs by the prevailing party. The Commonwealth Code states that "[t]he court may allow and tax any additional items of cost or actual disbursement, other than fees of counsel, which it deems just and finds have been necessarily incurred for services which were actually and necessarily performed." 7 CMC § 3207. Unless the court finds otherwise, the Legislature also specified that certain other costs are recoverable including "all fees and expenses paid or incurred under this chapter for the service of process, witness fees, of filing fees on appeal, by any party prevailing in any matter other than a criminal proceeding, shall be taxed as part of the costs against the losing party or parties," but this does not include witness fees when the witness is a party in interest. 7 CMC § 3208. Sections 3207 and 3208, however, are unlike the federal statute 28 USC § 1920,[29] which explicitly specifies what costs may be awarded to a prevailing party.

¶ 73 In *Farmer v. Arabian American Oil Co.*, 379 U.S. 227, 235 (1964), the Court interpreted rule 54(d) to not give district courts unfettered discretion in awarding costs, and instead held that "the discretion given district judges to tax costs should be sparingly exercised with reference to expenses not specifically allowed by statute." *Crawford Fitting Co. v. J. T. Gibbons, Inc.*, 482 U.S. 437 (1987), considered an interpretation of Rule 54(d) that would give district courts wide discretion to award costs irrespective of the strictures of 28 USC § 1920. The Court stated "[i]f Rule 54(d) grants courts discretion to tax whatever costs may seem appropriate, then § 1920, which enumerates the costs that may be taxed, serves no role whatsoever. We think the better view is that § 1920 defines the term "costs" as used in Rule 54(d)." *Id*. at 441. In *United States v. Pommerening*, 500 F.2d 92, 102 (10th Cir. 1974), recoverable costs under the statute "must be strictly construed and items to be taxed must be within the express language of the statute." Therefore, the federal rules allowing for the recovery of costs is very narrow because of the language of 28 USC § 1920. In the Commonwealth, however, 7 CMC § 3207 is entirely permissive. It does not enumerate recoverable costs, but rather allows the trial judge to award costs it deems justly and necessarily incurred. While our rule of civil procedure mirrors its federal counterpart, 7 CMC § 3207 is the polar opposite of 28 USC § 1920; as a result, it is only useful in as much as it is

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[29] § 1920. Taxation of Costs

A judge or clerk of any court of the United States may tax as costs the following:
(1) Fees of the clerk and marshal;
(2) Fees for printed or electronically recorded transcripts necessarily obtained for use in the case;
(3) Fees and disbursements for printing and witnesses;
(4) Fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case;
(5) Docket fees under section 1923 of this title [28 USCS § 1923];
(6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title [28 USCS § 1828].

diametrically opposed to our own statute. Therefore, given this broad language, the trial court enjoys considerable latitude in awarding costs.

¶ 74 Royal Crown argues that costs awarded for expert witnesses, photocopying, mileage, and telecopying were improper. Expert witness fees are not governed by 1 CMC § 3402 as its counsel argues; the statute is silent regarding the fees paid to lay versus expert witnesses. Witness fees are recoverable pursuant to 7 CMC § 3208, and are further discussed in 7 CMC §§ 3204 and 3205, but there is no discussion concerning the amount recoverable as costs in any of those sections. Therefore, the argument that expert witness fees are only recoverable to the extent of lay witness fees fails, and the trial court may award expert witness costs. Concerning photocopying, mileage, and telecopying costs, the trial court reviewed the record, denied some costs, and awarded others. These costs are routine, and while the court's examination of this issue was brief, it performed a sufficient investigation. Given the broad discretion given to trial courts pursuant to 7 CMC § 3207, we affirm the award of these costs because it was neither unreasonable nor excessive, and therefore, the amount awarded was not an abuse of discretion.

¶ 75 Legal research costs, however, are generally not taxable as costs. In *United States ex rel. Evergreen Pipeline Constr. Co. v. Merritt Meridian Construction Corp.*, 95 F.3d 153, 173 (2d Cir. 1996), the court held, "computer research is merely a substitute for an attorney's time that is compensable under an application for attorney's fees and is not a separately taxable cost." Another court found there is "no difference between a situation where an attorney researches manually and bills only the time spent and a situation where the attorney does the research on a computer and bills for both the time and the computer fee." *Haroco, Inc. v. Am. Nat'l Bank & Trust Co.*, 38 F.3d 1429, 1441 (7th Cir. 1994). Similarly, in *McIlveen v. Stone Container Corp.*, 910 F.2d 1581, 1584 (7th Cir. 1990), the court disallowed a recovery of Westlaw research costs "because such expenses are more akin to awards under attorneys fees provisions than under costs." In *BD v. DeBuono*, 177 F. Supp. 2d 201, 209 (S.D.N.Y. 2001), the court aptly stated that "[a]n attorney's time spent performing computerized research is properly compensable. However, the cost of the computer service used in the research is no more reimbursable than the cost of the West's Keynote Digests and the volumes of the Federal Reporter and the Federal Supplement . . . ." Despite the broad statutory language giving the trial court substantial leeway in awarding costs, computerized legal research expenses are not taxable because such expenses are actually part of the attorney's time that is compensated through the fees either charged to the client or awarded by the court. Therefore, it was an abuse of discretion to award costs for computerized legal research expenses.[30]

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[30] Computerized legal research costs totaled $1,916.51. ER at 891.

III

¶ 76 For the reasons given, we find that (i) the statutory preemption arguments were not properly raised during trial so we cannot consider those issues now; (ii) there is sufficient evidence to find liability and support the damage awards; (iii) the award of punitive damages complied with due process; (iv) there is no private cause of action under the UCSPA; (v) a new trial is not warranted; (vi) a cross-appellant may not challenge a remittitur; (vii) the award of attorney's fee was reasonable; and (viii) some of the costs awarded must be reduced. Accordingly, we AFFIRM in part, REVERSE in part, and REMAND this matter to the trial court to enter judgment consistent with this opinion.

SO ORDERED this 1st day of June, 2010.

/s/_____
MIGUEL S. DEMAPAN
Chief Justice

/s/_____
ALEXANDRO C. CASTRO
Associate Justice

/s/_____
JOHN A. MANGLONA
Associate Justice

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IN THE
SUPREME COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

HIROSHI ISHIMATSU,
Plaintiff,

BERNARDO A. HIPONIA, and SERAFIN ESPERANCILLA,
Plaintiffs-Appellees/Cross-Appellants,

v.

ROYAL CROWN INSURANCE CORPORATION,
Defendant-Appellant/Cross-Appellee.

SUPREME COURT NO. 06-0043-GA
SUPERIOR COURT NO. 02-0065

ERRATA ORDER

¶ 1 On June 1, 2010, the Court issued its Opinion in the above matter, *Ishimatsu v. Royal Crown Insurance Corp.*, 2010 MP 8. The Plaintiff-Appellee's name was incorrectly spelled in the Opinion's caption. The Court now amends the caption to reflect the correct spelling of Plaintiff-Appellee's name, Hiroshi Ishimatsu.

SO ORDERED this 20th day of December, 2012.

/s/_____
ALEXANDRO C. CASTRO
Chief Justice

/s/_____
JOHN A. MANGLONA
Chief Justice