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No. 96261-8  
(Court of Appeals No. 75864-1-I)

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IN THE SUPREME COURT  
FOR THE STATE OF WASHINGTON

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FOLWEILER CHIROPRACTIC, PS, a Washington corporation,

Petitioner,

v.

FAIR HEALTH, INC. a New York corporation,

Respondent,

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**ANSWER TO PETITION FOR REVIEW**

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## **INTRODUCTION**

Petitioner Folweiler Chiropractic, P.S. (“Folweiler”) asks this Court to review a unanimous, unpublished decision in which the Court of Appeals concluded that Respondent FAIR Health: (1) did not subject itself to the jurisdiction of Washington courts by licensing a module of nationwide charge data to a California entity; (2) did not commit any unfair act under the CPA; and (3) did not proximately cause any harm to Folweiler. Each of these holdings is independently fatal to Petitioner’s CPA claim, and all three are the natural result of the undisputed facts and controlling law. Review by this Court would serve no purpose other than to make an unduly expensive and lengthy litigation even more so.

## **ANSWER TO ISSUES PRESENTED**

FAIR Health does not seek review of any issue decided by the Court of Appeals but will briefly answer the four issues presented in the Petition:

1. Washington courts do not have specific personal jurisdiction over a New York non-profit corporation that licenses a module of nationwide charge data to a California entity.
2. Under the Washington long-arm statute, courts have discretion to award reasonable fees to an out-of-state defendant who prevails in an action by defeating jurisdiction or by successfully defending the merits of a claim.
3. A defendant that does not commit a deceptive or unfair act does not violate the Washington CPA.

4. Under *Indoor Billboard*, the proximate causation standard in WPI 15.01 applies to Washington CPA claims. That standard requires proof of both “but for” and “legal” causation.

## **STATEMENT OF THE CASE**

### **A. FAIR Health and Its Mission**

FAIR Health was formed in 2009 at the direction of the Office of the New York State Attorney General following that office’s investigation of Ingenix, a subsidiary of United HealthCare. CP 2283-88. As part of the settlement of the New York AG’s investigation, Ingenix exited the business of collecting and publishing healthcare claims data. FAIR Health was created to achieve the goals of “reforming the out-of-network reimbursement system . . . and increasing transparency for consumers....” CP 2293-2311.

FAIR Health is a New York not-for-profit 501(c)(3) public charity. Its mandate is to create and distribute an independent, impartial source of aggregated data benchmarks based on healthcare claims, to educate consumers and offer them free tools for estimating expenses, and to disseminate such data to all stakeholders in the healthcare arena. CP 2279. To fulfill this mandate FAIR Health, advised by academic experts in statistics, healthcare, economics, and technology, and under the direction of an independent Board of Directors, developed data products based on

new health claims data and its own newly developed and vetted methodologies. CP 2278-79.

Each of FAIR Health's modules includes a range of percentile benchmark charges (in this case including 11 separate benchmarks) for each one of thousands of different medical procedures, in each of approximately 500 geozips<sup>1</sup> nationwide. CP 2283-88, 2314-15. Pursuant to its mandate, FAIR Health's modules are licensed to governments, insurers, medical providers, researchers and others, and provided free to consumers through an award-winning consumer website and mobile apps in English and Spanish. CP 2279-80.

FAIR Health plays no role in its licensees' decisions on how, whether, or where its data products are used. Instead, FAIR Health specifically advises its licensees—and requires them to inform their customers—that FAIR Health data products do not represent a position on the reasonable or customary charges in any given area. CP 2314 (“The FAIR Health products do not set forth a stated or implied ‘reasonable and customary’ charge or allowed amount. Licensee’s or Licensee Customers’ determination of an appropriate level of reimbursement or fee is in their

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<sup>1</sup> A geozip is a geographical location generally based on the first three digits of a zip code. CP 2315.

sole discretion, regardless of whether Licensee or Licensee Customers use FAIR Health products”).

FAIR Health has received numerous awards and honors that attest to its acceptance throughout the healthcare industry. CP 2280, 2289. In 2012, FAIR Health was recognized at the White House Summit on Smart Disclosure as a leading innovator in consumer transparency. *Id.* Many state governments have recognized the reliability of FAIR Health data and use the data when making reasonableness determinations for state-sponsored programs. CP 2280. Numerous states (including New York, California, Pennsylvania, and New Jersey) expressly require the use of FAIR Health data for certain purposes. *See id.*

**B. Folweiler v. Progressive Insurance**

David Folweiler is the sole owner of Folweiler Chiropractic, P.S. (“Folweiler”). CP 2401. In April 2013, Progressive determined that Dr. Folweiler’s charge of \$95 for a particular chiropractic procedure was unreasonable and instead reimbursed Folweiler \$91. CP 3. In 2015, Folweiler sued Progressive, claiming that this \$4 reduction was a violation of the Washington Consumer Protection Act (“CPA”). CP 4059-87. The parties agreed to settle the claims; the settlement provided that Folweiler and the class were entitled to receive more than 100 cents for every \$1 that



was allegedly underpaid by Progressive. *See Folweiler Chiropractic, P.S. v. Progressive Max. Insurance Company, et. al.*, No. 15-2-17846-6 SEA.

**C. Folweiler v. FAIR Health**

In May 2015, Folweiler sued FAIR Health for the same alleged underpayment. CP 1-17. Folweiler acknowledged that Progressive, not FAIR Health, made the reimbursement decision. *Id.* And there was no averment that FAIR Health directed or suggested the amount of any payment by any insurance company to any provider. *See id.* (Indeed, Folweiler testified that Progressive used FAIR Health’s data “incorrectly.” CP 1002-03). FAIR Health moved to dismiss the Complaint for lack of personal jurisdiction, arguing that it did not have the requisite minimum contacts to permit the exercise of jurisdiction. CP 19-47. The court denied the motion after permitting jurisdictional discovery. CP 869-71.

On June 8, 2016, before the newly certified class had been notified of the case, Folweiler moved for partial summary judgment on the issue of CPA liability. CP 2208-34. FAIR Health then cross-moved on the same CPA issue and again argued that personal jurisdiction was lacking. CP at 2248-76. Both motions were argued together and in a consolidated order, the Superior Court granted FAIR Health’s motion for summary judgment and denied Folweiler’s motion, observing that FAIR Health had not engaged in any unfair act or practice—under any definition—and that

FAIR Health's conduct was not the legal cause of Folweiler's alleged injury. CP 3986-3992. Following the decision, the Superior Court decertified the class<sup>2</sup> and entered a judgment against Folweiler individually, but declined to award fees. CP 4557.

#### **D. The Court of Appeals Decision**

Folweiler appealed the summary judgment decision, and FAIR Health cross-appealed the finding of personal jurisdiction, as well as the class certification and denial of fees. Briefing concluded in August 2017, and the Court of Appeals heard argument in February 2018. In June 2018 the Court of Appeals issued a unanimous, unpublished decision ruling in FAIR Health's favor on both the jurisdictional issue and the merits of the alleged CPA claim. Among other things, the Court held that:

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<sup>2</sup> Contrary to the Petitioner's Introduction, the Petitioner is not a class. The trial court decertified the class before entering judgment.

Petitioner has made a habit of misstating the record before both the Superior Court and the Court of Appeals. That trend has unfortunately continued with the Petition for Review. Much of Petitioner's Statement of the Case is simply wrong. Petitioner's Clerk's Papers citations, when they exist, frequently do not support the propositions that they are cited for. For example, Petitioner states that "geo-zip does not correspond to a reasonable medical market," citing CP 3010 and CP 2900-01. Pet. at p. 4. There is no support for this proposition in the record and the pages cited consist of a blank page of pleading paper and statements made by Petitioner's counsel during deposition, respectively. Petitioner also includes statements—without any citation—that FAIR Health "intended" for its disclaimers to be ignored and that its data modules cannot be used to determine what is or is not a "reasonable" charge for a given medical treatment. Pet. at p. 4. These are demonstrably false. The former is wholly unsupported. Further, FAIR Health's modules contain data that a decision maker can consult but the modules do not constitute opinions by FAIR Health about what is, or is not, reasonable or what is, or is not, a particular market. *See* CP 1099, 1114. But that does not mean such data cannot be consulted. These are only a few of Petitioner's unsubstantiated statements.

- FAIR Health had no direct contact with either Progressive, other auto insurers, Folweiler, or any other putative class member. Slip. Op. at 8.
- While FAIR Health had Washington customers, the claims did not arise out of those contacts. Slip. Op. at 9.
- There was no evidence that FAIR Health committed an unfair or deceptive act for purposes of the CPA. Slip. Op. at 17.
- FAIR Health was not the proximate cause of any alleged injury suffered by Petitioner. Slip. Op. at 18-19.

Having concluded that Folweiler could neither establish specific personal jurisdiction or two of the five elements of its CPA claim, the Court of Appeals affirmed and awarded FAIR Health fees under the long arm statute, RCW 4.28.185(5).

The Court of Appeals denied Folweiler's motion for reconsideration on August 3, 2018, and the Commissioner awarded FAIR Health's reasonable attorneys' fees incurred in the appeal.<sup>3</sup> A decision on FAIR Health's fees for the lower court proceedings will be made upon remand to the Superior Court for such determination.

### **ARGUMENT**

The Court of Appeals' decision below may only be reviewed by this Court if it: (1) conflicts with a decision of this Court; (2) conflicts with a published decision of another Washington appellate court;

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<sup>3</sup> "A ruling by a commissioner or clerk of the Court of Appeals is not subject to review by the Supreme Court." RAP 13.3(e).

(3) involves a significant question of law under the Washington or United States Constitutions; or (4) involves an issue of substantial public interest. RAP 13.4(b). The decision here satisfies none of those four criteria.

The Court of Appeals hewed closely to this Court's precedents, refusing to be led into error by Petitioner. And while this case did involve a constitutional Due Process right, that right belonged to FAIR Health rather than Folweiler, and it was a straightforward question that the court answered in accordance with decisions by this Court and the United States Supreme Court. Finally, there is no public interest at stake. Even the alleged injury that Folweiler claims to have suffered (a \$4 underpayment of a bill submitted to Progressive) was remedied in the lawsuit Folweiler brought against Progressive.

None of the RAP 13.4(b) requirements justifies review. This baseless case has already lasted three years — and consumed a considerable amount of FAIR Health's resources — it should not be allowed to extend into a fourth.

**A. There is no Conflict with this Court's Precedent**

On each of the three issues discussed in the Petition (jurisdiction, CPA liability, and the long-arm statute fee award), the Court of Appeals correctly identified and applied controlling law.

## **1. Personal Jurisdiction**

FAIR Health is a New York non-profit corporation with its principal place of business in New York. FAIR Health has no operations in Washington and has never owned, rented, or leased real property in the state. Nor has it ever employed anyone in Washington, registered to do business here, or engaged in any advertising targeted at Washington residents. CP 101-102. FAIR Health does have a small number of licensees located in Washington but neither Progressive nor Folweiler are among them, and none of those licensees' actions are at issue in the case. These few contacts FAIR Health has with Washington are insufficient to establish general personal jurisdiction.<sup>4</sup>

As for FAIR Health's suit-related conduct relevant to the issue of specific personal jurisdiction, it consisted of the following actions: From its New York office, FAIR Health (i) gathered and validated raw charge data regarding medical procedures from all 50 states; (ii) used that raw data to create data modules that sorted the charge data according to percentiles, medical procedure, and geographic location for the entire country; and (iii) licensed one such nationwide data module to a California entity, Mitchell International, Inc. ("Mitchell"). FAIR Health had no direct

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<sup>4</sup> Petitioner did not concede the lack of general personal jurisdiction until oral argument on the appeal of its summary judgment loss.

or indirect relationship with either Folweiler or Progressive. Indeed, FAIR Health did not even know that Progressive was using its data in Washington let alone how. CP 687.

On these facts, the Court of Appeals held that the Superior Court lacked specific personal jurisdiction over FAIR Health in connection with Folweiler's CPA claim. In so holding, it correctly relied on this Court's opinions in *Noll v. American Biltrite Inc.*, 188 Wn.2d 402, 395 P.3d 1021 (2017) ("*Noll*") and *State v. LG Electronics, Inc.*, 186 Wn.2d 169, 375 P.3d 1035 (2016) ("*LG*") and on the United States Supreme Court's opinions in *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 131 S. Ct. 2846, 180 L. Ed. 2d 796 (2011) ("*Goodyear*"); *Walden v. Fiore*, 571 U.S. 277, 134 S. Ct. 1115, 188 L. Ed. 2d 12 (2014) ("*Walden*"); *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 198 L. Ed. 2d 395 (2017) ("*Bristol-Myers*"); and *BNSF Railway Co. v. Tyrrell*, 137 S. Ct. 1549, 198 L. Ed. 2d 36 (2017) ("*Tyrrell*"). In particular *Noll* and *Bristol-Myers* brought into focus two significant points in the jurisdictional analysis.

First, that it is inappropriate to apply a "sliding scale" between specific personal jurisdiction contacts and general personal jurisdiction

contacts.<sup>5</sup> *Bristol-Myers* 137 S. Ct. at 1780-81; *Noll*, 188 Wn.2d at 410-13. In other words, general contacts that are insufficient to establish general personal jurisdiction should not factor into the analysis of specific personal jurisdiction. Here, Petitioner—without specifically saying so—urged such a sliding scale approach, hoping to taint the specific personal jurisdiction analysis with general personal jurisdiction facts. The Court of Appeals refused to be led into error.

The second principle is that no theory allows “jurisdiction based on the mere foreseeability that a product may end up in the forum state.” *Noll*, 188 Wn.2d at 413. Because FAIR Health creates nationwide data modules, it is “foreseeable” that the modules could be used in all 50 states. But that does not mean FAIR Health is subject to specific personal jurisdiction in all 50 states on any claim that involves one of its data modules. Both the Supreme Court and this Court have been clear that foreseeability is not the standard for specific personal jurisdiction. *Id.*; *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 885, 131 S. Ct. 2780, 2790, 180 L. Ed. 2d 765 (2011) (“The owner of a small Florida farm might sell crops to a large nearby distributor . . . who might then distribute

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<sup>5</sup> In *Noll*, for instance, the plaintiff sought to use contacts with the forum unrelated to the claims at issue to establish specific personal jurisdiction. 188 Wn.2d at 410–11. But this Court refused to consider those unrelated contacts for purposes of specific jurisdiction because they were “not transactionally related to Noll's claim.” *Id.*

them to grocers across the country. If foreseeability were the controlling criterion, the farmer could be sued in Alaska or any number of other States' courts without ever leaving town").<sup>6</sup> Again, following clearly controlling law, the Court of Appeals correctly refused to equate foreseeability with the targeting necessary to establish specific personal jurisdiction.

Having refused to engage in an erroneous analysis peddled by Folweiler, the Court of Appeals correctly held that specific personal jurisdiction did not exist over a New York non-profit that had licensed a nationwide data module to a California entity.

## **2. CPA — Unfair Act**

Turning to the substantive elements of Petitioner's CPA claim, both the Superior Court and the Court of Appeals were at a loss to find any unfair act on the part of FAIR Health.<sup>7</sup> The Superior Court noted that "there is no apparent basis for finding unfairness in FAIR Health's own acts. Plaintiff alleges injury resulting directly from actions of Progressive Insurance. The defendant did not in any way direct or control the acts of Progressive." CP 3989-90. The Court of Appeals added that "CPA liability

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<sup>6</sup> Of course, here a foreseeability standard would cause even more chaos because the data licensed to Mitchell in California was never sent to other states like the Florida farmer's crop in the *McIntyre* example. Rather the data was simply used by Mitchell in California to provide services to customers around the country.

<sup>7</sup> Whether an act is unfair under the CPA is a question of law. *Panag v. Farmers Ins. Co. of Wash.*, 166 Wn. 2d 27, 47, 204 P.3d 885 (2009).



does not extend to a party that compiles data and clearly explains the limitations of that data simply because a licensee ignores those limitations.” Slip. Op. at 17.

Knowing that it could not prove that licensing a data module was an unfair act, Petitioner pivoted to an “aiding and abetting” theory of liability,<sup>8</sup> arguing that FAIR Health could be liable for Progressive’s alleged unfair acts. But that theory has its own fatal flaws.

First, there is no authority for aiding and abetting liability under the CPA. Indeed, the principle federal case upon which Petitioner relied, *FTC v. Neovi, Inc.*, made clear that it was not adopting an aiding and abetting theory. 604 F.3d 1150, 1157 (9th Cir. 2010). Second, even if the aiding and abetting theory was legally available, there was no evidence that FAIR Health even knew that Progressive was using its data in Washington or in any particular way. CP 687. As the Superior Court noted, FAIR Health “did not in any way direct or control the acts of Progressive.” CP 3990.<sup>9</sup>

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<sup>8</sup> Petitioner calls this theory “facilitating and contributing” instead of “aiding and abetting” but it is the same concept.

<sup>9</sup> Before this lawsuit was filed, several Washington Superior Courts had already ruled that it was not a CPA violation—or a violation of any other law—for a PIP insurer to consult FAIR Health data modules when paying PIP claims. CP 1099, 1114.

In sum, neither the Superior Court nor the Court of Appeals could find an unfair act upon which a CPA claim could be predicated. As a result, Petitioner was unable to clear the first hurdle of its CPA claim.

### **3. CPA — Causation**

Petitioner also could not clear the last CPA hurdle, establishing proximate causation. Knowing causation would be a barrier to recovery, Petitioner tried to convince both the Superior Court and Court of Appeals to lower the causation bar from proximate causation to “but for” causation. Both courts correctly declined that invitation.

In *Indoor Billboard*, this Court clarified “that the proximate cause standard embodied in WPI 15.01 is required to establish the causation element in a CPA claim.”<sup>10</sup> Washington Pattern Instruction 15.01 requires that a plaintiff establish both “but for” and “legal” causation in order to establish proximate causation. Indeed, the first sentence of the Comment to WPI 15.01 provides: “Proximate cause under Washington law recognizes two elements: cause in fact and legal causation.” Both courts below applied this standard, which Folweiler admitted it could not satisfy. There is no conflict with this Court’s precedents regarding proximate causation.

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<sup>10</sup> *Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc.*, 162 Wn.2d 59, 83, 170 P.3d 10 (2007); see also *Schnall v. AT & T Wireless Servs., Inc.*, 171 Wn.2d 260, 278, 259 P.3d 129 (2011).

#### **4. Long-Arm Statute**

The long arm statute allows an out-of-state defendant that “prevails in the action” to recover its reasonable attorneys' fees. RCW 4.28.185(5). This Court has clarified that a defendant may “prevail in the action” for purposes of the long arm statute by winning on the merits of the claim, by defeating jurisdiction, or through a voluntary dismissal. *Scott Fetzer Co. v. Weeks*, 114 Wn.2d 109, 113, 786 P.2d 265 (1990); *Andersen v. Gold Seal Vineyards, Inc.*, 81 Wn.2d 863, 868, 505 P.2d 790 (1973); *Kim v. Lakeside Adult Family Home*, 185 Wn.2d 532, 564-65, 374 P.3d 121 (2016). Here, FAIR Health prevailed both on jurisdiction and on the merits of the CPA claim. The decision whether to award fees under the statute is discretionary, and the Court of Appeals properly exercised that discretion. Nothing about that decision satisfies the requirements of RAP 13.4(b).<sup>11</sup>

#### **B. There is no Conflict with a Published Appellate Decision**

The Petition does not identify any published Court of Appeals decision that conflicts with the decision below. Petitioner does cite *Holiday Resort Cmty. Ass'n v. Echo Lake Assocs.*, 134 Wn. App. 210, 135 P.3d 499 (2006) for the proposition that a plaintiff and a defendant do not need to have a direct relationship in order for a CPA claim to be

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<sup>11</sup> As for the proper amount of fees, that issue is not properly before this Court under RAP 13.3(e) because the Court of Appeals has not ruled on Petitioner's Motion to Modify.

maintained. FAIR Health agrees. But FAIR Health has never argued otherwise and that was not why Petitioner lost below. Both the *Holiday* and *Neovi* courts found that the defendant—itsself—had done something wrong. Here there was no such finding. Nor could there be.

**C. Petitioner’s Constitutional Rights Are not Involved**

This case does not involve any state constitutional right. And the only federal right at issue is FAIR Health’s Due Process right not to be called into a distant forum to defend a baseless claim. *See, e.g., Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471–72, 105 S. Ct. 2174, 2181, 85 L. Ed. 2d 528 (1985) (“The Due Process Clause protects an individual’s liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful ‘contacts, ties, or relations’”) (citation omitted). As demonstrated above, the Court of Appeals correctly applied a number of recent decisions by this Court and the United States Supreme Court, and their discussion on the limits of specific jurisdiction, to reach its decision. Although very important to FAIR Health, that right does not justify review of the entire case by this Court. Indeed, forcing FAIR Health to further defend its liberty interest only diminishes the value of that right by making it more expensive to vindicate.

**D. There is no Substantial Public Interest Requiring Review**

FAIR Health was formed to advance the public interest by providing a source of health claims charge data that could be used by governments, providers, insurers, researchers, and consumers throughout the United States. There is nothing wrong with FAIR Health data, and as alluded to above several Washington superior courts have expressly endorsed the use of the data as a tool in determining the reasonableness of PIP claims. CP 1099, 1114; *Chan Healthcare Grp., PS v. Liberty Mut. Fire Ins. Co.*, 844 F.3d 1133, 1135 n. 1 (9th Cir. 2017) (“Breskin brought two separate class action lawsuits in Washington state court against other insurers, both of which resulted in settlements that allowed use of the FAIR Health database.”). As for the legal issues presented by the case below, the unanimous, unpublished decision of the Court of Appeals did not break any new legal ground. Instead it was a faithful application of well-settled legal principles to a case that should never have been filed.

**E. FAIR Health Requests Fees Under RAP 18.1**

Under RAP 18.1(j), FAIR Health respectfully requests an award of the reasonable fees it has incurred in responding to the Petition.

## CONCLUSION

Petitioner lost below on three independently fatal bases in a unanimous, unpublished opinion that correctly applied this Court's and the United States Supreme Court's most recent decisions. There is no reason for review to be granted in this case.

Respectfully submitted this 17th day of October, 2018.

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**PROOF OF SERVICE**

I hereby certify under penalty of perjury under the laws of the State of Washington that on October 17, 2018, I caused the true and correct copy of the foregoing be served via appellate court web portal:

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Dated this 17th day of October, 2018, at Seattle, Washington.

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**STOKES LAWRENCE, P.S.**

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