

72632-3

72632-3

72632-3-I
IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

CHRISTOPHER NELSON, REBECCA WIRTEL,
and A.N., a minor

Appellants,

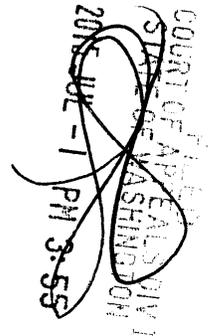
v.

GEICO GENERAL INSURANCE COMPANY,

Respondent.

BRIEF OF RESPONDENT
GEICO GENERAL INSURANCE COMPANY

Alfred E. Donohue, WSBA# 32774
WILSON SMITH COCHRAN DICKERSON
901 Fifth Avenue, Suite 1700
Seattle, WA 98161
(206)623-4100
(206)623-9273 facsimile
Attorneys for Respondent



ORIGINAL

TABLE OF CONTENTS

I. INTRODUCTION.....	1
II. ASSIGNMENT OF ERROR.....	2
III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....	2
IV. STATEMENTS OF THE CASE.....	3
A. Claims Handling Facts.....	4
1. Before Suit Filed.....	4
2. After Suit Filed	8
B. Facts Regarding Summary Judgment Proceedings.....	10
V. ARGUMENT.....	17
A. Standard of Review.....	17
B. Plaintiffs have abandoned their appeal of the October 23, 2014, discovery order.....	18
C. Plaintiffs’ theory of the case has changed throughout the litigation.....	18
D. GEICO acted reasonably as a matter of law.....	20
E. Plaintiffs failed to provide evidence of injury or damage regarding their CPA claim.....	27
1. Plaintiffs submitted no evidence of emotional injury.	28
2. Plaintiffs submitted no evidence of loss of use of money.....	28
3. Plaintiffs have abandoned their argument that attorney fees may establish the injury element.....	32

F. GEICO did not violate the Insurance Fair Conduct Act....	32
G. Appellants are not entitled to an award of attorney fees.....	34
VI. CONCLUSION.....	34

TABLE OF AUTHORITIES

CASES:

<i>Ainsworth v. Progressive Cas. Ins. Co.</i> , 180 Wn. App. 52, 322 P.3d 6, 20 (2014).....	33
<i>Allstot v. Edwards</i> , 116 Wn. App. 424, 65 P.3d 696 (2003).....	17
<i>Am. Mfrs. Mut. Ins. v. Osborn</i> , 104 Wn. App. 686, 17 P.3d 1229 (2001).....	22
<i>Anderson v. State Farm Mutual Ins. Co.</i> , 101 Wn. App. 323, 2 P.3d 1029 (2000).....	25, 26, 28, 29
<i>Banuelos v. TSA Washington, Inc.</i> , 134 Wn. App. 603, 141 P.3d 652 (2006).....	29
<i>Blue Diamond Group, Inc. v. KB Seattle 1, Inc.</i> , 163 Wn. App. 449, 266 P.3d 881 (2011).....	17, 18, 23
<i>Cedell v. Farmers Insurance Co. of Washington</i> , 176 Wn.2d 686, 295 P.3d 239 (2013).....	20, 21
<i>Demopolis v. Galvin</i> , 57 Wn. App. 47, 786 P.2d 804 (1990).....	30
<i>Dombrosky v. Farmers Ins. Co. of Wash.</i> , 84 Wn. App. 245, 928 P.2d 1127 (1997).....	22, 27
<i>Felice v. St. Paul Fire & Marine Ins. Co.</i> , 42 Wn. App. 352, 711 P.2d 1066 (1985).....	22
<i>Griffin v. Allstate Ins. Co.</i> , 108 Wn. App. 133, 29 P.3d 777, 36 P.3d 552 (2001).....	23, 30
<i>Hangman Ridge Training Stables v. Safeco Title Ins. Co.</i> , 105 Wn.2d 778, 719 P.2d 531 (1986).....	27, 30
<i>Indus. Indem. Co. of the NW, Inc. v. Kallevig</i> , 114 Wn.2d 907, 792 P.2d 520 (1990).....	23

<i>Ledcor Indus. (USA), Inc. v. Mutual of Enumclaw Ins. Co.</i> , 150 Wn. App. 1, 206 P.3d 1255 (2009).....	28
<i>Liberty Mut. Ins. Co. v. Tripp</i> , 144 Wn.2d 1, 25 P.3d 997 (2001).....	23
<i>Mason v. Mortgage America, Inc.</i> , 114 Wn.2d 842, 792 P.2d 142 (1990).....	30
<i>McGill v. Hill</i> , 31 Wn. App. 542, 644 P.2d 680 (1982).....	18
<i>Michak v. Transnation Title Ins. Co.</i> , 148 Wn.2d 788, 64 P.3d 22 (2003).....	17
<i>Overton v. Consol. Ins. Co.</i> , 145 Wn.2d 417, 38 P.3d 322 (2002).....	22
<i>Panag v. Farmers Ins. Co. of Wash.</i> , 166 Wn.2d 27, 204 P.3d 885 (2009).....	32
<i>Simpson Tacoma Kraft Co. v. Dep't of Ecology</i> , 119 Wn.2d 640, 835 P.2d 1030 (1992).....	17
<i>Smith v. Safeco Ins. Co.</i> , 150 Wn.2d 478, 484, 78 P.3d 1274 (2003).....	22, 23
<i>Sorrel v. Eagle Healthcare, Inc.</i> , 110 Wn. App. 290, 38 P.3d 1024 (2002).....	29
<i>Starzewski v. Unigard Ins. Group</i> , 61 Wn. App. 267, 810 P.2d 58 (1991).....	22
<i>Stephens v. Omni Ins. Co.</i> , 138 Wn. App. 151, 159 P.3d 10 (2007)...	16, 32
<i>Tallmadge v. Aurora Chrysler Plymouth, Inc.</i> , 25 Wn. App. 90, 605 P.2d 1275 (1979).....	30
<i>Transcontinental Ins. Co. v. Wash. Pub. Util. Dist. Util. Sys.</i> , 111 Wn.2d 452, 760 P.2d 337 (1988).....	22
<i>Urban v. Mid-Century Ins.</i> , 79 Wn. App. 798, 905 P.2d 404	

(1995).....	21
<i>Werlinger v. Clarendon Nat'l Ins. Co.</i> , 129 Wn. App. 804, 120 P.3d 593 (2005).....	23

STATUTES AND ADMINISTRATIVE CODE PROVISIONS:

RCW 46.70.180(4)(a).....	29
RCW 48.30.015(1).....	32
RCW 48.30.015(8).....	33
WAC 284-30-330(6).....	11, 12, 19, 21, 22
WAC 284-30-350(1).....	19
WAC 284-30-360(4).....	19
WAC 284-30-380.....	19

I. INTRODUCTION

Minor Plaintiff A.N. was injured when an uninsured motorist in a stolen vehicle struck her as she was walking on the sidewalk with her mother. Plaintiffs Christopher Nelson and Rebecca Wirtel are A.N.'s divorced parents. They each had an automobile liability policy issued by GEICO and each policy included UIM coverage with a \$25,000 limit. Upon learning from the Washington State Crime Victims Compensation Fund that they could submit UIM claims under their policies, Plaintiffs contacted GEICO and began the claims process. The policies also both included PIP coverage and GEICO ultimately paid the PIP limits of each policy.

The UIM coverage in each GEICO policy provided that an insured could recover only one policy limit for one accident, meaning that the limits of each policy could not be stacked. Thus, a total of \$25,000 was available for A.N.'s UIM claim. In September 2012, GEICO began the process of finalizing the settlement for the \$25,000 policy limit, including the appointment of a Settlement Guardian Ad Litem. This process took several months. Before that process could be completed, Plaintiffs retained an attorney who put a halt to everything and demanded a total UIM payment of \$50,000. The attorney also challenged the need for a Settlement Guardian Ad Litem. He then served an Insurance Fair Conduct

Act notice. The basis for Plaintiffs' IFCA notice was GEICO's failure to stack UIM benefits and pay \$50,000. This suit followed.

When the trial court properly held that only \$25,000 in UIM coverage was available, Plaintiffs' theory shifted and they began asserting that GEICO had delayed in settling A.N.'s UIM claim. The record establishes that GEICO acted reasonably as a matter of law and that the trial court properly dismissed Plaintiffs' extra-contractual claims on summary judgment. The trial court's ruling should be affirmed.

II. ASSIGNMENT OF ERROR

Plaintiffs/Appellants have assigned error as follows:

1. The Superior Court erred in dismissing all claims against Geico based on its ruling that there was no duty to make a settlement offer during an insurance claim.
2. The Superior Court erred in dismissing all claims against Geico based on its ruling that Appellants were not harmed by Geico's delay in making a settlement offer.¹

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. Did the trial court properly dismiss all of Plaintiffs' extra-contractual claims because GEICO acted reasonably as a matter of law?

B. To the extent the CPA claim was considered independently of the other extra-contractual claims, did the trial court properly dismiss that claim because Plaintiffs' failed to establish any injury or damage?

¹ Appellant's Opening Brief at 3.

IV. STATEMENT OF THE CASE

The Appellants' statement of facts paints an inaccurate and incomplete picture of what transpired during the adjustment of A.N.'s claim. As demonstrated throughout the record and explained below, GEICO did not delay in adjusting her UIM claim.

The Appellants' statement contains numerous "facts" that are without any citation to the record.² The Appellants also wish for the Court to mistakenly believe that GEICO either did not make a settlement offer or that GEICO did not promptly offer the \$25,000 in UIM coverage that was available when A.N.'s parents sought benefits. As demonstrated below, that assertion is incorrect. Finally, the Appellants completely gloss over a key fact – i.e., that GEICO was in the process of obtaining court approval for the full \$25,000 A.N. was entitled to receive when her attorney stepped in and halted the settlement approval process. Any purported delay in paying A.N.'s \$25,000 in UIM benefits is solely the result of attorney Hanson's conduct.

² *See, e.g.*, Appellants' Opening Brief at 8 nn. 6 & 10 and factual assertions at 6-7 & 14. Appellants have also cited to sources outside the record for facts regarding the accident. (Opening Brief of Appellants at 4 – 5 nn. 2 & 4.) Respondent asks that the Court disregard this evidence that was not included in the record before the trial court. In any event, it is irrelevant to the issues presented herein.

A. Claims Handling Facts

1. *Before Suit Filed*

The facts of the accident out of which this matter arises are undisputed. On May 30, 2011, Appellant Rebecca Wirtel and her daughter A.N. were walking in Seattle when A.N. was struck by an SUV. (CP 35.) The SUV had been stolen and the driver was evading a pursuing police officer. (*Id.*) A.N. suffered serious, but not life-threatening, injuries. (*Id.*)

Ms. Wirtel and Appellant Christopher Nelson are A.N.'s parents. (CP 1.) At the time of the accident, they were divorced. Ms. Wirtel and Mr. Nelson each had an automobile insurance policy issued by GEICO General Insurance Company. (CP 38 – 66; 68 – 96.)

Mr. Nelson notified GEICO of the accident on August 10, 2011. (CP 603, 932.) GEICO opened Personal Injury Protection (“PIP”) claims under both policies. GEICO made payments under the PIP coverages for several months and ultimately exhausted the \$35,000 PIP coverage available under Mr. Nelson’s policy (CP 611) and the \$10,000 PIP coverage available under Ms. Wirtel’s policy (CP 618).

In addition to the PIP coverage, both GEICO policies included Underinsured Motorist (“UIM”) coverage with a \$25,000 per person limit. (CP 38, 68.) The UIM coverage in each policy includes the following provisions:

LIMITS OF LIABILITY

1. The limits for “each person” is the most we will pay as damages for bodily injury, including those for care and loss of services, to one person in on accident.

...

6. If separate policies with us are in effect for you or any person in your household, they may not be combined to increase the limit of our liability for a loss. If this policy and any other policy providing Underinsured Motorists Coverage apply to the same loss, the maximum limit of liability under all policies will be the highest limit of liability that applies under any one policy.

...

(CP 52 – 53; 82 – 83.) Based upon these provisions, the total amount of UIM coverage available for A.N.’s claim was \$25,000.

The claim notes for Mr. Nelson’s policy state that, on September 12, 2012, Mr. Nelson was ready to settle A.N.’s UIM claim. (CP 874.) A note to the file for Ms. Wirtel’s policy on October 24, 2012, states the file handler received a call from Ms. Wirtel and “she feels that they will settle.” (CP 808.) In a Declaration, Ms. Wirtel confirmed that Mr. Nelson was responsible for handling the UIM claim. She testified:

I do vaguely recall Geico telling me something about money over the phone around that time, and me telling them to call Chris because he was handling it.

(CP 201.)

The claim files for both policies reflect continuing discussions between GEICO and Mr. Nelson regarding finalizing the UIM claim. In

October 2012, Laura Jaeger was retained to act as a settlement guardian ad litem (“SGAL”) because A.N. is a minor. (CP 807, 874.) The file handler for the claim under Mr. Nelson’s policy sent forms for Mr. Nelson to complete and on January 9, 2013, the file handler documented a telephone conversation in which Mr. Nelson confirmed he had received the forms and would sign and return them so the file handler could obtain medical records. (CP 866.) The note closes with the statement “and then we should be able to complete the settlement for this minor.” (*Id.*) On January 28, 2013, the file handler noted GEICO was “awaiting receipt of medical records from the hospital so we can proceed with court approval.” (CP 865.) The file handler for the claim under Ms. Wirtel’s policy noted GEICO was collecting documents and also waiting for the Seattle Police Department to respond with additional investigative documents. (CP 806.)

On February 14, 2013, the file handler for Mr. Nelson’s policy documented a call with Harborview indicating GEICO had an incorrect address for Harborview when it sent the medical records request. (CP 863.) On that same date, GEICO faxed the medical records request and authorization to Harborview. (*Id.*) GEICO did not receive a billing from Harborview for the medical records copy charge until March 8, 2013, and GEICO sent payment to Harborview that same day. (CP 862.)

On March 26, 2013, the SGAL called GEICO to ask about the status of the Harborview records and the file handler told her GEICO had sent a check for the copies, Harborview had cashed the check, and now GEICO was awaiting the records. (CP 860 – 61.) On April 9, 2013, GEICO received another request from Harborview for pre-payment for the records. (CP 860.) The file handler spoke with an employee at Harborview on April 10, 2013, and was told Harborview had not received the check, even though GEICO’s records showed the check had been received because Harborview had cashed it. (CP 859.)

GEICO finally received the Harborview records and on April 23, 2013, the file handler submitted a request to have the CD/DVD of the record copied for the SGAL. (CP 858.) A note to the file on May 9, 2013, states the “SGAL is reviewing the records we received from the hospital.” (CP 856.) Once the SGAL’s report was available, a copy would be provided to GEICO and the SGAL would advise when a hearing had been set to approve the settlement. (*Id.*)

Before the settlement could be finalized, a May 30, 2013, note to the file states the family had hired an attorney. (CP 855.) By September 6, 2013, the file handler noted that GEICO was “still waiting for the minor’s attorney to get up to speed.” (CP 853 – 54.) There was also an indication that the attorney was “horribly confused about the fact that there were two separate GEICO policies involved.” (CP 854.)

On October 10, 2013, attorney Joel Hanson filed an Insurance Fair Conduct Act (“IFCA”) Notice. (CP 99 – 100.) The Notice stated the insureds “claim a cause of action against Geico for the unreasonable [failure] to timely pay the full benefits due under the their [sic] policies and for violation of the insurance regulations. (CP 99.) It further stated:

Geico may resolve the cause of action against it under RCW 48.30.015, the Insurance Fair Conduct Act, by immediate payment of all sums due under the policy. Based on information provided by Geico, it is believed that Geico owes an additional \$25,000 for each policy, for a total of \$50,000.

(CP 100.)

On October 16, 2013, GEICO’s counsel responded to the IFCA Notice, explaining the GEICO’s position that the anti-stacking provision in each GEICO policy was valid and enforceable. (CP 102 – 104.) As a result, only \$25,000 in UIM coverage was available.

A note to the file on November 14, 2013, states GEICO had not heard from Mr. Hanson regarding the IFCA response. (CP 844.) On November 26, 2013, the file handler documented a call with Mr. Hanson noting that Mr. Hanson still disputed the coverage decision and would be filing suit. (CP 842.)

2. *After Suit Filed*

On November 27, 2013, the insureds filed suit. (CP 1 – 5.) Nonetheless, GEICO continued its attempts to resolve the UIM claim. On January 14, 2014, GEICO’s attorney explained to Mr. Hanson that GEICO

could not simply pay the undisputed amount of \$25,000. Rather, a settlement guardian ad litem's report was necessary. (CP 357.) The SGAL had been in the process of preparing her report when Mr. Hanson became involved and objected to GEICO's conclusion that only \$25,000 was available for the claim. GEICO's counsel suggested that Mr. Hanson contact the SGAL in order to allow her to continue her investigation, with the understanding that the insureds disputed the amount of available coverage. (CP 837 – 58.)

On January 24, 2014, Mr. Hanson took exception to GEICO's position regarding the need for an SGAL, stating that "settlement and payment" were "not the same thing." (CP 360.) He also stated that he and his clients continued to "believe the policy can be interpreted to grant a benefit of \$50,000 in this situation." (*Id.*) GEICO's attorney responded on January 31, 2014, again explaining the need for an SGAL and the fact that only \$25,000 was available. (CP 363.) He indicated he would consider any explanation Mr. Hanson might have as to why GEICO's coverage position was not correct. (CP 363.) Mr. Hanson never provided any explanation or support for his legal position that two policies applied.³

Mr. Hanson then exchanged emails with the SGAL and on February 24, 2014, the SGAL confirmed she could now continue with her investigation of the claim. (CP 365.)

³ Notably, appellants have not sought review of the trial court decision finding that only one \$25,000 UIM policy limit is available for A.N.

B. Facts Regarding Summary Judgment Proceedings

The legal issues presented by the parties in their summary judgment pleadings are addressed in detail in the argument section below. They are, however, also mentioned in this factual discussion because the legal issues, particularly the injury component of Plaintiffs' CPA claim, were a critical component of the procedural progression of the case.

On February 11, 2014, GEICO moved for summary judgment, asking the court to declare the anti-stacking provision in the UIM coverage of the GEICO policies was valid and enforceable. (CP 20 – 27.) In response, for the first time, the insureds raised the argument that, even if the policies were not stacked, \$50,000 was available because two insureds had been involved in the accident – A.N. Nelson and Ms. Wirtel. (CP 188.) In its reply, GEICO explained it was undisputed that Ms. Wirtel had never submitted a claim for any emotional injuries she may claim to have suffered a result of witnessing the accident. (CP 248 – 49.) On April 18, 2014, the trial court granted GEICO's motion, holding that "the anti-stacking language is enforceable and applies." (CP 462.) As a result, only \$25,000 in UIM coverage was available for A.N.'s claim.

On June 13, 2014, the insureds moved for summary judgment regarding their allegations that GEICO had violated various claims handling regulations in Washington Administrative Code. (CP 538 – 549.) On the same day, GEICO filed a motion for summary judgment

seeking dismissal of all extra-contractual claims. (CP 577 – 91.) On July 11, 2014, the trial court granted GEICO’s motion as to the bad faith and IFCA claims. (CP 710 – 12.) The order makes no mention of whether GEICO had a duty to make a settlement offer. The court reserved ruling on the CPA claim pending review of “additional claim file entry notes” that were currently in the possession of the parties. (CP 712.) The Order directed GEICO to “submit a copy of the agreed claim file no later than” July 11, 2014, with a copy to Plaintiff’s counsel. (*Id.*)

On July 14, 2014, Plaintiffs filed a motion asking the trial court to reconsider its order granting GEICO’s summary judgment motion regarding bad faith and the IFCA claim. (CP 716 – 23.) In their motion, Plaintiffs primarily argued that GEICO had a duty to make a settlement offer pursuant to WAC 284-30-330(6), but delayed in doing so and Plaintiffs could establish harm for purposes of their extra-contractual claims by showing they retained an attorney due to the delay.

On July 30, 2014, the court denied Plaintiffs’ motion for reconsideration. (CP 945 – 46.) The order included the following:

Plaintiff Nelson advised Geico that he wished to settle his claims on 9-12-12. On 10-18-12, Geico started the process to obtain court approval for the minor settlement. Plaintiff Wirtel advised Geico that she wished to settle on 10-24-12. Geico documents from Jan 2013 thru May 2013 detail several attempts to obtain medical records for the SGAL’s review. On 5-9-13 there is an entry indicating that the SGAL was reviewing the medical record and that a hearing was to be scheduled to obtain court approval of the minor settlement. On 5-23-13, Plaintiffs hired Mr. Hanson. From

this point on, communications between Mr. Hanson and Geico were focused on the disputed issue of whether they could stack their two UIM policies. On 10-10-13, Plaintiffs filed their IFCA notice claiming an unreasonable denial of their claim coverage. On 11-26-13, Mr. Hanson advised Geico that he would be filing a lawsuit.

(CP 946.) The court further noted that, even if Plaintiffs had shown GEICO delayed in investigating the UIM claim or failed to explain the UIM coverage to them, they had failed to produce any evidence that they had sustained damage caused by those acts. (*Id.*) Finally, the court held that Plaintiffs' new argument that GEICO had violated WAC 284-30-330(6) was not presented in the original motion, so there was no summary judgment ruling on that issue for the court to reconsider.

Also on July 30, 2014, the trial court denied GEICO's motion regarding the CPA claim. (CP 943 – 46.) The court noted that Plaintiffs contended they did not receive a settlement offer from Geico in October 2012. (CP 944.) The court further held that emotional damages were sufficient to sustain a CPA claim. (*Id.*) From these two points, the court concluded "Plaintiffs are entitled to argue to the jury that (1) Geico failed to make a prompt settlement offer and (2) they suffered emotional damages as a result of this failure." (*Id.*)

On August 8, 2014, Geico moved for reconsideration of the order denying its summary judgment motion on the CPA claim. (CP 949 – 57.) Geico asserted that Plaintiffs were required to show an injury to their business or property to sustain their CPA claim and, because they had

testified in their depositions they had suffered no such injury, the CPA claim must be dismissed. Specifically, Mr. Nelson testified:

Q. How about any sort of facility payments, what sometimes might refer to as copayments, anything like that that you've paid since the incident occurred out of your own pocket?

A. No. Wonderfully no.

...

Q. Let me see. Let me ask you this more specifically. Did you submit anything yourself, separate and apart from a provider, you sent it to Geico and said can I get reimbursed for this? Did you do that ever?

A. No. Can I take a break?

...

Q. I'm assuming no insurance, no entity in any way, shape or form has ever reimbursed you for the \$60 that you paid towards the massage therapy for A.N.; is that correct?

A. Yes, I never put that in. I never claimed it.

Q. Okay. At the time of commencing this litigation in November of last year, did you have any other expenses that you can think of off the top of your head?

A. No.

Q. That you incurred, okay. Prior to commencing this litigation, had you ever paid any monies or fees to Mr. Hanson?

A. Prior to?

Q. Prior to filing this lawsuit did you ever pay Mr. Hanson any fees?

A. No.

Q. Any money at all?

A. No.

Q. Did you pay Mr. Carney any money or fees?

A. No.

Q. Prior to filing this lawsuit, did you consult with anyone in relation to Geico's handling of anything in which you had to pay that individual a fee?

A. No.

...

Q. Has any of the bills incurred in relation to this incident with your daughter ever resulted in you being reported to collections?

A. Fortunately, no.

Q. Is anyone, any entity, anyone requesting that you reimburse them for any of the medical care that's been paid for to date?

A. To the best of my knowledge all care providers have been reimbursed for care. There's no outstanding bills that I'm aware of.

(CP 620 – 24; 961 – 65.)

Ms. Wirtel testified in her deposition as follows:

Q. We'll go back on the record. The next questions I want to ask you a little bit about A.N.'s bills, which I also asked Mr. Nelson about. To date have you personally paid out of pocket for any medical bills?

A. [By Ms. Wirtel] No, I have not.

Q. And hopefully a negative on this one. You haven't been sent to collections for any bills, have you?

A. I don't believe so.

Q. Are there any bills that are outstanding that you're aware of?

A. Not that I'm aware of.

Q. Did you submit any sort of bill or expense or anything to Geico that you were requesting reimbursement for personally?

A. No.

Q. Did you consult with any professional prior to filing this lawsuit regarding Geico's handling of the claim and pay that professional any money?

A. Oh, no, absolutely not.

Q. Prior to filing this lawsuit did you pay Mr. Hanson any money?

A. No.

Q. Mr. Carney any money?

A. No.

(CP 626 – 27; 967 – 68.)

In response, Plaintiffs argued they were injured in the following ways: (1) by paying \$60 for one massage treatment that was never submitted to GEICO for payment (CP 974); (2) theoretical lost interest they might have earned on the settlement funds had the settlement been paid sooner (CP 975); (3) inability to pay for additional medical care (CP 976); and (4) by incurring costs to file suit (CP 977).

On September 8, 2014, the trial court denied GEICO's motion for reconsideration on the CPA claim. (CP 1023 – 24.) The court held:

The injury element of a CPA violation will be met if [Plaintiffs'] property/money interest is diminished even minimally. The costs incurred (incl. cost to hire counsel) to investigate a potentially unfair/deceptive practice is sufficient to establish injury. Stephens v. Omni, 138 Wn. App. 151, 180 (2007).

(CP 1023.)

GEICO filed a motion seeking clarification of the order or certification for discretionary review. (CP 1036 – 45.) GEICO sought clarification as to whether the court intended to allow Plaintiffs to establish injury via legal costs incurred after filing suit or whether the order was referring to only pre-litigation costs. GEICO pointed out that, under the case law, only pre-litigation costs could be considered and Plaintiffs had testified that they had incurred no such costs. (CP 1037 – 39.)

Plaintiffs responded that, because their attorney had worked on the case before filing suit, this could satisfy the injury element even though he did not bill them. (CP 1064 – 65.) They also reasserted their claims that the \$60 massage, inability to pay for medical treatment, and theoretical lost interest could constitute injury under the CPA. (CP 1065 – 66.)

In response, GEICO noted the court's order referred only to legal costs as potentially showing injury for purposes of the CPA. (CP 1077 – 83.) GEICO further pointed out that the time spent by Mr. Hanson on the case before filing suit had nothing to do with any alleged delay by GEICO in settling the UIM claim. Rather, any delay was caused by Mr. Hanson's

actions, including instructing the SGAL on May 29, 2013, to halt the legal proceedings regarding settlement. (CP 1081; CP 1075.)

On September 26, 2014, the court granted GEICO's motion for clarification. (CP 1094 – 95.) The court dismissed the CPA claim, holding that attorney fees could constitute injury and:

Although Mr. Hanson spent time on Plaintiffs' case prior to filing, it was a contingent fee agreement. Plaintiffs would not owe any money if there was no recovery. The claim of economic loss due to delay in receipt of a settlement offer has already been denied – see order of 7/30/14 sub 53. Therefore, Plaintiff's [sic] CPA claim is dismissed.

(CP 1095.)

This appeal followed.

Plaintiffs' Notice of Appeal (CP 1180 – 1202) does not refer to or incorporate in any manner the trial court's Order on Defendant GEICO's Motion for Summary Judgment Re: Coverage. (CP 461.) This appeal, therefore, relates exclusively to the summary dismissal of Plaintiff's extra-contractual claims asserted against GEICO.

V. ARGUMENT

A. Standard of Review

The trial court's dismissal of the claims against GEICO on summary judgment is subject to *de novo* review.⁴ This Court may affirm summary judgment on any grounds supported by the record.⁵

⁴ *Blue Diamond Group, Inc. v. KB Seattle 1, Inc.*, 163 Wn. App. 449, 453, 266 P.3d 881 (2011) (citing *Simpson Tacoma Kraft Co. v. Dep't of Ecology*, 119 Wn.2d 640, 646, 835

B. Plaintiffs have abandoned their appeal of the October 23, 2014, discovery order.

Because there were two separate policies at issue here, GEICO maintained two separate claim files. This led to some confusion during discovery and the trial court entered discovery orders. In their Notice of Appeal, Plaintiffs assigned error to one such order entered on October 23, 2014. (CP 1180.) However, Plaintiffs have not addressed that order in any manner in their Opening Brief, so the Court should not consider any issues relating to that order.⁶

C. Plaintiffs' theory of the case has changed throughout the litigation.

From the time Plaintiffs retained attorney Joel Hanson, their theory as to why GEICO was allegedly acting in bad faith was continually shifting. Plaintiffs asserted in their IFCA Notice that GEICO had an obligation to pay \$50,000. (CP 99 – 100.) They provided no explanation as to why this amount, rather than the \$25,000 policy limit, should have been paid. When GEICO explained that the anti-stacking provision in the UIM coverage for each policy dictated that only one policy limit was available (CP 102 – 104), Plaintiffs filed suit.

P.2d 1030 (1992); *Michak v. Transnation Title Ins. Co.*, 148 Wn.2d 788, 794, 64 P.3d 22 (2003)).

⁵ *Id.* (citing *Allstot v. Edwards*, 116 Wn. App. 424, 430, 65 P.3d 696 (2003)).

⁶ *McGill v. Hill*, 31 Wn. App. 542, 544 n. 1, 644 P.2d 680 (1982).

GEICO then moved for summary judgment on the anti-stacking provision and for the first time, Plaintiffs raised the argument that \$50,000 was owed because Ms. Wirtel has also been involved in the accident. (CP 188.) However, Ms. Wirtel was not struck by the stolen SUV, has never submitted a claim to GEICO, and there was never any indication at any time before or during the lawsuit that Ms. Wirtel claimed she was injured by witnessing the SUV striking her daughter. The trial court properly rejected Plaintiffs' new theory and found that \$25,000 was the maximum amount owed for A.N.'s claim.

Plaintiffs' focus then shifted to a new theory when the parties filed cross-motions for summary judgment on the extra contractual claims. In their own motion, Plaintiffs argued: (1) GEICO's investigation was untimely under WAC 284-30-380; (2) GEICO failed to explain the UIM benefits available to Plaintiffs, in violation of WAC 284-30-350(1); and (3) GEICO failed to instruct Plaintiffs as to what they needed to do in order to recover payment, in violation of WAC 284-30-360(4). (CP 539.) Plaintiffs asserted these same theories in response to GEICO's summary judgment motion. (CP 636.)

When the trial court concluded that GEICO's actions had not violated the WAC provisions upon which Plaintiffs relied, Plaintiffs asserted for the first time in their Motion for Reconsideration the argument that GEICO had violated WAC 284-30-330(6). (CP 716 – 23.) They have

now assigned error to only two specific rulings. They assert the trial court (1) “erred in dismissing all claims against Geico based on its ruling that there was no duty to make a settlement offer during the insurance claim” and that the court (2) “erred in dismissal all claims against Geico based on its ruling that Appellants were not harmed by Geico’s delay in making a settlement offer.”⁷

As discussed in the following sections, whether GEICO had an obligation to make a settlement offer and the injury issue are not the sole basis for the court’s ruling. Plaintiffs are simply trying to distract the Court from the reality of this case – Plaintiffs thought they should recover two UIM limits, the trial court properly concluded they were only entitled to one limit, and Plaintiffs recognize this is the correct legal result and have assigned no error to it. Any allegations regarding timeliness of GEICO’s actions are nothing more than an after-the-fact attempt to keep alive extra-contractual claims that were properly dismissed on summary judgment.

D. GEICO acted reasonably as a matter of law.

In *Cedell v. Farmers Insurance Co. of Washington*,⁸ cited by Plaintiffs,⁹ the court specifically noted that UIM claims differ from other types of first party claims:

⁷ Appellants’ Opening Brief at 3.

⁸ 176 Wn.2d 686, 295 P.3d 239 (2013).

⁹ Appellants’ Opening Brief at 28.

we recognize a difference between UIM bad faith claims and other first party bad faith claims. The UIM insurer steps into the shoes of the tortfeasor and may defend as the tortfeasor would defend. . . .¹⁰

Nonetheless, GEICO acknowledges the insurer still has an obligation of good faith with regard to a UIM claim, which includes complying with WAC 284-30-330(6).¹¹ That regulation provides:

The following are hereby defined as unfair methods of competition and unfair or deceptive acts or practices of the insurer in the business of insurance, specifically applicable to the settlement of claims:

...

(6) Not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear. . . .

At oral argument on the parties' cross-motions for summary judgment, there was admittedly some confusion regarding whether an insurer handling a UIM claim has an affirmative obligation to make a settlement offer.¹² At that time, Plaintiffs' counsel did not raise any issues regarding WAC 284-30-330(6). That regulation was presented to the trial court for the first time in Plaintiffs' Motion to Reconsider and the trial court made no ruling on it.¹³ Therefore, whether GEICO had any duties under that

¹⁰ 176 Wn.2d at 697.

¹¹ See, e.g., *Urban v. Mid-Century Ins.*, 79 Wn. App. 798, 807, 905 P.2d 404 (1995).

¹² RP at 20 & 27.

¹³ CP 946.

regulation was never an issue in the case and this Court need not consider it.

Even if this Court were to consider WAC 284-30-330(6), it cannot do so in a vacuum. Rather, GEICO's actions and whether the trial court properly concluded Plaintiffs' extra-contractual claims all failed as a matter of law, must be considered in the context of the totality of the undisputed facts. Upon such consideration, the only conclusion that can be reached is that the trial court properly dismissed the extra-contractual claims because the only conclusion reasonable minds could reach is that GEICO acted reasonably as a matter of law regarding all of its obligations, including any obligations arising under WAC 284-30-330(6).

To succeed on a bad faith claim, an insured must show the insurer's alleged breach of the insurance contract was "unreasonable, frivolous, or unfounded."¹⁴ Conversely, a reasonable basis for the insurer's actions "constitutes a complete defense to any claim that the insurer acted in bad faith or in violation of the Consumer Protection Act."¹⁵ All the claims handling regulations, including those which do not specifically use the word reasonable, are subject to this reasonableness

¹⁴ *Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 484, 78 P.3d 1274 (2003) (citing *Overton v. Consol. Ins. Co.*, 145 Wn.2d 417, 433, 38 P.3d 322 (2002)).

¹⁵ *Dombrosky v. Farmers Ins. Co. of Wash.*, 84 Wn. App. 245, 260, 928 P.2d 1127 (1997) (citing *Transcontinental Ins. Co. v. Wash. Pub. Util. Dist. Util. Sys.*, 111 Wn.2d 452, 760 P.2d 337 (1988); *Felice v. St. Paul Fire & Marine Ins. Co.*, 42 Wn. App. 352, 711 P.2d 1066 (1985); *Starczewski v. Unigard Ins. Group*, 61 Wn. App. 267, 273, 810 P.2d 58 (1991)).

standard.¹⁶ In addition, even if the insurer's coverage decision is determined to be incorrect, an insured may not base a bad faith claim "on an insurer's good faith mistake, which occurs when the insurer acts honestly, bases its decision on adequate information, and does not overemphasize its own interest."¹⁷

While the reasonableness of an insurer's conduct is often a question of fact, an insurer is entitled to summary judgment "if there are no disputed material facts pertaining to the reasonableness of the insurer's conduct under the circumstances, or the insurance company is entitled to prevail as a matter of law on the facts construed most favorably to the non-moving party."¹⁸ Here, GEICO's conduct was reasonable as a matter of law.

The trial court did not expressly state that the reasonableness of GEICO conduct was the basis of her dismissal of the non-CPA extra-contractual claims, but the records conclusively supports that conclusion. In addition, because this Court may affirm summary judgment on any grounds supported by the record,¹⁹ the only question this court need

¹⁶ *Am. Mfrs. Mut. Ins. v. Osborn*, 104 Wn. App. 686, 699 – 700, 17 P.3d 1229 (2001).

¹⁷ *Werlinger v. Clarendon Nat'l Ins. Co.*, 129 Wn. App. 804, 808, 120 P.3d 593 (2005) (citing *Griffin v. Allstate Ins. Co.*, 108 Wn. App. 133, 143, 29 P.3d 777, 36 P.3d 552 (2001)).

¹⁸ *Smith*, 150 Wn.2d at 484 (citing *Indus. Indem. Co. of the NW, Inc. v. Kallevig*, 114 Wn.2d 907, 920, 792 P.2d 520 (1990)). See also *Liberty Mut. Ins. Co. v. Tripp*, 144 Wn.2d 1, 23 – 24, 25 P.3d 997 (2001) (insurer entitled to summary judgment where insured raised no material issue of fact that showed the insurer had acted in bad faith).

¹⁹ *Blue Diamond Group, Inc.*, 163 Wn. App. at 453.

consider here is whether the trial court's summary dismissal of the extra-contractual claims was proper because GEICO acted reasonably as a matter of law in the manner in which it handled A.N.'s UIM claim. The undisputed facts show that it did.

The timing of events is set forth in the following table:

Date	Event	CP
5/20/11	Accident.	35
8/10/11	Insureds notify GEICO of accident.	603, 932
8/11-7/12	PIP payments until \$45,000 in PIP exhausted.	611, 618
9/12/12	Mr. Nelson tells GEICO he's ready to settle A.N.'s UIM claim.	874
10/24/12	Ms. Wirtel tells GEICO she feels they will settle.	808
10/12	Laura Jaeger retained as SGAL with GEICO paying her fees.	807, 874
1/7/13	GEICO collecting documents; waiting for response from SPD.	806
1/9/13	Mr. Nelson confirms he has received forms, will sign and return.	866
1/28/13	GEICO awaiting receipt of medical records from Harborview.	865
2/14/13	Harborview tells GEICO request for records was sent to an incorrect address.	863
2/14/13	GEICO faxes request and authorization to Harborview.	863
3/8/13	GEICO receives and pays bill from Harborview for copy charges.	862
3/26/13	SGAL calls GEICO regarding records and GEICO explains situation.	860 – 61
4/9/13	GEICO receives another request for payment from Harborview, even though payment made.	859 – 60
4/23/13	GEICO receives Harborview records.	858
5/30/13	GEICO learns insureds have retained Mr. Hanson.	855
5/30/13	Mr. Hanson specifically asks that GEICO "hold-off on any filings or hearings until I have learned the details of the ongoing	740

	action.”	
6/20/13	GEICO explains in an email to Mr. Hanson that there are two policies and that a total of \$25,000 in UIM coverage is available.	750
7/9/13	GEICO answered additional questions from A.N.’s attorney Hanson regarding the claim and explains that the company was awaiting court approval before paying the settlement.	758
8/13/13	Despite have received responses to his questions on July 9, 2013, Mr. Hanson repeated the same questions to GEICO.	765
8/22/13	Mr. Hanson demands \$50,000.	768
9/6/13	GEICO still waiting for Mr. Hanson “to get up to speed.”	853 – 54
10/10/13	Mr. Hanson serves IFCA notice on GEICO. contending \$50,000 UIM is available and should be paid.	99 – 100
10/16/13	GEICO responds to IFCA notice.	102 – 104
11/27/13	Insureds file suit	1 – 5

It cannot be disputed that GEICO acted reasonably. The company was working with the insureds regarding A.N.’s claim and never withheld any information regarding the coverage available. GEICO always agreed to pay the full \$25,000 in UIM benefits that A.N. was entitled to under the policy. Indeed, Plaintiffs’ own testimony confirms they knew of the UIM coverage and were in fact making a claim under the UIM coverage of each policy. The undisputed facts establish that GEICO acted reasonably in its handling and settlement of A.N. Nelson’s claim.

Plaintiffs incorrectly assert this case is like *Anderson v. State Farm Mutual Ins. Co.*²⁰ In *Anderson*, the insured submitted a PIP claim and the insurance company did not tell her she was also entitled to make a UIM

²⁰ 101 Wn. App. 323, 331, 2 P.3d 1029 (2000).

claim. The insured only learned of that possibility eight months later when she met an attorney. The trial court dismissed the insured's bad faith and CPA claims on summary judgment. This Court reversed, holding that the insurer's failure to disclose the UIM coverage actually supported summary judgment in the insured's favor on the CPA claim.

This matter is easily distinguished from *Anderson*. Plaintiffs here have never testified that they did not understand they each had UIM coverage and that they were making a claim under that coverage. To the contrary, they knew before they ever called GEICO that they were pursuing UIM coverage. In his Declaration, Mr. Nelson testified that, after the accident, Plaintiffs learned of the Washington State Crime Victims Compensation Fund and:

Upon contacting this agency we were notified of our right to utilize our uninsured motorist insurance on both our Geico car policies. Once we learned of this option, I immediately contacted Geico and initiated a claim.²¹

The reasoning of *Anderson* does not apply here. Plaintiffs were always aware that they were pursuing a claim for A.N.'s injuries under the UIM coverages of both their policies. The only issue raised by Plaintiffs before they filed suit was their desire to stack the UIM coverage to obtain \$50,000 in coverage rather than \$25,000. Any assertion that GEICO acted improperly regarding the handling of their claim is nothing more than a

²¹ CP 656.

creation of Plaintiffs' counsel not based in fact. Therefore, the trial court properly dismissed all extra-contractual claims.

E. Plaintiffs failed to provide evidence of injury or damage regarding their CPA claim.

The trial court's references to the injury or damage element related to the consideration of the CPA claim.²² The court did not dismiss the other extra-contractual claims due to a lack of damages and this Court need not consider those claims in conjunction with that issue. Similarly, the Court need not consider the injury issue as to the CPA claim because that claim fails as a matter of law based upon the reasonableness of GEICO's conduct.²³ But even if the Court does examine the injury issue, it will find the trial court properly dismissed the CPA claim.

Because Plaintiffs' stacking argument failed, the only basis for their extra-contractual claims was GEICO's alleged delay in settling the claim for the \$25,000 available limit. While a delay in payment may be sufficient to establish the injury element in certain cases, Plaintiffs must actually submit evidence to support the claim of such an injury.²⁴ Plaintiffs here provided no such evidence to the trial court showing any

²² CP 1095.

²³ *Dombrosky*, 84 Wn. App. at 260.

²⁴ See, e.g., *Hangman Ridge Training Stables v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 794, 719 P.2d 531 (1986) (a contention that plaintiffs were injured by a tax liability was insufficient to satisfy the injury element when they failed to establish the liability existed or that they had actually paid it).

alleged delay caused them injury or damage and the trial court properly dismissed Plaintiffs' extra-contractual claims.

1. *Plaintiffs submitted no evidence of emotional injury.*

Plaintiffs assert that emotional injury is sufficient harm to support their claims for bad faith and violation of IFCA.²⁵ Plaintiffs acknowledge that emotional injury is insufficient to sustain a CPA claim²⁶ and it is the CPA claim which the Court dismissed due to lack of injury. The reference to emotional injury, therefore, is irrelevant to Appellant's CPA claim.

To the extent Plaintiffs assert the trial court dismissed their bad faith and IFCA claims due to lack of injury, the emotional injury argument is equally unavailing because Plaintiffs submitted no evidence that they suffered such injury. The argument in their brief includes no citation to the record and the record includes no evidence which could have been cited.

2. *Plaintiffs submitted no evidence of loss of use of money.*

While the loss of use of money may satisfy the injury component of a CPA claim in certain instances, Plaintiffs submitted no evidence of such injury here. Plaintiffs first rely on *Anderson*²⁷ in support of their argument that theoretical lost interest, absent any evidence supporting that

²⁵ Appellants' Opening Brief at 37.

²⁶ *Ledcor Indus. (USA), Inc. v. Mutual of Enumclaw Ins. Co.*, 150 Wn. App. 1, 13 – 14, 206 P.3d 1255 (2009).

²⁷ 101 Wn. App. 323.

claim, is sufficient evidence of injury to save their extra-contractual claims from summary dismissal. As previously discussed, the reasoning of *Anderson* does not apply here. In addition, the insured in that case had alleged not only loss of interest, but she also claimed “to have experienced financial penalties attributable to the delay[.]”²⁸ Plaintiffs here provided no evidence of any such actual financial injury. *Anderson*, therefore, does not save Plaintiffs’ CPA claim.

Plaintiffs also cite several other cases regarding loss of use of funds as establishing injury, but each of those cases differs from the present one in one significant respect – in the cited cases the plaintiffs gave the defendant funds which the defendant wrongfully failed to timely return. For example, in *Banuelos v. TSA Washington, Inc.*,²⁹ a car dealership was found to have violated RCW 46.70.180(4)(a), the bushing statute, by failing to return a car purchaser’s \$1,000 down payment within three days when the deal was not consummated. Under those circumstances, the court held it was not error for the trial court to have awarded lost interest for each day the down payment was not returned.

In *Sorrel v. Eagle Healthcare, Inc.*,³⁰ the plaintiff had pre-paid for 18 days of nursing home care for his wife, but she died after one week. He sought a refund. Under those circumstances, the court held the loss of

²⁸ 101 Wn. App. at 333.

²⁹ 134 Wn. App. 603, 141 P.3d 652 (2006).

³⁰ 110 Wn. App. 290, 38 P.3d 1024 (2002).

the funds satisfied the injury element.³¹ Similarly, in *Griffin v. Hartford Insurance Co.*,³² the plaintiffs paid for defense counsel themselves and their insurer failed to reimburse them. Under those circumstances, the loss of use of the funds constituted injury for purposes of a CPA claim.³³

Mason v. Mortgage America, Inc.,³⁴ also cited by Plaintiffs, establishes that regardless of the type of injury alleged, there must be evidence that the injury occurred. In that case, the trial court conducted a bench trial. During trial, the plaintiffs presented evidence that the defendants had delivered the wrong mobile home to them and violated the CPA. The Supreme Court held that the record supported the conclusion that the plaintiffs had established they had been injured and it was causally related to defendants' unfair or deceptive acts. *Mason* does not stand for or support the argument that a theoretical loss of use of funds, without any supporting evidence, can save a CPA claim from summary dismissal.

Plaintiffs also cite *Tallmadge v. Aurora Chrysler Plymouth, Inc.*,³⁵ in support of their injury argument. This court, however, has declined to apply *Tallmadge* to cases decided after *Hangman Ridge Training Stables, Inc.*,³⁶ redefined the injury element.³⁷

³¹ 110 Wn. App. at 298 – 99.

³² 108 Wn. App. 133, 29 P.3d 777 (2001).

³³ 108 Wn. App. at 149.

³⁴ 114 Wn.2d 842, 792 P.2d 142 (1990).

³⁵ 25 Wn. App. 90, 605 P.2d 1275 (1979).

³⁶ 105 Wn.2d 778, 719 P.2d 531 (1986).

Plaintiffs failed to submit any evidence supporting the injury element. The only out-of-pocket payment to which Plaintiffs can point is the \$60 Mr. Nelson testified he paid for one massage therapy session for A.N.³⁸ Yet, he also testified that he never sought reimbursement of that payment from GEICO.³⁹ Nor did Plaintiffs submit any evidence in support of their assertion that they would have invested an earlier payment of the UIM settlement in some manner that would have gained them additional funds. Plaintiffs also submitted no evidence in support of the assertion they would have used an earlier UIM payment for medical expenses. They submitted no evidence of any unpaid expenses and no evidence of any treatment they would have pursued had they received the payment sooner. Plaintiffs failed to create any issue of fact regarding the injury element of their CPA claim and that claim was properly dismissed as a matter of law.⁴⁰

³⁷ *Demopolis v. Galvin*, 57 Wn. App. 47, 54 n. 5, 786 P.2d 804 (1990).

³⁸ CP 623.

³⁹ *Id.*

⁴⁰ Moreover, if the Court accepts Plaintiff's *theoretical* delay argument to establish damages, then any allegation of a delay in providing insurance benefits made by an insurer, even for a single day, would be sufficient to establish damages sufficient to avoid summary judgment. This theoretical delay argument is also inconsistent with the procedural history of the claim because A.N.'s attorney prevented GEICO from obtaining court approval of the settlement and paying the \$25,000 to A.N.

3. ***Plaintiffs have abandoned their argument that attorney fees may establish the injury element.***

Plaintiffs argued to the trial court that attorney fees could satisfy the injury component of the CPA claim. They have abandoned that argument on appeal.⁴¹

F. **GEICO did not violate the Insurance Fair Conduct Act.**

Appellants mistakenly argue that a violation of a WAC claims handling regulation constitutes a violation of IFCA.⁴² This is incorrect. IFCA provides in subsection (1) that only an unreasonable *denial* of claim or benefit is a violation of IFCA:

Any first party claimant to a policy of insurance who is unreasonably denied a claim for coverage or payment of benefits by an insurer may bring an action in the superior court of this state to recover the actual damages sustained, together with the costs of the action, including reasonable attorneys' fees and litigation costs, as set forth in subsection (3) of this section.⁴³

Washington courts have held, consistent with the plain language of the statute, that a WAC violation is not sufficient to constitute a violation

⁴¹ Appellants' Opening Brief at 41 – 42. The attorney time entries which Plaintiffs originally claimed supported the injury element for their claim of alleged delay actually show that the only issues being addressed by the attorney before filing suit related to the stacking issue. CP 1075. In addition, Plaintiffs' reliance on *Stephens v. Omni Ins. Co.*, 138 Wn. App. 151, 159 P.3d 10 (2007), *aff'd by Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 204 P.3d 885 (2009), is misplaced. In that case, the plaintiffs actually incurred out-of-pocket expenses in connection with consulting an attorney due to the alleged wrongful actions of the defendant. Plaintiffs here provided no evidence that they incurred any such out-of-pocket expenses.

⁴² Appellants' Opening Brief at 34.

⁴³ RCW 48.30.015(1).

of IFCA. There must be a denial of claim or benefits.⁴⁴ Here, there was no such denial—before the IFCA Notice was even served, GEICO had already agreed to pay the full \$25,000 in UIM benefits available to A.N. The trial court held that GEICO’s decision was correct and only \$25,000 was available. Plaintiffs have not appealed that decision. Therefore, not only was there no denial of benefits, as a matter of law any issue raised by the IFCA notice was determined by the trial court to be a non-issue.

RCW 48.30.015(8) provides a notice and right to cure procedure. An insured may bring an IFCA claim only “if the insurer fails to resolve the basis for the action within the twenty-day period after the written notice.” Here, A.N. served a notice on GEICO demanding that it pay her \$50,000 for her UIM. GEICO had already agreed to pay the available \$25,000 limit. The trial court found that GEICO correctly concluded that only \$25,000 was available. Thus, any alleged wrongful act included in the IFCA notice was found by the trial court not to be wrongful and Plaintiffs have not appealed that decision. As a result, as a matter of law, there was no basis for the IFCA claim and it was properly dismissed on summary judgment.

⁴⁴ *Ainsworth v. Progressive Cas. Ins. Co.*, 180 Wn. App. 52, 78-79, 322 P.3d 6, 20 (2014) (holding that “[s]ubsection (1) describes two separate acts giving rise to an IFCA claim. The insured must show the insurer unreasonably denied a claim for coverage *or* that the insurer unreasonably denied payment of benefits. If either or both acts are established, a claim exists under IFCA.”).

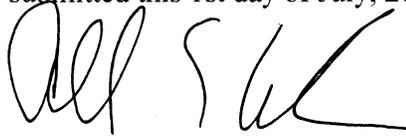
G. Appellants are not entitled to an award of attorney fees.

Appellants ask the Court to award fees pursuant to RAP 18.1 based upon IFCA and the CPA. Because the trial court properly dismissed the IFCA and CPA claims, Appellants are not entitled to an award of attorney fees under those statutes.

VI. CONCLUSION

The trial court properly dismissed all extra-contractual claims on summary judgment. The record establishes that GEICO acted reasonably as a matter of law. That reasonable conduct is a defense to all extra-contractual claims.

DATED and respectfully submitted this 1st day of July, 2015.



Alfred E. Donohue, WSBA #32774
WILSON SMITH COCHRAN DICKERSON
901 Fifth Avenue, Suite 1700
Seattle, Washington 98164
Tel. - 206.623.4100
Fax - 206.623.9273
Donohue@wscd.com

*Counsel for Respondent
GEICO General Insurance Company*

DECLARATION OF SERVICE

The undersigned certifies that under penalty of perjury under the laws of the State of Washington, that on the below date I caused to be served and filed the attached document as follows:

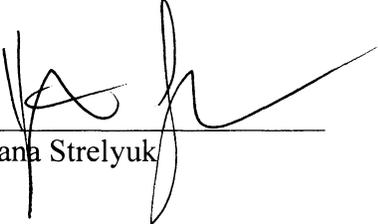
VIA LEGAL MESSENGER

Joel Hanson
Joel B. Hanson, Attorney at Law, PLLC
6100 – 219th Street SW, Suite 480
Mountlake Terrace, WA 98043

VIA LEGAL MESSENGER

Court of Appeals, Division I
One Union Square
600 University St.
Seattle, WA

DATED at Seattle, Washington this 1st day of July, 2015.



Yana Strelyuk