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## I. INTRODUCTION

Appellant, Terry S. Hartman, (Hartman) submits this Reply Brief to respond to points raised by Assurity Life Insurance Company (Assurity) in its Respondent's Brief. Assurity agrees that *Hangman Ridge* provides the applicable test for deciding this dispute and that the standard of review is *de novo* for both the trial court's order granting Assurity's motion for summary judgment and denying Hartman's cross motion for summary judgment. However, Assurity asserts that Hartman cannot meet the *Hangman Ridge* test. Hartman will address Assurity's arguments in order.

## II. ARGUMENT

### 1. Hangman Ridge Factors.

#### A. Unfair or deceptive act

Assurity cites *Sato v. Century 21 Ocean Shores Real Estate*, 101 Wn.2d 599, 681 P.2d 242 (1984) for the proposition that an inadvertent isolated mistake is not an unfair or deceptive act. Respondent's Brief p. 6. *Sato* is easily distinguishable. *Sato* predates *Hangman Ridge*. The *Sato* court's focus on the "inadvertent isolated mistake" was in the context of determining whether the act complained of satisfied the public interest requirement, as it existed prior to *Hangman Ridge*; not whether the act was

deceptive or unfair. *Sato* at 101 Wn.2d 602-603. Consequently, *Sato* has nothing to do with what constitutes an unfair or deceptive act or even the public interest element post *Hangman Ridge*. This is borne out by the fact that Assurity does not cite *Sato* in the part of its brief addressing public interest.

Next Assurity argues that Nettland's misrepresentations in the conservation letter were good faith mistakes and therefore cannot satisfy the first *Hangman Ridge* element. Brief of Respondent, p. 6. Assurity cites *Coventry Associates v. American States Insurance Co.*, 136, Wn.2d 269, 280, 961 P.2d 933 (1988), for this proposition. *Coventry*, however, states:

As long as the insurance company acts with honesty, bases its decision on adequate information, and does not overemphasize its own interests, an insured is not entitled to base a bad faith or a CPA claim against its insurer on the basis of a good faith mistake.

Here Assurity did not act with honesty. False information was provided to Hartman and he was encouraged to base his insurance decision on that false information. Assurity, however, claims that Hartman does not dispute that Nettland's mistake was honest. Respondent's Brief p. 6. But, this is just semantics. Hartman does not dispute that Nettland's

misrepresentations were unintentional. He admits nothing more.

Moreover, Assurity did not base its decisions on adequate information. The information supplied to Hartman was incorrect and information in Assurity's possession showed that the information was false. Thus Assurity had adequate information in its possession to provide accurate information to Hartman, but it provided false information nonetheless.

In addition, Assurity overemphasized its own interests. The false information provided to Hartman cut in Assurity's favor since it provided more of an inducement for Hartman to pay his premium, and Assurity now takes the position that it provided no greater burden.

Despite Assurity's actions of not acting with honesty, basing decisions on inadequate information and overemphasizing its own interests, Assurity claims that *Coventry* applies to this case because Nettland's mistake was made in good faith. Respondent's Brief p. 6. Hartman does not dispute that Nettland's acts were unintentional, but this does not mean that a CPA action cannot lie under *Coventry*. *Coventry* itself involved unintentional actions by an insurance company. Nevertheless, the *Coventry* court found that bad faith and CPA claims

were viable. In fact, some of the same insurance regulations cited by Hartman were found to be violated by the *Coventry* court despite the fact that such violations were not intentional. *Coventry* at 136 Wn.2d 280-281. Under *Coventry* the question is not whether the acts were intentional or not, but whether the acts violated insurance statutes and regulations: “Either the insurer complies with [its statutory obligations] or it does not.” *Id.*

Despite this clear language, Assurity strains *Coventry* to state that not only must a statutory or regulatory violation occur, but that such violation must be committed with bad faith in mind. Respondent’s Brief p. 8. This misreads *Coventry*. The *Coventry* court found that violations of the insurer’s statutory duties to conduct a reasonable investigation constituted bad faith because such violation breached the insurer’s duty to act in good faith. *Coventry* at 136 Wn.2d 283.

Moreover, Assurity’s argument that a statutory or regulatory violation must be made in bad faith, is contrary to Washington case law, both prior to and subsequent to *Coventry*. “An unfair or deceptive practice does not require a finding of intent to deceive or defraud and therefore good faith on the part of the seller is immaterial.” *Fisher v. Worldwide*

*Trophy Outfitters, LTD*, 15 Wn.App 742, 748, 551 P.2d 1398 (1976); “An unfair or deceptive act or practice need not be intended to deceive...”

*Indoor Billboard/Washington, Inc., v. Integra Telecom of Washington*, 162 Wn.2d 59, 75, 170 P.3d 10 (2007); “It is not important whether [defendant] intended to deceive...” *Mayer v. Sto Industries, Inc.*, 123 Wn.App 443, 457, 98 P.3d 116 (2004), *rev on other grounds*, 156 Wn.2d 677 (2006).

Next Assurity states that a *scienter* requirement is necessary because otherwise insurers will be strictly liable for good faith violations of the insurance statutes or regulations. Respondent’s Brief p. 8. This argument, however, ignores that under *Hangman Ridge* a statutory or regulatory violation must be accompanied by separate findings of harm and causation. *Coventry* at 136 Wn.2d 269, 276-277. One can easily imagine a scenario in which the insurer violates a statute or regulation, but the insured is not harmed or was not harmed as a proximate cause of the violations. In such case, a CPA claim will not lie; thus there is no strict liability from the mere showing of a statutory or regulatory violation.

Next Assurity asserts that the insurance regulations at issue here only apply if violated “after a claim is presented.” Respondent’s Brief p.

7. Assurity cites no case law for this proposition, and contrary case law exists. In *Matheny v. UNUMProvident Corporation*, 594 F.Supp.2d 1212, 1225 (2009), the court held that a CPA claim was viable where WAC 284-30-330(1) was violated in the contract formation stage of an insurance policy, well before any loss occurred.

Moreover, contrary to Assurity's claim, the plain language of the insurance regulations do not mandate that a violation must occur after a claim is presented. In fact, neither regulation says anything about the timing of the violation.

WAC 284-30-330 only states that the listed deceptive acts or practices are "specifically applicable to the settlement of claims." Here Assurity's misrepresentations are specifically applicable to the settlement of Hartman's claim.

WAC 284-30-350(1) only states that the failure to fully disclose all pertinent benefits be made in a policy "under which a claim is presented." Here, Assurity failed to fully disclose to Hartman all pertinent benefits in a policy under which his claim is presented.

Next Assurity argues that RCW 48.30.180 does not apply because Hartman was not seeking to buy or replace an existing policy.

Respondent's Brief p. 7. Assurity cites *Strother v. Capitol Bankers Life Insurance Co.*, 68 Wn.App 224, 232, (1992), for this proposition.

However, the cited language of *Strother* does not apply to RCW 48.30.180. Rather, it expressly relates to WAC 284-23-400 to 284-23-485, none of which are relied on by Hartman or applicable to this case. In contrast, RCW 48.30.180 specifically addresses, among other scenarios, the situation at issue here, where the insurer by misrepresentation induces (or tends to induce) the insured to *retain* the policy. Nothing in *Strother* limits the use of RCW 48.30.180 in a case like this where retention of the policy is at issue. Consequently, *Strother* does not excuse Assurity's violation of RCW 48.30.180.

Next Assurity claims that RCW 48.30.090 does not apply, unless intent is shown. Respondent's Brief p. 8. Not only is this contrary to the plain language of the statute; it ignores that the *Big Bend* and *Shah* courts found the statute was violated in the absence of intentional conduct. In both *Big Bend* and *Shaw* the actions complained of were unintentional.

In *Shah*, 130 Wn.App 74, 79, the violation occurred when the agent incorrectly entered the square footage into Allstate's computer system for calculating the replacement value of the property and represented that this

figure was sufficient for actual replacement value. The misrepresentation was not intentional; it was based on an unintentional miscalculation.

In *Big Bend*, 150 Wn.App 504, 520, the violation occurred when the agent negligently entered improper information into the computer system designed to calculate replacement value resulting in an under insured house. There was no intentional conduct.

In addition to showing that RCW 48.30.090 does not require intent in order to be violated, *Shah* and *Big Bend* also highlight that miscalculations, due to poor business procedures, also violate the statute and are not excused by any type of reasonableness defense.

Here, Assurity's oversight and business procedures were woefully inadequate to guard against the misrepresentations contained in the conservation letter. Thus the misrepresentation cannot be found to be in any way reasonable:

- 1) Nettland testified that she had to calculate the monthly benefit amount. She couldn't just look it up on the policy schedule or the computer. CP 89.
- 2) The word "currently" appears in all conservation letters regardless of whether the benefit amount has ever changed. CP 91.
- 3) Finally, and perhaps most importantly, there is no evidence in the

record that Assurity requires anyone to review the conservation letters for accuracy before they are sent.

These business procedures produced Nettland's unintentional misrepresentation. Given this record, Assurity's misrepresentations cannot be considered reasonable because they resulted from inadequate business procedures and oversight. Indeed, "[t]he purpose of the capacity to deceive test is to deter deceptive conduct before the injury occurs." *Indoor Billboard/Washington* at 162 Wn.2d 59, 75 (2007).

Next Assurity argues that the case law interpreting the requisite intent necessary for a violation of RCW48.30.090 is sparse and unclear. Respondent's Brief p. 8. This argument ignores *Shah* and *Big Bend*. But it also ignores the plain language of the statute which does not contain a *scienter* requirement. Indeed, the basic definition of "misrepresentation" does not contain a *scienter* requirement:

Misrepresentation. Any manifestation by words or conduct by one person to another that, under the circumstances, amounts to an assertion not in accordance with the facts. Black's Law Dictionary 1152 (4<sup>th</sup> ed. 1968).

Finally, Assurity urges this court to apply the law of scriveners' errors to this CPA claim. Respondent's Brief p. 9. However, the law of scriveners' errors applies to the enforcement of contracts. *Reynolds v.*

*Farmers Ins. Co. of Washington*, 90 Wn.App 880-885, 960 P.2d 432 (1998). This is not a contract claim. The purposes of the CPA and the purposes of contract enforcement are different. The CPA was enacted to protect the public from unfair methods of competition and unfair or deceptive acts or practices. RCW 19.86.020; *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 169, 744 P.2d 1032 (1987).

Moreover, the scrivener's error law only applies where the error in drafting the agreement differs from the intent of *both* parties. Here, it is undisputed that Hartman did not know the correct amount of his monthly benefit at the time the misrepresentations were made so Hartman's lack of knowledge did not conform to Assurity's intent. Additionally, Hartman does not claim that the conservation letter constituted an agreement between Hartman and Assurity so that an enforceable contract was made. Rather, Hartman claims that the misrepresentations in the conservation letter violated the CPA.

B. Harm

Assurity claims that Hartman was saved from being uninsured due to its misrepresentations which induced him to retain his policy. This may be the case, but it is not dispositive. Harm still results when only a portion

of a represented benefit is paid. Indeed, loss of money and the loss of use of money is a recognized item of damage under the CPA. *Griffin v. Allstate*, 108 Wn.App 133, 148, 29 P.3d 777 (2001), rev.denied, 146 Wn.2d 1005 (2002). *Mason v. Mortgage America Inc.*, 114 Wn.2d 842, 854, 792 P.2d 142 (1990).

Hartman's injury stems from the fact that less insurance benefit was actually delivered to him than was represented. It is only in this sense that he was under insured. His damages are akin to the situation where 10 pounds of potatoes were promised but only 5 actually delivered.

Here Assurity represented that \$10,000 in monthly benefits would be payable should disability subsequently occur. Disability did subsequently occur but only \$5,000 in monthly benefits were actually paid. Harm is established in the amount of \$5,000 in unpaid monthly benefits for the duration of the disability or until the disability period in the policy is exhausted.

Assurity cites *Shah* and *Big Bend* to show that plaintiff did not lose out on an opportunity to shop elsewhere. Respondent's Brief p. 11-13. This may or may not be the case. In any event, those cases do not address the harm element of *Hangman Ridge* in any detail and even if they did,

Hartman's injury to his property interests does not hinge on lost opportunity. Rather, Hartman's injury to his property interest is that less insurance benefits were actually delivered than had been represented. Consequently, his money and use of that money was diminished due to Assurity's unlawful conduct. This is sufficient under *Mason v. Mortgage America*; *Griffen v. Allstate*; and *Ambach v. French* to satisfy the harm element of *Hangman Ridge*.

C. Public interest

Assurity does not dispute that either a statutory or regulatory violation in the insurance context constitutes a *per se* public interest showing under *Hangman Ridge*. Instead, Assurity argues in the alternative that the four-part private dispute test under *Hangman Ridge* cuts in its favor. Respondent's Brief p. 14. Assurity argues that it did not actively solicit Hartman. *Id.* This ignores that Assurity's conservation attempt took place in the context of Hartman's prior unequivocal request to terminate his policy. Assurity's response to that request was an attempt to conserve the policy. The letter invited Hartman to consider false information about his policy, represented that his policy "continued to be a valuable asset to you and your family", and stated "if you feel you need

more or less coverage, consider the advantage of supplementing or reducing what you currently have” and finished by stating, “...we would like to continue serving your future needs.” CP 116. Hartman did not request a response to his termination request– Assurity made the decision to send Hartman the conservation letter all on its own. Consequently, Assurity solicited Hartman to continue his policy or to supplement or reduce his policy.

Next, Assurity argues that Hartman had a superior bargaining position to Assurity. In so doing, Assurity characterizes Hartman as “considering cancelling” and “deciding whether to maintain his policy”. Respondent’s Brief p. 15. Nothing could be further from the truth. Hartman unequivocally manifested his intent to cancel his policy prior to Assurity’s solicitation. CP 114. Contrary to Assurity’s assertion Hartman did not attempt to leverage the situation to his advantage. (i.e. I’ll cancel if you don’t give me more favorable terms.) Consequently, this case is more like the situation where Hartman is a potential customer rather than an existing customer trying to bargain for a better deal.

This coupled with the facts that Hartman is not sophisticated in insurance matters; had no clear understanding of how the policy benefits

worked; and Assurity wrote the entire contract of insurance, demonstrates that Assurity had a superior bargaining position.

D. Proximate cause

Assurity characterizes Hartman's injury as being under insured in the sense that he possessed less coverage than was necessary for him to cover his costs. Respondent's Brief p. 15. This is, however, a straw man because Hartman was not under insured in that sense. His harm/injury was that he was paid benefits in an amount less than had been represented. *See* Brief of Appellant p. 23. It is only in this sense that Hartman was under insured. Hartman asserts that the proximate cause of this harm was Assurity's misrepresentations.

With this in mind, the causation test of *Indoor Billboard/Washington*, is satisfied – But for Assurity's misrepresentations there would have been no payment of benefits in an amount less than had been represented and without the misrepresentations there would be no payment of benefits in an amount less than had been represented.

Assurity asserts that Hartman's monthly benefits were "clearly spelled out" at the time of contract formation in 2000. Respondent's Brief p. 17. But reference to the policy schedule reproduced by Assurity shows

that a calculation is necessary to determine the monthly benefit amount. Assurity fails to explain why Hartman should be required to correctly calculate his monthly benefit while Assurity is not. More importantly, even if Hartman was found to have known in 2000, that his monthly benefit was \$5,000, this does not excuse Assurity's misrepresentation in 2004, that "Currently" his monthly benefit was higher.

Assurity next argues that the proximate cause of Hartman's injury was his own misunderstanding of the insurance policy<sup>1</sup> and misrepresentations made by Pilkey Insurance who is not a party to this action. Respondent's Brief p. 16-17. This argument fails for three reasons. 1) Assurity's misrepresentations intervened and superceded these other potential causes; 2) there may be more than one proximate cause of an injury under the *Indoor Billboard/Washington* standard; and 3) reliance satisfies the *Indoor Billboard/Washington* standard. Each of these will be discussed.

The *Indoor Billboard/Washington* court stated that WPI 15.01 is the appropriate proximate cause standard in cases like this where an affirmative misrepresentation is alleged to have occurred. *Indoor*

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<sup>1</sup> Assurity did not plead comparative negligence on Hartman's part. CP 4-8.

*Billboard/Washington* at 162 Wn.2d 84. WPI 15.01 states that “proximate cause” means 1) a cause which in a direct unbroken sequence unbroken by any new independent cause produce the injury complained of; and 2) without which the injury would not have happened; and 3) there may be more than one proximate cause of an injury.

Here any prior misunderstandings that Hartman had were broken by a new independent cause— Assurity’s misrepresentations which obviously added to the confusion. It is further clear that Assurity’s misrepresentations were the only cause which in a direct sequence produced Hartman’s injury and without which such injury would not have occurred— But for Assurity’s misrepresentations there would have been no payment of benefits in an amount less than had been represented and without the misrepresentations there would no payment of benefits in an amount less than had been represented.

Furthermore, even if other causes of Hartman’s injury exist, Assurity can only escape liability if the sole proximate cause of Hartman’s injury is attributable to other entities. Indeed WPI 15.01 states that “There may be more than one proximate cause of an injury.” Use of WPI 15.01 without this language is error where there is evidence of more than one

proximate cause. *Jonson v. Milwaukee Railroad Co.*, 24 Wn.App 377, 601 P.2d 951 (1976). In addition, the failure to give WPI 15.04, which discusses concurring proximate causes, may be error, even where WPI 15.01 with this language is given. *Brashear v. Puget Sound Power and Light Co., Inc.*, 100 Wn.2d 204, 667 P.2d 78 (1983).

Here there may be more than one proximate cause of Hartman's injury. He certainly did not know what his actual monthly benefit was when he wrote to terminate his policy. This lack of knowledge was probably attributable to his lack of ability to understand his insurance policy as written.<sup>2</sup>

All of the proximate cause of Hartman's injury was not attributable to entities other than Assurity. Assurity's misrepresentations clearly induced Hartman's reliance and subsequently caused his injury when he was paid benefits in an amount less than had been represented— But for Assurity's misrepresentations there could have been no reliance on the same and no harm resulting from the reliance.

Moreover, Hartman's reliance on Assurity's misrepresentations

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Hartman's lack of knowledge about his insurance policy is typical. The record indicates that even after receiving a conservation letter, customers would on occasion call Vickie Goodman and ask questions about how much coverage they had, the elimination period or the benefit period. CP 97, ll. 1-15.

establishes the *Indoor Billboard/Washington* standard. The *Indoor Billboard/Washington* court relied on *Schmidt v. Cornerstone Invs. Inc.*, 115 Wn.2d 148, 167, 68, 795 P.2d 1143 (1990), and stated that in affirmative misrepresentation cases, a showing of reliance is compatible with WPI 15.01. *Indoor Billboard* at 162 Wn.2d at 83.

Here the facts show actual reliance by Hartman on Assurity's misrepresentations and like the facts in *Schmidt*, Hartman testified that had he not been shown the inflated conservation letter, he would not have changed his mind and paid his premium. CP 111-112.<sup>3</sup>

Assurity's final argument rests on *Michak v. Transnation Title Insurance Company*, 148 Wn.2d 788, 64 P.2d 22 (2003). Respondent's Brief p. 16-17. *Michak* is distinguishable because it only involved a contract enforcement action, not a CPA claim. The rule set forth in *Michak* clearly applies to contract enforcement, not extra contractual disputes. But the question is this case is entirely extra contractual—whether Assurity's misrepresentations violated the CPA. Indeed, the insurance statutes and regulations claimed by Hartman to have been

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At the trial court Assurity argued that Assurity's act of sending the conservation letter prevented Hartman from becoming uninsured and this fact cut in its favor. RP 11-12. However, this fact actually establishes Hartman's reliance.

violated demonstrates that there is a strong public policy within this state against *extra contractual* misrepresentations, regardless of whether the underlying contract is read. Moreover, the rule in *Michak* does not apply where, as here, there is deceit. *Michak* at 148 Wn.2d 799. *Michak* does not excuse Assurity's misrepresentations.

2. This Court Should Order the Trial Court to Grant Hartman's Motion for Summary Judgment and Provide Guidance As to How to Calculate Hartman's Actual Damages.

Should this court find that Assurity's motion for summary judgment should not have been granted, Hartman requests this Court to order the trial court to grant his cross motion for summary judgment because there are no disputed issues of fact and the only question is one of law upon which the parties take opposing views. *Weden v. San Juan County*, 135 Wn.2d 678, 710, 958 P.2d 273 (1988). *Est. Of Spahi v. Hughes-Nw., Inc.*, 107 Wn.App 763, 776-77, 27 P.3d 84 (2001)(*upon reversal of summary judgment, a grant of summary judgment to the other party can be an appropriate remedy where the two motions take diametrically opposite positions on the dispositive legal issue and raise no issues of material fact*).

Here the facts are undisputed and Assurity raises no issues of material fact to defeat Hartman's motion for summary judgment. The only

question is the application of the law to the facts. Hartman requests that the trial court be instructed to enter summary judgment in his favor.

Hartman also requests that the trial court be guided as how to calculate Hartman's actual damages. Hartman briefed this issue in his Appellant Brief. Appellant's Brief p. 26-27. Assurity did not respond.

Finally, Hartman requests that he be awarded attorney fees if it is found that he established all of the *Hangman Ridge* factors. Hartman briefed this issue. Appellant's Brief p. 27-28. Assurity did not respond.

### III. CONCLUSION

The trial court erred in granting summary judgment to Assurity on Hartman's CPA claim. The trial court should have granted Hartman's cross motion for summary judgment because Assurity raised no issues of material fact. Hartman requests that this Court order the trial court to grant his motion for summary judgment because the facts are not in dispute and the sole issues in this case are matters of law.

Assurity violated each prong of the *Hangman Ridge* test by misrepresenting Hartman's monthly benefit amount after he requested that Assurity cancel his policy. These misrepresentations induced Hartman to change his mind and retain the policy. He subsequently sustained injury when he later became disabled and was paid monthly benefits in an

amount less than had been represented.

DATED this 3<sup>rd</sup> day of December, 2009

Respectfully submitted,

TODD R. RENDA, ATTORNEY AT LAW

A handwritten signature in black ink, appearing to read 'T. Renda', is written over a horizontal line.

Todd R. Renda, WSBA# 20779  
Attorney for Appellant, Hartman

