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NO. 52364-7-II
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

ALIONA KOSOVAN,

Plaintiff/Appellant,

v.

OMNI INSURANCE COMPANY and PRAXIS CONSULTING, INC

Defendants/Respondents,

APPEAL FROM THE SUPERIOR COURT OF CLARK COUNTY
CAUSE No. 18-2-00084-3

REPLY BRIEF

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INTRODUCTION

This Reply Brief will address the arguments made by both Omni Insurance Company (Omni) and Praxis Consulting, Inc., (Praxis) in the briefs that each has submitted. The brief will attempt to avoid reiteration of the discussion in Amended Brief of Appellant (Kosovan Brief) although that will be unavoidable to some extent. Rather, references to portions of the Kosovan Brief will be made.

This brief will require discussion of factual matters not specifically addressed in the Statement of the Case section of the Kosovan Brief. Those matters will be presented along with related argument.

ARGUMENT

I. The Sending of the October 2017 Letter to USAA Violated the Consumer Protection Act Because Omni Was Owed Nothing at That Time.

Both Praxis and Omni claim that the sending of the October 2017 letter to the tortfeasor's insurer was neither unfair or deceptive because it only served to alert the insurer of Omni's reimbursement interest. This argument must be rejected because the letter directed the insurer to send money to which Omni had no claim or right.

The discussion begins with the letter itself. As pertinent, it reads as follows:

Our investigation of the accident . . . indicates that liability rests with your insured. . . On behalf of our client we now turn to you for reimbursement under the provision of the Personal Injury Protection Law for benefits and expenses incurred by them to date in the amount of **\$10,000.00** . . .

Please make your check payable to **Praxis Consulting, Inc.** . . and forward to the address above. Please include our claim number on your check. . .

(CP 189) It goes much further than merely alerting the tortfeasor's insurer of an interest. It demands payment of \$10,000.00. Omni was not entitled to this money.

In *Mahler v. Szucs*, 135 Wn.2d 398, 424-25, 957 P.2d 632 (1998), the Court clearly indicated that an insurer that pays Personal Injury Protection (PIP) benefits has no reimbursement claim until its insured has resolved his or her claim with the tortfeasor's insurance. As it stated:

As noted above, State Farm contracted for a right to reimbursement from its insureds' settlement proceeds and a traditional right of subrogation only if its insured did not seek recovery from a tortfeasor. As Fisher and Mahler sought such recovery, State Farm had only a right of reimbursement from its insureds from the proceeds of the settlements. More important, State Farm had to await the outcome of the settlement process before attempting any recovery from the tortfeasors' insurers, because, pursuant to *Thiringer*, State Farm was not entitled to any recovery of its PIP payments until its insureds had been made whole. Until the settlement agreements became effective, however, there was no way to know if Mahler and Fisher had been made whole. Thus, State Farm could do nothing until the settlements were executed.

Once the settlements were executed, however, there was nothing left for State Farm to recover, either from the tortfeasors or the tortfeasors' insurance companies. Surely the tortfeasors cannot be made to pay Mahler and Fisher once, and then pay State Farm again. Nor can we discern any rule of law or of commercial common sense that would permit State Farm to recover from the tortfeasors' insurers after those insurers had already paid their insureds to settle with Mahler and Fisher.

In summary, State Farm had no rights against the tortfeasors' insurers, and even if it did, nothing was "recoverable." That being the case, the exception stated in Paragraph d does not apply. We hold State Farm must pay Mahler and Fisher according to the (relevant policy provision) if it wishes to obtain recovery for its PIP payments.

(Emphasis added) No distinction can be made on the basis of policy language. The relevant provisions of Omni's policy are set out in the Kosovan Brief, pps. 9-10. They are identical in thrust—and in language to some extent—to those of the State Farm policy at issue in *Mahler v. Szucs*, *supra*, 135 Wn.2d at 418-19.

There is no doubt that Praxis sought reimbursement in its letter. It specifically directs the tortfeasor's insurer to send money "for reimbursement." Based on this language as well, Praxis and Omni cannot claim that anything other than reimbursement was sought.

It is clear from the text of the Praxis letter of October 19, 2019, and the language of the opinion in *Mahler v. Szucs*, *supra*, set out above that the letter of October 19, 2017, amounted to an effort to obtain funds to

which Omni had no claim. Since Omni had no claim, the letter should not have been sent.

Furthermore, and more importantly, Omni should never have referred the matter to Praxis for the same reason—it had no claim unless and until Ms. Kosovan made a recovery that rendered paid her all the damages to which she was entitled. It impermissibly put its own financial interests ahead of Ms. Kosovan’s by doing so. *Tank v. State Farm Mutual Automobile Insurance Company*, 105 Wn.2d 381, 385-86, 715 P.2d 1133 (1986); *Mutual of Enumclaw v. T & G Construction, Inc.*, 165 Wn.2d 255, 269, 199 P.3d 376 (2008) There was no reasonable justification for this action, and Omni has not indicated what any reasonable justification might be. An insurer cannot take an action without reasonable justification. If it does take such action, it violates the duty of good faith owed to its insured. Any such violation of that duty of good faith is a violation of the Consumer Protection Act. *Tank v. State Farm Mutual Automobile Insurance Company, supra*, 105 Wn.2d at 394; 105 Wn.2d 381, 394, 715 P.2d 1133 (1986); *Coventry Associates v. American States Insurance Co.*, 136 Wn.2d 269, 279-80, 961 P.2d 933 (1998); *Barry v. USAA*, 98 Wn.App. 199, 206, 989 P.2d 1172 (1999)

Praxis and Omni both claim that they may freely contact a tortfeasor’s insurer to “recover subrogation interests,” citing to *Stephens v.*

Omni Insurance Co., 138 Wn.App. 151, 158, 159 P.3d 10 (2007), affirmed sub nom. *Panag v. Farmers Insurance Company of Washington*, 166 Wn.2d 27, 204 P.3d 885 (2009). That statement has no applicability here because Omni and Praxis were not attempting to recover a subrogation interest. Rather, they were attempting to recover a contractual reimbursement interest. As the Court pointed out in *Mahler v. Szucs*, *supra*, a PIP carrier has no subrogation interest when its insured makes a claim against the tortfeasor. It has only a reimbursement interest based on the language of its policy. See 135 Wn.2d at 418-25 The statement upon which Praxis and Omni rely must be viewed in the context of the case. In *Stephens v. Omni Insurance Company*, *supra*, the Omni insured who apparently had been injured by Mr. Stephens and the Farmers insured who had been injured by Ms. Panag were making no claim against either tortfeasor or against their insurers. By contrast, Ms. Kosovan was making a claim against the tortfeasor and his insurer, USAA.

Statements in Omni's brief confirm that it acted without reasonable justification because what it describes as "normal practice" was not followed here. It states that if it as the first party insurer sends a notice to the tortfeasor's insurer and then learns that its insured is pursuing a claim

either from its insured's attorney or tortfeasor's insurer, it "stands down."¹ Omni's Brief, pps. 11-12 That practice was not followed in this case. Neither Omni nor Praxis "stood down" until Ms. Kosovan had commenced suit and after her deposition testimony clearly showed that her damages well exceeded the tortfeasor's policy limits.

The arguments that Praxis and Omni make, therefore, confirm—and do not refute—the existence of a Consumer Protection Act violation.

II. Praxis Violated RCW 19.16.110.

a. Introduction.

Praxis violated the Consumer Protection Act by engaging in collection activity when it was not licensed to do so in violation of RCW 19.16.110. Kosovan Brief, pps. 14-18 Praxis denies that it is subject to RCW 19.16 because it is not a collection agency. Its argument ignores both the facts and the law.

¹ Omni also says that if it receives payment from the tortfeasor's insurer, it refunds the money to the insured's attorney or works with the insured's attorney to deal with full compensation or reduction pursuant to *Mahler v. Szucs, supra*. The undersigned are experienced in this area but are unaware of this as a normal practice. Insurers typically do not refund anything they may have received from the tortfeasor's insurer without litigation.

b. Praxis Meets the Definition of Collection Agency.

First of all, Praxis claims that the definition of collection agency does not apply to its activities. The term “collection agency” is defined in RCW 19.16.100(4)(a) as follows:

“Collection Agency” means and includes:

- (a) Any person directly or indirectly engaged in soliciting claims for collection, or collecting or attempting to collect claims owed or due or asserted to be owed or due another person.

Praxis is a “person” for the purposes of RCW 19.16 because it is a corporation. (CP 182, 184) The term “person” is defined as follows in RCW 19.16.100(11):

“Person” includes individual, firm, partnership, trust, joint venture association, or corporation.

But Praxis argues that it is not a collection agency because it does not attempt to collect “claims.” A “claim” is defined to mean the following in RCW 19.16.100(2):

“Claim” means any obligation for the payment of money or thing of value arising out of any agreement or contract, express or implied.

Praxis contends that it is attempting to collect subrogation claims which are tort claims not based on any contract. It relies on language in *Panag v. Farmers Insurance Company of Washington*, 166 Wn.2d 27, 52-53, 204

P.3d 885 (2009), to the effect that subrogation claims are not “claims” for the purposes of RCW 19.16 because they are based in tort rather than in contract. Praxis is incorrect because it was attempting to collect a reimbursement claim which is contractual in nature.

Praxis was attempting to collect a claim for reimbursement because Ms. Kosovan was pursuing a claim for damages against Mr. Roland, the USAA insured. Kosovan Brief, pps. 8-10 Omni’s right to reimbursement was governed by its policy. In *Mahler v. Szucs, supra*, 135 Wn.2d at 421, and dealing with rights under a State Farm policy quite similar to Omni’s, the Court stated that a PIP insurer’s reimbursement interest is a contractual obligation owed by the insured. It said:

. . . Thus, State Farm has reserved a traditional subrogation right to sue in the shoes of the insured only when it makes PIP payments to the insured and the insured does not pursue a tortfeasor. Similarly, Paragraph c quoted above succinctly creates a subrogation right: "Under all other coverages the right of recovery of any party we pay passes to us." This assignment of rights is a proper, classical subrogation clause.

Thus, by its terms Paragraph b creates a contractual right of reimbursement, not a right to subrogation, when an insured pursues an action or seeks recovery from a tortfeasor. . .

Since Omni’s claim for reimbursement is contractual, it is a “claim” for the purposes of RCW 19.16.100(2). Therefore, Praxis is a collection agency because it is both soliciting claims for collection—soliciting Omni

and other insurers—and is attempting to collect a contractual claim for reimbursement as set out in Omni’s policy.

Praxis’ reliance on *Panag v. Farmers Insurance Company of Washington, supra*, is misplaced. In that case, the insurers and the collection agency involved were collecting tort claims. They were pursuing individuals who were involved in collisions with their insureds. Ms. Panag was uninsured, and Farmers Insurance had paid underinsured motorists benefits to its insured. Mr. Stephens was insured but had not reported the incident to his insurer. Omni Insurance paid its insured property damage and other bodily injury benefits. The Court referred to these claims as adjudicated tort claims. 166 Wn.2d at 47, 54-55, 65. The case did not deal in any way with collection of reimbursement after an insured made a recovery against the tortfeasor. It therefore does not support Praxis’ argument.

c. Praxis Is Not Exempt.

Praxis also contends that it is exempt because it only serves the needs of insurance companies.² Praxis’ Brief, p. 35. This argument is

² Interestingly, Credit Control Services, Inc., the collection agency at issue in *Panag v. Farmers Insurance Company of Washington, supra*, is a foreign corporation and has been licensed in Washington as a collection agency since 2003. This information is available from the website of the Department of Revenue. The Court may, if it chooses, take judicial notice of this fact since it is capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. ER 201(b)(2); Tegland, *Evidence Law and Practice*, 5 Wash. Prac. § 2.17.

based on a flawed reading of RCW 19.16.100(5)(c). That statute provides as follows:

‘Collection agency’ does not mean and does not include:

Any person whose collection activities are carried on in his, her, or its true name and are confined and directly related to the operation of a business other than that of a collection agency such as but not limited to: Trust companies; savings and loan associations; building and loan associations; abstract companies doing an escrow business; real estate brokers; property management companies collecting assessments, charges, or fines on behalf of condominium unit owners associations, associations of apartment owners, or homeowners’ associations; public officers acting in their official capacities; persons acting under court order; lawyers; insurance companies; credit unions; loan or finance companies; mortgage banks; and banks.

This statute must be interpreted to advance the legislative intent and in accordance with its plain meaning. *Department of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002) The plain meaning and the legislative intent does not allow Praxis the exemption that it seeks.

The exemption in RCW 19.16.100(5)(c) applies to “persons.” As noted above, Praxis is a person for the purposes of RCW 19.16.

The exemption applies only if two requirements are met. These are:

1. The person must carry on “collection activities in his, her, or its own name;” and

2. Those collection activities must be “confined and directly related to the operation of a business other than that of a collection agency.”

If we assume that Praxis meets the first requirement, it does not meet the second.

Praxis claims that it satisfies the second requirement because it only works for insurance companies. The statute cannot be construed to get to that conclusion.

The second requirement focuses on an entity’s collection activities. The term “collection activities” is not defined in RCW 19.16. That allows the Court to consider the dictionary definition and the context to determine what the term should mean. *Department of Ecology v. Campbell & Gwinn, LLC, supra*, 146 Wn.2d at 11; *Cornu-Labatt v. Hospital District No. 2. of Grant County*, 177 Wn.2d 221, 231-32, 298 P.3d 741 (2013) The term “collection” refers to the “act of collecting.” One of the meanings of the verb “collect” is “to claim as due and receive payment for.” Merriam Webster Online Dictionary found at www.merriam-webster.com/dictionary. With these dictionary definitions, the term “collection activities” refers, then, to the things done to claim as due and receive payment for certain claimed obligations. Praxis is clearly involved in collection activities.

Once again, the second requirement set out above requires that collection activities be “confined and directly related to the operation of a business other than that of a collection agency.” This requires an evaluation of the operations of the entity at issue, in this case, Praxis. It should be clear that Praxis’ operations are limited to collecting money owed to others, in particular insurance companies. (CP 174-77) Therefore, it does not operate a business “other than that of a collection agency,” and the exemption does not apply.

Conversely, while the statute acknowledges that insurance companies can be exempt, Praxis is not an insurance company. Insurance is defined in RCW 48.01.040 to mean:

Insurance is a contract whereby one undertakes to indemnify another or pay a specified amount upon determinable contingencies.

And an insurer is:

“Insurer” as used in this code includes every person engaged in the business of making contracts of insurance. .

RCW 48.01.050 Praxis does not enter into insurance contracts, and is not an insurer.

Praxis argues, however, that it meets the second requirement because it collects only for insurance companies and insurance companies are among the types of businesses listed as examples in RCW

19.16.100(5)(c). In other words, it wants to focus on the operations of its customers rather than its own operations for the purposes of the second requirement.

Praxis' view has not been adopted by the Courts that have considered the matter, primarily the United States District Courts for the Eastern and Western Districts of Washington. In what appears to be the first reported case, the Court interpreted the second requirement as follows when considering whether a law firm was a collection agency:

When read as a whole and in light of the interpreting case law, Washington's Collection Agency Act applies to entities such as JBC which seek to collect debts that are unrelated to JBC's (or its affiliated company's) non-debt collector business. If, for example, JBC were seeking to recover fees owed to it by a client for legal services rendered, such activities would not make JBC a "collection agency."

Semper v. JBC Legal Group, 2005 W.L. 2172377, 2005 U.S. Dist. Lexis 33591 (W.D. Wash. 2005), at page 10³ In other words, the focus of the second requirement is the entity's "non-debt collector" operations, if any it has, and not the operations of its customers. The Court took a similar view *Motherway v. Gordon*, 2010 W.L. 2803052, 2010 U.S. Dist. Lexis 71340 (W.D. Wash. 2010) when it held at pps 10-11, that a law firm was exempt from the requirements of RCW 19.16 because, while it specialized in the collection of debts, it was at the end of the day a law firm.

Praxis is attempting to exempt itself from the requirements of RCW 19.16 by contracting with entities listed in RCW 19.16.100(5). This cannot be done as the Court in *Cavnar v. BounceBack, Inc.*, 2015 W.L. 4429095, 2015 U.S. Dist. Lexis 93525 (E.D. Wash. 2015), ruled. The defendant in that case, BounceBack, Inc., contracted with prosecuting attorneys to arrange for the collection of dishonored checks. It claimed to be exempt from RCW 19.16 because it worked only for Prosecuting Attorneys, based on the fact that prosecutors are “public officers acting in their official capacities,” one of the types of entities listed in RCW 19.16.100(5)(c). The Court rejected that argument stating:

The Court finds that BounceBack has not established as a matter of law that it is exempt from the CAA (RCW 19.16). . . .(T)he CAA does not provide a means for a private entity to form a contract with a prosecuting attorney and thereby become exempt from the stringent regulations that apply to collections agencies.

This statement applies to Praxis. It cannot exempt itself from RCW 19.16 by contracting with an insurance company.

Praxis’ reasoning also must be rejected because it would make RCW 19.16 inapplicable to anyone doing business as a collection agency. Under Praxis’ interpretation of RCW 19.16.100(5)(c), any entity performing collection work for any of the types of businesses listed in the

³ At that time, RCW 19.16.100(5)(c) was codified as RCW 19.16.100(3)(c).

statute would be exempt from all requirements of RCW 19.16, including the duty to obtain a license. For example, collection agencies routinely collect credit card debt owed to banks or other financial institutions. Under Praxis' view of RCW 19.16.100(5)(c), entities doing that work would not be subject to RCW 19.16 because the statute lists banks. Furthermore, a firm that did collection work for more than one of the types of entities would also be exempt. It might be argued that collectors who work for health care providers would still be subject to RCW 19.16. That argument cannot carry the day because the statute's list of entities that might qualify for the exemption is explicitly not exclusive—it is preceded by the phrase “such as but not limited to.”

Statutes cannot be read to avoid strained or absurd consequences. *In re Eaton*, 110 Wn.2d 892, 901, 757 P.2d 961 (1988); *Tingey v. Haisch*, 159 Wn.2d 652, 663-64, 152 P.3d 1020 (2007) Praxis' interpretation RCW 19.16.100(5)(c) qualifies as absurd or strained because it would allow the exemption to swallow the whole of RCW 19.16.

Praxis relies on the Last Antecedent Rule to argue that the second requirement in RCW 19.16.100(5)(c) must modify or apply to its collection activities. Praxis' Brief, p. 32 That rule does not help Praxis. The Last Antecedent Rule of statutory construction provides that, unless a

contrary intention appears in the statute, qualifying words and phrases refer to the last antecedent. It is merely another aid to discovery of intent or meaning and is not inflexible or uniformly binding. *Personal Restraint of Smith*, 139 Wn.2d 199, 205-206, 986 P.2d 131 (1999) It is not applied if the result would be at odds with the legislative intent if applying the rule would result in an absurd or nonsensical interpretation. *State v. Bunker*, 169 Wn.2d 571, 578, 238 P.3d 487 (2010)

In this case, the Last Antecedent Rule is not necessary. There is no confusion. The second exemption requirement in RCW 19.16.100(5)(c) does concern and apply to Praxis' collection activities. It requires that those activities be "confined and directly related to the operation of a business other than that of a collection agency." As discussed in depth above, that requirement is not met here because Praxis does not engage in any other business than that of a collector.

This discussion makes clear that Praxis is not exempt under the terms of RCW 19.16.110(5)(c).

III. Omni Violated the Consumer Protection Act.

a. Introduction.

As discussed above and in the Kosovan Brief, pps. 8-13, Omni committed an unfair or deceptive act by failing to act in good faith

toward its insured. Omni has not refuted these points. This section of the brief will be limited to addressing other arguments that Omni has made.

b. Omni Failed to Investigate or Ignored the Facts.

Omni argues that it can't be guilty of failing to investigate or not having procedures in place to require the investigation because there is no evidence of what its procedures are. Omni had two matters to investigate—whether Ms. Kosovan was pursuing a claim against Mr. Rowland, the USAA insured, and whether her damages exceeded his policy limits. The referral to Praxis when Ms. Kosovan was pursuing her own claim is sufficient to show Omni's fault. The fact of the referral shows at least one of the following: 1) Omni intentionally decided to violate its own policy provisions and the rules set out in *Mahler v. Szucs, supra*, by making the referral to Praxis; 2) Omni had no procedures in place to investigate whether Ms. Kosovan was in fact pursuing her claim against Mr. Roland and USAA and whether her damages exceeded his policy limits; 3) Omni did have procedures but they were insufficient to determine the extent of Ms. Kosovan's damages or whether she was making a claim; or 4) Omni had sufficient procedures in place but chose to ignore them. Each of these conclusions shows an act without reasonable justification and an attempt by Omni to put its interests ahead

of Ms. Kosovan's. That means that Omni is liable under the Consumer Protection Act.

Omni also hints that it is not responsible for the acts of Praxis. It successfully argued that it had no vicarious liability for the acts of its collection agency in sending deceptive letters in *Stephens v. Omni Insurance, supra*. But the claim against Omni here is based on its own conduct in referring the matter to Praxis when Ms. Kosovan was pursuing her own claim against the tortfeasor.

c. Omni Cannot Invoke the Invited Error Doctrine.

Omni argues that the doctrine of invited error eliminates Ms. Kosovan's right to appeal the judgment rendered in its favor. The facts show that this contention has no merit.

Praxis moved for summary judgment on the basis, among other things, that sending the October 19, 2017, letter did not amount to an unfair and deceptive practice for the purposes of the Consumer Protection Act. (CP 158-59) Omni joined in Praxis' summary judgment motion on June 26, 2018. It stated that "the issues sought to be resolved by; the instant motion filed by Praxis apply equally to the claim asserted against Omni." It went on to say:

Omni joins in Praxis factual statement and cited authority for the proposition that plaintiff Kosovan legal and

factually cannot set forth the prima facie elements of a Consumer Protection Act Claim. As this is the only legal allegation against defendant Omni, Omni respect for requested that the court grant the instant motion for summary judgment and dismiss the entire complaint against Praxis and Omni with prejudice and without recovery.

(CP 231-32)

The summary judgment motion was heard on July 13, 2018. (RP 1) Omni's counsel attended the summary judgment hearing and presented argument to the effect that there was nothing unfair or deceptive about the October, 2017, letter. (RP 30-31) The trial court first dismissed any claim based on Praxis' violation of RCW 19.16 for being an unlicensed collector. (RP 19) It then went on to grant summary judgment on the basis that the October, 2017, letter sent to USAA did not amount to an unfair or deceptive act. The trial court also wondered what the results of an appeal might be since the issues presented were interesting. (RP 46-47) Based on the nature of the ruling and on Omni's joinder, this was fairly interpreted as a dismissal of both defendants.

An initial hand written order was entered on the same day as the hearing. (CP 349) The parties agreed to set that order aside and to the form of the Order on Defendant Praxis' Motion for Summary Judgment. (CP 353-54) This order was prepared by Praxis and omitted language dismissing Omni. It was subsequently entered. (CP 350-52) When the

Court of Appeals pointed out this omission, Ms. Kosovan indicated that she would obtain another order that included language dismissing Omni. Omni made no reply or suggestion that it had not been dismissed. It ultimately stipulated to the entry of the Third Order Granting Defendant Praxis' Motion for Summary Judgment. (CP 355-61)

Ms. Kosovan's preparing and submitting the Third Order Granting Defendant Praxis' Motion for Summary Judgment does not allow Omni to invoke the invited error doctrine. It is not invited error for an unsuccessful litigant to present findings in accord with a previously announced decision of the court. *Hughes v. Boundary Gold Placers*, 193 Wash. 564, 568, 76 P.2d 611 (1938); *Finnemore v. Alaska S.S. Co.*, 13 Wn.2d 276, 281, 124 P.2d 956 (1942); *State v. Pippin*, 193 Wn.App. 826, 846, 403 P.3d 907 (2017) Ms. Kosovan did nothing more than that. She certainly did not concede the merits of the ruling that the trial court made. That, too, precludes application of the invited error doctrine. *Levigne v. Chase, Haskell, Hayes, & Halamon*, 112 Wn.App. 677, 681-82, 50 P.3d 606 (2002)

Omni appears to believe that the trial court did not mean to dismiss Omni. If it is correct, then Ms. Kosovan was mistaken about the trial court's intentions, and the order she presented did not accurately

reflect its ruling. To settle this issue, Ms. Kosovan will file a motion under CR 60(a) and CR 60(b)(1) to vacate the order that she prepared.⁴

d. Issues Under RAP 2.5(a).

Omni also complains that arguments made against it were not raised in the trial court. Ms. Kosovan's trial court brief was replete with references to the requirements of *Mahler v. Szucs, supra*, and rights under the insurance contract. (CP 218-24) At oral argument, counsel for Ms. Kosovan argued that Omni had placed its financial interests above that of Ms. Kosovan. (RP 33-34; RP 39) He also discussed Omni's failure to use due diligence to investigate. (RP 35)

Omni is relying on RAP 2.5(a). That rule states in pertinent part that "(T)he appellate court may refuse to review any claim of error which was not raised in the trial court." The rule allows the Court to entertain issues raised for the first time on appeal in the interest of justice. *State v. McFarland*, 189 Wn.2d 47, 57 fn. 4, 399 P.3d 1106 (2017) This case involves important issues relating to the practices of insurers in dealing with policy provisions concerning reimbursement rights.

⁴ RAP 7.2(e) allows such a motion to be heard but requires prior permission from the Court of Appeals before an order granting the motion can be entered.

IV. Ms. Kosovan Sustained an Injury Caused by Acts of Praxis and Omni.

Both Omni and Praxis contend that there is insufficient evidence of any injury suffered by Ms. Kosovan and caused by their actions. Neither, however, has refuted Ms. Kosovan's discussion in the Kosovan Brief, pps. 23-25, on the issue of the sufficiency of the injury that she sustained.

Praxis argues that there is insufficient evidence of causation. That is simply not correct. The facts are undisputed that USAA offered to pay its insured's policy limits by letter dated November 8, 2017, but required a waiver from Praxis or Omni that the "subrogation" was waived. (CP 195-203) The treatment provider waived its lien claim. (CP 206-207) As counsel for Ms. Kosovan stated in his declaration, USAA did not consummate the settlement until it had received a letter from counsel for Praxis indicating that it was not pursuing anything that Omni had paid. (CP 170) These are all facts and are admissible as such.

In the context of a summary judgment motion, a fact is an event, an occurrence, or something that exists in reality. It is what took place, an act, an incident, a reality as distinguished from supposition or opinion. *Grimwood v. University of Puget Sound*, 110 Wn.2d 355, 359, 753 P.2d 517 (1988) Furthermore, they lead to only one conclusion—had

Praxis not interfered in Ms. Kosovan's settling her claim, the settlement would have been consummated in November of 2017, and opposed to in April of 2018 after Ms. Kosovan submitted to a deposition.

V. The Public Interest Requirement Is Satisfied as to Omni.

Omni has argued that the public interest requirement for a Consumer Protection Act violation was not satisfied as to it. That argument has no merit. This issue was addressed in the Kosovan Brief, p. 22.

It must be remembered that Omni's action violated RCW 48.01.030. It has long been the law in Washington that a violation of the statute satisfies the public interest requirement. *Salois v. Mutual of Omaha*, 90 Wn.2d 355, 381 P.2d 1349 (1978); *Hangman Ridge Training Stables v. Safeco Title Insurance Co.* 105 Wn.2d 778, 791, 719 P.2d 531 (1986); *Safeco Insurance v. JMG Restaurants, Inc.*, 37 Wn.App. 1, 11, 680 P.2d 409 (1984)

VI. Ms. Kosovan Is Entitled to an Award of Attorney's Fees.

Praxis has argued that Ms. Kosovan should not receive attorney's fees on appeal because "there is no disposition of (this) appeal available to this Court that would afford (Ms.) Kosovan relief under the (Consumer Protection Act.)" Praxis' Brief, pps. 39-40 Praxis is incorrect. The facts

of this case are clear. Both defendants are liable under the Consumer Protection Act. Under those circumstances, Ms. Kosovan as the non-moving party is entitled to summary judgment to that effect. Kosovan Brief, p. 6 All that should be left to decide is the amount of Ms. Kosovan's damages. Ms. Kosovan requested that the matter be remanded for such a determination. Kosovan Brief, pps. 25-26

CONCLUSION

For reasons stated here and in the Kosovan Brief, the trial court's judgment should be reversed. Ms. Kosovan is entitled to summary judgment against both Praxis and Omni. The matter should be remanded to the Superior Court with directions to determine the amount of Ms. Kosovan's damages and to provide other relief as allowed by RCW 19.86.090.

RESPECTFULLY SUBMITTED this 8 day of April,
2019.



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DECLARATION OF SERVICE

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

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Thomas Hojem

CARON, COLVEN, ROBISON & SHAFTON PS

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