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COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

ALIONA KOSOVAN

Plaintiff/Appellant,

v.

OMNI INSURANCE COMPANY and PRAXIS CONSULTING, INC

Defendants/Respondents

BRIEF OF RESPONDENT PRAXIS CONSULTING, INC

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INTRODUCTION

This appeal arises out of a single letter sent by Defendant/Respondent Praxis Consulting, Inc. (“Praxis”) to the liability carrier for the tortfeasor in an underlying automobile accident. The letter sought recovery from the liability carrier of benefits paid by Defendant/Respondent Omni Insurance Company (“Omni”) to Plaintiff/Appellant Aliona Kosovan under the personal injury protection (“PIP”) coverage of her policy. Kosovan admits she never saw or relied upon the letter and there is no evidence that the tortfeasor did either. It is also undisputed that the tortfeasor’s insurance carrier never paid anything to Praxis or Omni. Kosovan nevertheless filed this lawsuit, claiming that the letter constitutes a violation of the Washington Consumer Protection Act (“CPA”) because it amounted to an attempt by Omni to pursue subrogation “directly from the tortfeasor” and because Praxis is not licensed as a “collection agency.” Rejecting both arguments, the trial court, per the Honorable Daniel L. Stahnke, dismissed the complaint on summary judgment.

Judge Stahnke’s order was correct as a matter of law because Kosovan cannot establish an unfair or deceptive act or practice by either Praxis or Omni. This court held in *Stephens v. Omni Ins. Co.*, 138 Wn. App. 151, 167, 159 P.3d 10 (2007) that a demand letter nearly identical in all material respects to the one at issue here was not deceptive as a matter of law and therefore could not give rise to a CPA violation. The court thus

need look no further than this clear precedent in order to affirm the decision below.

Moreover, no Washington court has ever held that a subrogated insurer is precluded from recovering “directly from the tortfeasor.” Such a holding would contradict decades of settled Washington precedent on subrogation. Similarly, the common law “made-whole” doctrine does not preclude an insurer from merely invoking its right to subrogation, especially where, as here, the insurer recovers nothing in the process. On the contrary, binding Washington authority indicates that an insurer may assert its rights against the tortfeasor so long as it first applies the proceeds of any recovery to the uncompensated damages of its insured. Because the letter at issue in this case fully complied with Washington law, Kosovan cannot establish an unfair or deceptive act.

Further, as to the Collection Agency Act, Kosovan’s argument fails for the simple reason that Praxis is not a “collection agency” as defined by the Act. To qualify as a “collection agency,” a person must collect obligations “arising out of any agreement or contract.” The essence of subrogation is the recovery of an interest arising in tort, not contract. To avoid any doubt about this conclusion, the Act also expressly exempts from its licensing requirements companies whose collection activities are “confined” and “directly related” to the operation of insurance companies. Because the undisputed facts show that Praxis’ operations are limited to recovering subrogation interests for insurance companies, Praxis is

excluded from the Collection Agency Act as a matter of law. The Act therefore provides no basis for the CPA claim against Praxis.

In addition to failing to establish an “unfair or deceptive act,” Judge Stahnke’s order was also correct because Kosovan failed to establish the CPA’s public interest, injury, and causation requirements. As to the public interest, it is well-established that a single communication between two sophisticated parties, which no consumer ever sees or relies upon, does not satisfy the requisite public interest impact for a CPA claim. As to injury and causation, Kosovan relied entirely upon a hearsay declaration from her attorney and postage costs incurred in sending a notice pursuant to the Insurance Fair Conduct Act (“IFCA”), which Praxis never even received. Because the Court may not consider the hearsay declaration and postage incurred in sending notice of an unfiled IFCA claim is not a cognizable injury under the CPA, Kosovan’s claim fails for this reason as well.

For these reasons, and as set forth more fully below, this Court should affirm the trial court’s dismissal of Kosovan’s complaint.

ASSIGNMENTS OF ERROR

Praxis assigns no error to the rulings of the trial court.

STATEMENT OF THE ISSUES

I. Under the Washington Consumer Protection Act, does an insurer commit a deceptive act merely by sending a demand letter to the tortfeasor’s insurer when the letter does no more than assert liability and demand payment of a specific sum?

II. Whether the made-whole doctrine as set forth in *Thiringer v. American Motors Insurance Co.*, 91 Wn.2d 215, 219, 588 P.2d 191 (1978) and its progeny prohibits an insurer from merely invoking its right to subrogation against a third-party tortfeasor, even if the insurer recovers nothing in the process.

III. Whether Washington's Collection Agency Act regulates the recovery of subrogation interests on behalf of insurance companies.

IV. Whether Praxis qualifies as a "collection agency" when its collection activities are "confined" and "directly related" to the operation of insurance companies.

V. Whether a single demand letter between two insurance companies, which no consumer ever saw or relied upon, "impacts the public interest" under the Consumer Protection Act.

VI. Whether alleged delay in payment or postage for sending an IFCA notice to a third party satisfies the Consumer Protection Act's injury requirement when there is no evidence that the delay was caused by an unfair or deceptive act and the plaintiff has not filed an IFCA claim.

STATEMENT OF THE CASE

A. Factual Background

On December 6, 2015, Plaintiff/Appellant Aliona Kosovan was traveling on Interstate 5 near Portland, Oregon when her vehicle was rear-ended by a vehicle driven by Joseph Roland. (CP 5, 86, 140). Kosovan had a policy of insurance with Defendant/Respondent Omni Insurance

Company (“Omni”). (CP 5). Roland was insured by USAA Insurance (“USAA”). (CP 6). Kosovan’s Policy provided \$10,000 in personal injury protection (“PIP”) coverage. The Policy also contains the following subrogation and reimbursement clause:

OUR RIGHT TO RECOVER PAYMENT

- A. If we make a payment under this policy and the person to or for whom payment was made has a right to recover damages from another we shall be subrogated to that right. That person shall do:
 - 1. Whatever is necessary to enable us to exercise our rights; and
 - 2. Nothing after loss to prejudice them.
- ...
- B. If we make a payment under this policy and the person to or for whom payment is made recovers damages from another, that person shall:
 - 1. Hold in trust for us the proceeds of the recovery; and
 - 2. Reimburse us to the extent of our payment. ...

(CP 56).

Following the accident, Kosovan underwent chiropractic treatment and massage therapy at NW Injury and Rehab. (CP 87-89). On September 25, 2017, Omni received a bill from NW Injury and Rehab in the amount of \$12,370.98. (CP 139). Omni paid Kosovan her \$10,000.00 PIP coverage limit on October 11, 2017. (CP 6). Omni then contacted Defendant/Respondent Praxis Consulting, Inc. (“Praxis”) to seek recovery of its payment. (CP 134).

Praxis is a subrogation recovery firm that works exclusively with insurance companies to obtain reimbursement from responsible third parties of benefits paid to insureds. (CP 134, 252-253). As set forth in its Service Agreement, Praxis’ recovery services consist of “subrogation, arbitration,

litigation, apportionment, or enforcing ... no fault loss transfer[s].” (CP 181). Praxis does not engage in the collection of liquidated debts, and the subrogation recovery services it provides are limited to insurance companies. (CP 313).

After receiving the assignment to recover Omni’s \$10,000.00 PIP payment, Praxis called USAA. (CP 293). USAA confirmed that it insured Roland and was accepting liability for the accident. (CP 293). While USAA did not state Roland’s policy limits, Praxis knew that both Washington and Oregon law require mandatory minimum bodily injury liability coverage in the amount of \$25,000. (CP 294); RCW 46.29.090; Or. Rev. Stat. § 806.070(2)).

On October 19, 2017, Praxis sent the letter that is the focus of the present appeal. (CP 138). The letter is addressed to USAA and reads, in relevant part, as follows:

Good Morning,

Our investigation of the accident referenced below indicates that liability rests with your insured. Your files should now reflect that we are handling this file. On behalf of our client we now turn to you for reimbursement under the provisions of the Personal Injury Protection Law for benefits and expenses incurred by them to date in the amount of \$10,000.00

Place of Accident	Portland, OR
Date of Accident	12/06/2015
Our Insured	Kosovan, Alla
Our Claim Number	2015-96242
Your Insured	Joseph Roland
Your Claim Number	4359531-20

Claimant Name	Claim Type	Payment Amount
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Alena Kosovan PIP \$10,000.00

Please make your check payable to Praxis Consulting, Inc. A/S/O OIC and forward to the address above. Please include our claim number on your check.

...
Very truly yours,
Debra Ryan
Praxis Consulting, Inc.

(CP 138). It is undisputed that Ms. Kosovan never saw this letter. (CP 102).

USAA faxed a copy to Kosovan's attorney on October 27, 2017. (CP 169, 189-94). On November 2, 2017, a legal assistant for Kosovan's attorney e-mailed Praxis to request additional information about the medical expenses paid. (CP 147). Counsel's assistant exchanged numerous e-mails with Praxis in November, but did not complain about the letter or its contents at that time. (CP 143-147). Nor did Kosovan's counsel inform Praxis that her damages exceeded USAA's policy limits. (CP 143-147; 294).

Praxis did not learn that Kosovan sought damages in excess of policy limits until January 23, 2018, after Praxis was served with a copy of the complaint filed in this action. (CP 5, 135, 143). On that date, Praxis wrote to Kosovan's attorney inquiring why the attorney had not informed her of this in November before filing suit. (CP 143). "Once we received proof that USAA exhausted their 25k policy," Praxis explained, "we would have closed our file." (CP 143). Kosovan's attorney responded that under Washington law,

PIP carriers are never allowed to attempt to collect subrogation directly from a tortfeasor ...

Adjusters often aren't familiar with Washington law and I spend a lot of time explaining how it all works. Some of the time, the people I am talking to don't believe me. So I have found that it's best for me not to assume the role of training insurance adjusters on Washington subrogation law, but instead to file a lawsuit, get a lawyer involved, who can then quickly resolve the issue.

(CP 142-143). Praxis followed up on January 23 and 24, 2018, asking the attorney if he would dismiss the lawsuit if Praxis disclaimed any attempted recovery. (CP 141-42). Kosovan's attorney responded, "You can continue to attempt to contact me, but I will not be responding until a lawyer gets involved." (CP 141).

USAA formally informed Praxis on February 19, 2018 that it would not be reimbursing Omni for the \$10,000.00 payment because Kosovan's claimed damages exceeded its policy limits. (CP 135). This was the first time USAA informed Praxis of this fact. (CP 135). Based on that representation, Praxis advised USAA that it would not be seeking recovery of Omni's PIP payment and that USAA could settle its claim with Kosovan. (CP 135). Praxis ceased all recovery efforts. (CP 135). USAA never paid Praxis or Omni anything relating to Kosovan's claim. (CP 135).

///

B. Proceedings Below

Kosovan's Complaint, filed on January 10, 2018 in Clark County Superior Court, alleges one cause of action, violation of the Washington Consumer Protection Act ("CPA"), RCW 19.86.010, *et seq.* (CP 7). The

complaint asserts that Omni violated Washington’s “made-whole” doctrine by seeking recovery directly from the tortfeasor. (CP 6-7). The Complaint further alleges that Praxis violated Washington law by operating as an unlicensed debt collection agency. (CP 6-7). Both claims are predicated entirely upon the October 19, 2017 letter from Praxis to USAA. (CP 6-7). In her deposition, however, Kosovan admitted she had never seen the letter. (CP 101). She did not know who Praxis was, why she was suing them, and could not identify any injury she suffered as a result of Praxis’ alleged conduct. (CP 104, 107-108).

Praxis moved for summary judgment and Omni joined that motion. (CP 148-167; 231). After hearing oral argument on July 13, 2018, the trial court, Honorable Daniel L. Stahnke, granted the motions. (CP 342-344). The court ruled that Praxis did not qualify as a collection agency under Washington’s Collection Agency Act (“CAA” or the “Act”), RCW 19.16.100, *et seq.* (Tr. at 19:17-20). The Court further held that the October 19, 2017 letter was not deceptive as a matter of law. (Tr. at 46:11-18). In reaching this conclusion, Judge Stahnke emphasized the fact that “all we have” here is a letter from Praxis “to USAA.” (Tr. at 40:21-23). Judge Stahnke observed that “the fact that it was sent to USAA Insurance who deals with these on a daily basis” rendered the letter not deceptive as a matter of law. (Tr. at 46:15-18).

Kosovan appeals the court’s order granting summary judgment to Praxis and Omni. (CP 337-341).

STANDARD OF REVIEW

This Court reviews an order granting summary judgment *de novo*, applying the same CR 56 criteria as the trial court. *Mohr v. Grantham*, 172 Wn.2d 844, 859, 262 P.3d 490 (2011). “An appellate court can affirm a trial court judgment on any basis within the pleadings and proof.” *Gosney v. Fireman’s Fund Ins. Co.*, 3 Wn. App. 2d 828, 877, 419 P.3d 447 (2018). Summary judgment “shall be rendered forthwith if ... there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law.” CR 56(c).

ARGUMENT

To establish a violation of the CPA, the plaintiff bears the burden of proving the following five elements:

- (1) an unfair or deceptive act or practice;
- (2) which occurs in trade or commerce;
- (3) that impacts the public interest;
- (4) which causes injury to the plaintiff in his or her business or property; and
- (5) which injury is causally linked to the unfair or deceptive act.

Washington Phys. Ins. Exch. v. Fisons Corp., 122 Wn.2d 299, 312, 858 P.2d 1054 (1993) (citing *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wash. 2d 778, 780, 719 P.2d 531 (1986)). Because Kosovan failed to establish the first, third, fourth, or fifth elements of her claim, the trial court properly dismissed her complaint.

I. PRAXIS DID NOT COMMIT AN UNFAIR OR DECEPTIVE ACT

The CPA proscribes only those acts or practices considered “unfair or deceptive.” RCW 19.86.020. To establish an “unfair or deceptive” act, the plaintiff bears the burden to prove either: (1) a *per se* violation of a statute, (2) an act or practice that has a “capacity to deceive,” or (3) an “unfair or deceptive act or practice not regulated by statute but in violation of public interest.” *Klem v. Wash. Mut. Bank*, 176 Wn.2d 771, 787, 295 P.3d 1179 (2013). Whether a particular act or practice is unfair or deceptive presents a question of law for the court to decide. *Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 47, 204 P.3d 885 (2009).

A. The October 19, 2017 Letter is Not Deceptive As a Matter of Law

The October 19, 2017 letter is not deceptive because it represents nothing more than an accurate and truthful demand letter from one insurance company to another. The CPA does not define the term “deceptive.” However, as numerous courts have held, “implicit” in this term “is the understanding that the actor *misrepresented* something of material importance.” *Hiner, v. Bridgestone/Firestone, Inc.*, 91 Wn. App. 722, 730, 959 P.2d 1158 (1998) (emphasis in original); *Brummett v. Washington's Lottery*, 171 Wn. App. 664, 677-78, 288 P.3d 48 (2012). While a plaintiff need not show intent or actual deception, “he or she must show that [the communication] had the capacity to deceive a substantial portion of the public.” *Hiner*, 91 Wn. App. at 730.

A communication does not have the “capacity to deceive” unless it is false or misleading in some material respect. *See, e.g., Pelzel v.*

Nationstar Mortg., LLC, No. 43294-3-II, 2015 Wash. App. LEXIS 638, *19 (Mar. 24, 2015) (unpublished decision) (holding that plaintiff failed to establish CPA violation where “the defendants did not misrepresent” anything). Thus, although a subrogation demand letter may be deceptive if it actually mischaracterizes the interest being pursued, there is nothing deceptive about a letter that merely demands payment from an alleged tortfeasor. *Stephens v. Omni Ins. Co.*, 138 Wn. App. 151, 167, 159 P.3d 10 (2007), *aff’d sub nom. Panag*, 166 Wn.2d 27 (2009).

This court directly addressed this question in *Stephens*. In that case, an insurer paid a \$400 claim arising out of a car accident caused by Michael Stephens and then sent Stephens a letter requesting reimbursement. *Stephens*, 138 Wn. App. at 159. The letter stated:

Our investigation into our insured's loss has determined that your auto was at fault for this accident, and under the terms of our policy we are making a claim against you for reimbursement of the amount we paid.

...

Since our investigation reveals that you are uninsured for this loss, we seek full reimbursement directly from you for all payments we have made in this matter.

Stephens, 138 Wn. App. at 159-60. Stephens paid the \$400. *Id.* at 160. Following that payment, however, the insured incurred thousands of additional dollars in medical expenses for which the insurer hired an outside agency. *Id.* Unlike the letter previously sent by the insurer, the agency sent multiple aggressively-worded “formal collection notices” describing the total as an “amount due” “already incurred” and threatening “license suspension” or other “legal action” if Stephens did not “act immediately.”

Id. at 161. Stephens filed suit under the CPA, challenging both the letters sent by the outside agency as well as the initial letter sent by the insurer. *Id.* at 162.

The court held that while the letters sent by the agency had the capacity to deceive, the letter sent by the insurer did not. *Id.* at 167, 182. “[W]e do not hold that it is deceptive for a tort claimant or the claimant’s agent to correspond with an alleged tortfeasor and demand payment of a specific sum.” *Id.* at 167. Because that is all the insurer’s letter did, the Court found no fault with it. *Id.* at 182. In distinguishing the letter sent by the outside agency, however, the court observed that by describing the request as “formal collection notice” of an “amount due,” the agency mischaracterized what was in fact merely an “unliquidated tort claim” as a “debt that must be paid.” *Id.* at 167. “[C]haracterizing an unliquidated claim as an ‘amount due,’” the Court held, “has the capacity to deceive.” *Id.* at 168.

However, the Court declined to impose liability upon the insurer for the agency’s letter, emphasizing that “the practice of referring a subrogation interest to a debt collector does not by itself have the capacity to deceive a substantial portion of the public.” *Id.* at 182. The Supreme Court affirmed. *Panag*, 166 Wn.2d at 65.

The letter at issue here is virtually identical to the letter the Court held was proper *Stephens*. Like the letter sent by the insurer in that case, Praxis’ letter states that “[o]ur investigation ... indicates that liability rests

with your insured.” It requests “reimbursement” and provides accurate details of the date of accident, claim number, place of accident, and type of claim at issue. The letter contains none of the characteristics deemed deceptive in the letter sent by the outside agency in *Stephens*. It does not characterize the subrogation request as an “amount due.” It is not described as a “formal collection notice” and does not contain unfounded threats of “license suspension” or other legal action. On the contrary, in describing the “payment amount,” the letter truthfully describes Omni’s subrogation interest as the amount of benefits paid by Omni under the policy. Unlike the threatening and urgent language used in the agency’s letter in *Stephens*, a reasonable consumer could not confuse Praxis’ demand letter with the assertion of a liquidated debt.

Indeed, in seeking collection from the tortfeasor’s insurer, and not the tortfeasor himself, the letter at issue here is even more benign than the one approved of in *Stephens*. Kosovan never saw the letter and there is no evidence that Mr. Roland did either. Courts consider the deceptiveness of a communication from the perspective of the audience targeted by the communication. *FTC v. Wash. Data Res.*, 856 F. Supp. 2d 1247, 1272 (M.D. Fla. 2012) (citing *Kalwajtys v. FTC*, 237 F.2d 654, 656 (7th Cir. 1956); *Aronberg v. FTC*, 132 F.2d 165, 167 (7th Cir. 1942));¹ *see also* Restatement (Third) of Unfair Competition, § 3 cmt b (“The materiality of

¹ In adopting the CPA, the legislature instructed Washington courts to “be guided by final decisions of the federal courts” in their construction of similar federal statutes such as the Federal Trade Commission Act. RCW 19.86.920.

a representation, like its meaning, must be determined from the perspective of the audience to whom it is directed.”). Here, the audience was neither Mr. Roland nor Kosovan, but USAA. As the trial court correctly observed, a reasonable insurer in USAA’s position, who sends and receives subrogation notices on a daily basis, would have no difficulty understanding that the letter dealt only with an unliquidated subrogation claim and not an established debt. The undisputed fact that USAA made no payment to Praxis reinforces this conclusion.

Under this Court’s holding in *Stephens*, the trial court properly held that the October 19, 2017 letter was not deceptive as a matter of law.

B. An Insurer Does Not Violate the “Made-Whole” Doctrine Merely By Sending a Subrogation Letter to the Tortfeasor’s Insurer

In apparent recognition of the non-deceptive nature of the letter itself, Kosovan asks the court to hold that the mere sending of the letter constituted an unfair act or practice based on the common law “made-whole” doctrine. This argument is without merit for several reasons.

i. The Made-Whole Doctrine Does Not Apply to Praxis

As a threshold matter, and as Kosovan seemingly concedes, this argument does not apply to Praxis.² To the extent it applies, the made-whole

² See Am. Br. at 8 (arguing that “Omni Committed an Unfair or Deceptive Act” and “Omni’s directing Praxis to collect directly from USAA ... was at odds with Omni’s

doctrine is a rule that pertains to the relationship between the insurer and the insured and not to a non-party to the insurance contract like Praxis.³

ii. The Made-Whole Doctrine Does Not Contradict Basic Principles of Subrogation

In any event, Kosovan’s argument fails on its merits. In arguing that Omni violated the CPA merely by sending the October 19, 2017 letter to USAA, Kosovan takes the position that, at least in the PIP context, the made-whole doctrine precludes an insurer from recovering “directly from the tortfeasor” and the insurer is limited to “seek[ing] reimbursement from the proceeds of [the insured’s] recovery.” Am. Br. at 8. The absurdity of this proposition is illustrated by the fact that it would abolish the concept of subrogation altogether. Kosovan cites no authority that would support such a sweeping result.

Subrogation is an equitable doctrine that allows an insurer to recover payments it has made to its insured from the third party responsible for the loss. *Mahler v. Szucs*, 135 Wn.2d 398, 411-413, 957 P.2d 632 (1998). A right of subrogation may arise either as a matter of law (“equitable subrogation”) or by contract (“conventional subrogation”). *Mutual of Enumclaw Ins. Co. v. USF Ins. Co.*, 164 Wn.2d 411, 423, 191 P.3d 866 (2008). In either case, the defining feature of the right is that it allows the insurer to be substituted to the rights of the insured and “pursue recovery

policy”); at 10 (arguing that Omni violated its own policy provisions and the rules set out in the cases cited above by pursuing reimbursement directly from USAA.”).

³ See Am. Br. at 11 (recognizing that the obligation arises from the duty of good faith applicable to “parties to the insurance contract.”).

directly from the tortfeasor.” Group Health Coop. v. Coon, 4 Wn. App. 2d 737, 750, 423 P.3d 906 (2018) (emphasis added); *Mahler*, 135 Wn.2d at 419 (“by definition, subrogation exists only with respect to rights of the insurer against third persons...”).

In arguing that an insurer may only pursue recovery from its own insured, Kosovan confuses the equitable remedy of “subrogation” with the distinct contractual right of “reimbursement.” Because an insurer cannot have a right of “subrogation” against its own insured, insurance policies typically also include a “reimbursement” clause. *Winters v. State Farm Mut. Auto. Ins. Co.*, 144 Wn.2d 869, 876, 31 P.3d 1164 (2001). Unlike a right of subrogation, the right of reimbursement allows the insurer to recover its payments from its insured after the insured herself pursues an action against the tortfeasor. *Winters*, 144 Wn.2d at 876.

Kosovan suggests that in *Mahler* the Washington Supreme Court limited a PIP insurer’s right of recovery to reimbursement from its insured. *See Am. Br.* at 9, 12. It did not. The decision in *Mahler* turned upon the unique language of the State Farm policy at issue in that case. The policy provided:

[1] we are subrogated to the extent of our payments to the proceeds of any settlement the injured person recovers from any party liable for the bodily injury.

[2] If the person to or for whom we have made payment has not recovered our payment from the party at fault, he or she shall: ... when we ask, take legal action through our representative to recover our payments.

Mahler, 135 Wn.2d at 418.

In interpreting this provision, the Supreme Court observed that although the first paragraph used the word “subrogated,” the meaning was “indistinct” as it substantively provided only for recovery from State Farm’s own insured. *Id.* at 419. Recognizing that an insurer cannot have a right of “subrogation” against its own insured, the Court held that the first paragraph “simply contracted for a right to reimbursement.” *Id.* at 420. While the second paragraph did, in fact, create “a traditional subrogation right,” the plain language of that paragraph stated that the right existed *only if* the insured “has not recovered our payment from the party at fault.” *Id.* at 420-21. Because the insured in *Mahler* had recovered from the party at fault, the Court held that State Farm waived its right of subrogation. *Id.* at 422-425.

The opinion makes clear throughout that this waiver resulted solely from the specific policy language at issue and not from the made-whole doctrine generally. “By its terms,” the Court held, “Paragraph b creates a contractual right of reimbursement, not a right to subrogation.” *Id.* at 421. The Court clarified that while “some courts initially refused to allow subrogation in the personal injury context, ... [m]ost jurisdictions ... now allow subrogation.” *Id.* at 415. Had the court intended the sweeping result *Kosovan* suggests, it would have said so expressly. Instead, the opinion makes clear throughout that Washington law permits an action by the insurer directly against tortfeasor to recover medical expenses paid. *Id.* at 416 (quoting approvingly from *Metropolitan Life Ins. Co. v. Ritz*, 70 Wn.2d

317, 321, 422 P.2d 780 (1967) for the proposition that an insurer “was entitled ... to be subrogated to [the insured's] claim for medical expenses against the tort-feasor.”⁴

Unlike the policy language at issue in *Mahler*, the Policy in this case does not condition Omni’s right to pursue subrogation on the insured’s decision not to pursue the tortfeasor. Omni’s Policy creates a right to subrogation whenever “we make payment under this policy and the person to or for whom payment was made *has a right to recover damages from another.*” (CP 56). The Omni Policy then incorporates the made-whole doctrine by stating that its entitlement to actually recover subrogation arises once the insured has been made whole. (CP 57). The distinction between the existence of rights to pursue subrogation and actually enforcing those rights through actual recovery of money was made clear in *Mahler*. 135 Wn.2d at 417-418. This distinction is important because, as will be further discussed below, the mere act of asserting subrogation rights, without obtaining actual recovery, does not violate the made-whole doctrine.

The State Farm policy at issue in *Mahler* only allowed pursuit of subrogation “[i]f the [insured] has not recovered our payment from the party

⁴ See also *Mahler*, 135 Wn.2d at 413 (“the subrogee, standing in the shoes of its subrogor, may pursue an action in the subrogor’s name against the third party to enforce the reimbursement right.”); at 417 (citing *Leader Nat’l Ins. Co. v. Torres*, 113 Wn.2d 366, 779 P.2d 722 (1989) as holding that a settlement agreement “did not extinguish the insurer’s subrogation right against the third party tortfeasor.”); at 417 (noting that these cases establish an insurer’s right to subrogation includes “an action ... *against the tortfeasor.*”) (emphasis added).

at fault.” *Id.* at 420-21. The Omni Policy contains no such limitation. *Mahler* provides no support for Kosovan’s argument.⁵

Kosovan’s argument is further undermined by the fact that it is contrary to Washington public policy. The basic public policy behind the concept of subrogation is to “impose ultimate responsibility for a wrong or loss on the party who, in equity and good conscience, ought to bear it.” *Mahler*, 135 Wn.2d at 411. Because a right of reimbursement arises only when the insured has recovered from the tortfeasor, a rule that limited the insurer’s recovery to this particular remedy would allow the tortfeasor to avoid responsibility for the loss whenever the insured chooses not to pursue the tortfeasor.

Although Kosovan attempts to temper the effect of her proposed rule by suggesting that an insurer would be allowed subrogation “if the insured makes no claim for damages,”⁶ she offers no explanation as to how this caveat would work in practice. Given that the extent of an insured’s damages for personal injury are often not known until years after the accident, such a rule would inevitably result in claims becoming time-barred. In fact, that very situation occurred here. Omni did not receive the bill from NW Injury and Rehab until one year and ten months after the December 6, 2015 accident. Kosovan finally informed Praxis that her damages exceeded USAA’s policy limits in January of 2018. By that time,

⁵ The decision in *Deturk v. State Farm Mut. Auto. Ins. Co.*, 94 Wn. App. 364, 967 P.2d 994 (1998) rests upon the same policy language as *Mahler* and is therefore equally inapposite.

⁶ Am. Br. at 8.

the two-year statute of limitations for an action against Roland had expired. *See* Or. Rev. Stat. § 12.110(1).

The made-whole doctrine does not require this absurd result and Kosovan has provided no precedent to support it. The Court should reject it as a matter of law.

iii. The Made-Whole Doctrine Does Not Preclude An Insurer from Invoking its Rights to Subrogation

Kosovan's made-whole argument also fails because it rests upon the mistaken assumption that the made-whole doctrine prohibits an insurer from "seeking" or "attempting" recovery, even if it recovers nothing in the process. Am. Br. at 8, 12. In articulating the made-whole doctrine, the Washington Supreme Court did not purport to prohibit an "attempted" recovery. *See Thiringer v. American Motors Insurance Co.*, 91 Wn.2d 215, 219, 588 P.2d 191 (1978). Indeed, in subsequent opinions, the Court has indicated that an insurer may even invoke its right to recovery before its insured has been made whole, so long as it applies the proceeds first to its insured's uncompensated damages. *Hamilton v. Farmers Ins. Co.*, 107 Wn.2d 721, 735, 733 P.2d 213 (1987).

In *Hamilton*, the Court held that when faced with a settlement that would otherwise impair its subrogation rights, an insurer has the option of paying the amount of the settlement itself and attempting to recover the payment from the tortfeasor. Importantly for present purposes, the Court recognized that the insurer may pursue such recovery even though the settlement did not make the insured whole. *Hamilton*, 107 Wn.2d at 734.

The insurer could fulfill its obligations under the made-whole doctrine, the Court explained, simply by “appl[ying]” any recovery “first to any uncompensated damages of the injured insured.” *Id.* “Only after the insured’s damages are fully compensated can the underinsurer *retain* any recovery.” *Id.* at 734 (emphasis added).

Washington law reflects an acceptance of this approach in other contexts as well. For example, by requiring an insurer to include the insured’s deductible in its subrogation demands, WAC 284-30-393 allows the insured to pursue recovery from the tortfeasor before the insured has been completely “made whole.” The insurer may satisfy the made-whole doctrine, the regulation recognizes, so long as it allocates the recovery “first to the insured for any deductible(s) incurred in the loss.” WAC 284-30-393.

If, as Kosovan argues, the made-whole doctrine prohibited the mere “attempt” to exercise subrogation rights, the procedures set forth in *Hamilton* and the cited WAC could not stand. As *Hamilton* indicates, Kosovan’s proposed rule would actually thwart the purposes of the made-whole doctrine as insurance companies often have greater resources and incentives to pursue third-party tortfeasors than the insured does. Allowing the insurer to pursue its subrogation interest thus promotes the purposes of the made-whole doctrine by increasing the insured’s prospect of recovery. The above authorities make clear that the made-whole doctrine does not prohibit an insurer from merely invoking its right to subrogation.

Accordingly, because the made-whole doctrine does not apply to a mere “attempted” recovery, Kosovan cannot predicate her CPA claim upon the made-whole doctrine for this reason as well.

iv. The Made-Whole Doctrine Applies Only to Reimbursement, Not Subrogation

Finally, Kosovan’s claim also fails because, as Washington courts have recently made clear, the made-whole doctrine applies only in the context of reimbursement, not traditional subrogation. In announcing the rule, the Washington Supreme Court stated that it limited the insurer’s ability to obtain reimbursement out of proceeds “the insured has received from the wrongdoer.” *Thiringer*, 91 Wn.2d at 219-220. This articulation of the rule “is precise,” this Court has confirmed, “in that it applies to cases where the insured recovers the payment and the insurer is seeking reimbursement, not vice versa.” *Averill v. Farmers Ins. Co. of Wash.*, 155 Wn. App. 106, 112, 229 P.3d 830 (2010); *see also Coon*, 4 Wn. App. 2d at 749 (describing the made-whole doctrine as a limitation upon the contractual right of reimbursement).

In *Averill*, Division I of this Court recognized that amounts paid to from the tortfeasor to the insured create a “common fund,” the diminution of which by the insurer necessarily affects the insured’s ability to be made whole. *Id.* at 113-14. “But, the same is not true,” the Court held,

where the insurer collects its subrogation interest from the tortfeasor. The made whole doctrine is a limitation on the recovery of the insurer when it seeks reimbursement from its insured for a loss it has previously paid to the insured. *Thiringer*, 91 Wn.2d at 219. *Averill* did not recover funds

from the tortfeasor, and Farmers made no claim for reimbursement from Averill for the loss it paid to her. Instead, Farmers pursued its own subrogation interest against the tortfeasor. The made whole doctrine has no application to this recovery.

Averill, 155 Wn. App. at 113.

Averill is not an outlier. Rather, it comports with the sound policy rationales expressed by other courts as well. The made-whole doctrine is designed “to prevent situations in which an insured is not made whole, but the insurer, who has already received premium payments from the insured, is able to recoup the proceeds of its payout.” *Chandler v. State Farm Mut. Auto. Ins. Co.*, 596 F. Supp. 2d 1314, 1320 (C.D. Cal. 2008). This rationale makes sense in the context of reimbursement because the insured has already settled with the tortfeasor and any payment of those proceeds to the insurer necessarily diminishes the insured’s recovery. The same reasoning does not apply to traditional subrogation because, where “the insurer seeks subrogation directly from the tortfeasor’s insurer, ... there is no indication that the insured will not be made whole.” *Chandler*, 596 F. Supp. 2d at 1320. The insured could either recover from the tortfeasor herself in a separate suit or, as *Hamilton* suggests, the insurer could simply remit the proceeds of its own recovery to the insured. In either case, the insurer’s pursuit of the third party would not preclude the insured from being made whole.

Further, as noted above, a subrogated insurer is subject to the same defenses as its insured, including the statute of limitations. *Mutual of*

Enumclaw, 164 Wn.2d at 424. Other courts have thus recognized that requiring the insurer to delay action against the tortfeasor until its insured was made whole would prejudice the insurer by forcing it to litigate a “stale claim, or worse, may result in its action being time barred.” *Winkelmann v. Excelsior Ins. Co.*, 650 N.E.2d 841, 845 (N.Y. 1995). For these reasons, Courts have held, consistent with *Averill*, that an insurer “need not delay seeking recovery from a third-party tortfeasor until the insured has exhausted her efforts to collect therefrom.” *Chandler*, 596 F. Supp. 2d at 1319 (citing *Winkelmann*, 650 N.E.2d at 845).

In this case it is undisputed that Omni and Praxis directed their recovery efforts solely against the tortfeasor’s insurer. Because the made-whole doctrine does not apply to this exercise of traditional subrogation rights, Praxis and Omni did not violate the doctrine. For all of these reasons, Kosovan’s attempt to predicate CPA liability upon the made-whole doctrine fails as a matter of law. The trial court thus properly granted Praxis’ and Omni’s motions for summary judgment.

C. The Collection Agency Act Does Not Apply to Subrogation Recovery for Insurance Companies

Kosovan’s attempt to predicate her CPA claim against Praxis on Washington’s Collection Agency Act fares no better. Kosovan argues that by seeking recovery of subrogation interests for its insurance clients, Praxis is operating a “collection agency,” and that its failure to obtain a license violates the CAA. *See* RCW 19.16.430.

This argument fails for two reasons. First, as the Washington Supreme Court has confirmed, the recovery of subrogation interests does not qualify as the “collection” of “claims” under the CAA. And second, even if it did, the CAA expressly exempts companies like Praxis who confine their operations recovering subrogation for insurance companies. As a result, the CAA does not apply to Praxis and Kosovan cannot maintain a CPA claim against Praxis.

i. Praxis is Not a “Collection Agency” because it does not Collect Obligations Arising Out of a Contract

Praxis does not come within the statutory definition of a “collection agency” for the simple reason that the interests it recovers arise in tort, not contract. A “collection agency,” for purposes of the Act, means a person “engaged in soliciting claims for collection, or collecting or attempting to collect claims.” RCW 19.16.100(4)(a). By its plain terms, the CAA does not regulate all attempts to recover money or property, but those that qualify as “claims.” The Act defines “claim,” to consist of only those obligations that “aris[e] out of any agreement or contract, express or implied.” RCW 19.16.100(2). “Because a subrogation claim ... does not arise from an agreement [or contract],” the Washington Supreme Court has held, “it is not a ‘claim’ for purposes of the CAA.” *Panag*, 166 Wn.2d at 52; *see also Stephens*, 138 Wn. App. at 171-72 (holding that the Federal Fair Debt Collection Practices Act (“FDCPA”) “does not regulate the collection of subrogation interests” and “[t]he same is true of [the CAA].”).

The reason lies in the nature of the interest recovered in subrogation. “Subrogation is the principle under which an insurer that has paid a loss under an insurance policy is entitled to all the rights and remedies belonging to the insured against a third party with respect to any loss covered by the policy.” *Mutual of Enumclaw*, 164 Wn.2d at 423. The insurer “stands in the shoes” of its insured and is entitled to only its insured’s rights and remedies. *Id.* at 424. Because the subrogated insurer is limited to the rights of its insured, it is those rights that must be considered in evaluating CAA’s applicability. Yet unlike consumer debts or business transactions, the rights of an insured against a third-party tortfeasor do not arise from any contractual obligation but rather arise out of the third-party’s breach of a duty imposed by tort law.

In adopting this reasoning in *Stephens*, Division I of this Court relied on the Eleventh Circuit’s decision in *Hawthorne v. Mac Adjustment*, 140 F.3d 1367 (11th Cir. 1998). *See Stephens*, 138 Wn. App. at 171. In *Hawthorne*, an insurer paid its insured for damages sustained in an auto accident and assigned its subrogation rights against the responsible third party to a recovery service. *Hawthorne*, 140 F.3d at 1369. After receiving a demand letter from the recovery service, the tortfeasor filed suit under the FDCPA. *Id.* at 1369-70. The Court held that the FDCPA did not apply because the underlying obligation did not “arise[] out of a ... transaction.” *Id.* at 1371. “[W]hen we speak of ‘transactions,’” the Court explained, “we refer to consensual or contractual arrangements, not damage obligations

thrust upon one as a result of no more than her own negligence.” *Id.* The Court continued:

Because Hawthorne's alleged obligation to pay Mac Adjustment for damages arising out of an accident does not arise out of any consensual or business dealing, plainly it does not constitute a "transaction" under the FDCPA. Moreover, the fact that Mac Adjustment may have entered into a contract with the insurer for subrogation rights does not change the fact that no contract, business, or consensual arrangement between Hawthorne and the damaged party, its insurer, or Mac Adjustment exists. Consequently, the FDCPA does not apply because this is not a transaction.

Hawthorne, 140 F.3d at 1371; *see also Turner v. Cook*, 362 F.3d 1219, 1227 (9th Cir. 2004) (adopting reasoning of *Hawthorne* and holding that “a tort judgment does not constitute a debt” for purposes of the FDCPA).

These principles apply with even greater force here. Unlike the word “transaction” in the FDCPA, which could include a contractual or other “consensual” relationship, the CAA’s definition of a “claim” specifically requires the obligation to arise out of a “contract or agreement.” As such, there can be no argument that the negligent acts of Mr. Roland somehow come within the scope of the Act. Roland’s negligence gave rise to a cause of action in tort. Because Praxis stands in Kosovan’s shoes and can assert only her rights in this context, the basis for the cause of action remains exclusively in tort. The claim therefore does not “arise out of” a contract or agreement and the recovery of it is “beyond the scope of the CAA.” *Panag*, 166 Wn.2d at 54.

In arguing that “Omni’s reimbursement arises out of its contract with its insured,” Kosovan conflates the rights of the insured with the

manner in which the insurer acquires that right. First, while the Policy at issue does contain a subrogation clause, it is well established that subrogation “is an equitable doctrine” that arises “by operation of law” regardless of the existence of a subrogation clause. *Mahler*, 135 Wn.2d at 411-12. Thus, Omni’s right to pursue recovery from the tortfeasor does not, in fact, depend upon any contract or agreement and, for that reason alone, does not constitute a “claim” under the CAA.

Second, and more importantly, the subrogation clause set forth in the Policy is not at issue in this case. “Conventional subrogation,” that is, a right of subrogation set forth in a contract of insurance, is “substantially the same” as an assignment. *Mutual of Enumclaw*, 164 Wn.2d at 424. The assignment is merely one way in which the insurer obtains the right to assert a cause of action that would otherwise belong to the insured. Kosovan has not alleged, and the record does not reflect, any dispute concerning the manner in which Omni or Praxis acquired its right to assert Kosovan’s cause of action. Rather, the dispute has always been about the manner in which Praxis sought to recover from the tortfeasor’s insurer.

This conclusion is reinforced by the statutory definition of “collection agency,” which requires a “collection,” “attempt[ed]” collection, or a solicitation of claims “for collection.” RCW 19.16.100(4)(a). To the extent Praxis’ conduct can reasonably be described as “collecting” anything, those efforts are asserted solely against the tortfeasor’s insurer. Since the rights it asserts in that effort arise exclusively

from tort law, the pursuit of them is not subject to the CAA. As the court held in *Hawthorne*, the fact there was an assignment of subrogation rights simply “does not change the fact that no contract ... between [the tortfeasor] and the [insured] exists.” *Hawthorne*, 140 F.3d at 1371

In short, because recovery of subrogation interests does not constitute the “collection” of “claims,” Praxis is not a “collection agency” under the CAA as a matter of law.

ii. The CAA Exempts Collections that are Confined and Directly Related to the Operation of Insurance Companies

Because Praxis does not constitute a “collection agency” under the basic definition set forth in RCW 19.16.100(4), the Court need not address any of the subsequent statutory exceptions to that provision. However, even if Praxis did satisfy this first part of the definition, it would still be exempted under RCW 19.16.100(5)(c). That section provides, in relevant part, as follows:

"Collection agency" does not mean and does not include:

...

(c) Any person whose collection activities are carried on in his, her, or its true name and are confined and are directly related to the operation of a business other than that of a collection agency, such as but not limited to: ... *insurance companies* ...

RCW 19.16.100(5) (emphasis added).

This exception contains the following requirements: first, the person must carry on its collection activities in its true name, and second the collection activities must be (a) “confined to” the operation of a business

such as insurance companies, and (b) “directly related” to the operation of a business such as insurance companies.

Praxis satisfies each of these requirements. First, it is undisputed that Praxis operates its collection activities in its true name. Second, the undisputed facts show that Praxis’ clientele consists exclusively of insurance companies. Praxis’ collection activities are thus “confined,” within the plain meaning of the term, to the insurance business. Third, all the evidence presented confirms that Praxis’ “collection activities” for insurance companies are limited to pursuing recovery of subrogation from responsible third parties. Because subrogation is directly related to the business of insurance, Praxis’ satisfies the third requirement of the statute as well.

Kosovan’s attempt to introduce additional requirements into the statute is without merit. Kosovan argues that in order to qualify for the exception, the “two entities” must be “so closely related” such that it amounts to one entity “collecting its own debt.” Kosovan’s argument apparently proceeds from the premise that the statutory term “directly related” modifies the word “person.” This is contrary to the text. By its terms, the statute exempts “[a]ny person whose *collection activities* ... are *directly related* to the operation of a business...” RCW 19.16.100(5)(c) (emphasis added). The term “directly related” clearly and unambiguously refers to the term “collection activities,” and not the term “person.” The

relationship required is thus between the collection activity and the business of the insurer, not between the collecting entity and the creditor.

Because the language is unambiguous, the Court need not apply any other methods of statutory construction to arrive at this plain meaning. *Davis v. Department of Licensing*, 137 Wn.2d 957, 963, 977 P.2d 554, 556 (1999). Nevertheless, it is a well-established canon of statutory construction that “qualifying words and phrases refer to the last antecedent.” *Spokane v. Spokane County*, 158 Wn.2d 661, 673, 146 P.3d 893 (2006). “The last antecedent is the last word, phrase or clause that can be made an antecedent without impairing the meaning of the sentence.” *In re Estate of Kurtzman*, 65 Wn.2d 260, 264, 396 P.2d 786 (1964).

Here, last phrase that can be made an antecedent of the term “directly related” is the phrase “collection activity.” The application of the canon thus means that the qualifier “directly related” refers to the relationship between the collection activities and the operation of a business other than a collection agency, not the relationship between the collecting entity and the creditor. *See Spokane*, 158 Wn.2d at 673-74 (holding that modifier “as a result of the termination” “modifies the last antecedent ‘cases filed in district court’ and not [the more remote word] ‘costs’”).

Kosovan’s interpretation is further undermined by the fact that it would effectively read the word “operation” out of the statute. Among competing interpretations of a statute, a court prefers the interpretation that gives effect to all its language, without rendering any part superfluous.

Whatcom County v. Bellingham, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996). If “directly related” referred to the relationship between “person” and the “business,” the word “operation” would have no meaning. The term “directly related” only makes sense if it refers to the relationship between the “collection activities” and the “operation of a business other than that of a collection agency.”

Kosovan’s argument also finds no support in the Supreme Court’s decision in *Trust Fund Servs. v. Aro Glass Co.*, 89 Wn.2d 758, 575 P.2d 716 (1978). In that case, Trust Fund Services collected unpaid employer contributions as assignee of multiple joint labor-management trusts. *Trust Fund*, 89 Wn.2d at 759, 761. Because the trustees included representatives of both labor and management, a law firm representing the trustees created Trust Fund as a way for the management trustees to avoid having to sue their own company. *Id.* at 792. The trustees assigned their rights to the trust, who sought collection from the employers. *Id.* In construing the applicability of the CAA to Trust Fund, the Court held, consistent with the above analysis, that the Trust Fund was exempt because its “activities” were “related directly” to a “business” other than that of a collection agency. *Id.*

While the Court did use the word “alter ego” in its analysis, an examination of the context reveals that the Court’s use of that term was for the sole purpose of establishing that the Trust Fund came within one of the entities listed in Subsection 5(c). In considering the *Trust Fund* decision, it is important to recognize that the law firm was not the creditor in that case,

the trustees were. *Id.* at 759. Because “trustees” are not specifically listed in Subsection 5(c)⁷, the *Trust Fund* Court analyzed the exception as though it would not apply unless the Trust Fund qualified as a “lawyer.” *See Trust Fund*, 89 Wn.2d at 761 (excluding all specifically-enumerated businesses other than the word “lawyers” from its recitation of the statute). Thus, in using the term “alter ego,” the court was addressing the unique situation in which a non-exempt entity seeks an exemption under the statute based on its close relationship to an exempt entity. *See Paris v. Steinberg & Steinberg*, 828 F. Supp. 2d 1212, 1220 (W.D. Wash. 2011) (rejecting the argument that *Trust Fund* “categorically exclude[s] all lawyers” because the Court in that case “was concerned with whether a trust fund was established as the law firm's alter ego, and therefore exempt.”).

This case does not involve that unique situation. Unlike the trustees in *Trust Fund*, “insurance companies” are specifically listed in Subsection 5(c). The Court therefore need not consider the relationship of Praxis to any other entity. Like the collecting entity in *Trust Fund*, who collected debts assigned from the various trustees, Praxis’ collection activities are “confined” and “directly related” because all the assignments it receives directly serve the operational purposes of insurance companies. This is all the statute requires.

⁷ The Court apparently concluded that the trustees did not qualify as “Trust Companies” under the statute because they “were not regarded as legal entities.” *Trust Fund*, 89 Wn.2d at 761.

Accordingly, even if Praxis constitutes a “collection agency” under RCW 19.16.100(4), it is exempted from the CAA’s licensing requirements under the exception set forth in RCW 19.16.100(5). Praxis has not violated the CAA and, as a result, Kosovan cannot satisfy the first element of her CPA claim.

II. A SINGLE LETTER BETWEEN TWO INSURANCE COMPANIES DOES NOT SATISFY THE PUBLIC INTEREST REQUIREMENT

This Court may also affirm the trial court’s ruling on the ground that the transaction here does not impact the public interest. *Hangman Ridge*, 105 Wash. 2d at 780 (describing the elements of a CPA claim). Kosovan’s complaint in this case is predicated entirely upon a demand letter sent by one insurance company to another, which she never saw and did not rely upon. It is not the purpose of the CPA to “provide an additional remedy for private wrongs which do not affect the public generally.” *Lightfoot v. McDonald*, 86 Wn.2d 331, 333, 544 P.2d 88 (1976). Washington courts have repeatedly held that a private dispute between sophisticated parties with business experience does not impact the public interest. *Hangman Ridge*, 105 Wn.2d at 790; *see also Pac. Northwest Life Ins. Co. v. Turnbull*, 51 Wn. App. 692, 703, 754 P.2d 1262 (1988) (holding that the public interest element was not satisfied because both parties “had sufficient sophistication to remove them from the class of bargainers subject to exploitation.”); *Goodyear Tire & Rubber Co. v. Whiteman Tire*, 86 Wn. App. 732, 745, 935 P.2d 628 (1997) (same). Because a single demand letter

between insurance companies does not implicate the public interest, Kosovan's claim fails for this reason as well.

III. KOSOVAN FAILED TO ESTABLISH ANY INJURY TO BUSINESS OR PROPERTY PROXIMATELY CAUSED BY PRAXIS' CONDUCT

Finally, the Court may also affirm because Kosovan failed to meet her burden to establish the final two elements of her CPA claim—injury and causation. Only a person who suffered injury to his or her business or property proximately caused by a violation of RCW 19.86.020 may prevail under the CPA. *Hangman Ridge*, 105 Wn.2d at 793. Kosovan relies upon two types of injury in this case: (1) an alleged two-and-a-half-month delay in receiving payment from USAA; and (2) the \$5.65 she allegedly spent in postage for an IFCA notice. Neither injury suffices, however, as there is no evidence of a causal connection between these claimed injuries and the alleged unfair or deceptive act.

A. Kosovan Failed to Establish A Delay in Payment Caused by Any Conduct of Praxis or Omni

Kosovan's reliance upon an alleged delay in payment from USAA fails because there is no evidence that the alleged delay was caused by any conduct on the part of Praxis or Omni. To establish causation, a plaintiff must show that "but for the defendant's unfair or deceptive practice, the plaintiff would not have suffered an injury." *Indoor Billboard/Washington, Inc. v. Integra Telecom of Wash., Inc.*, 162 Wn.2d 59, 84, 170 P.3d 10 (2007). To avoid summary judgment, Kosovan had the burden to come forward with admissible evidence that she would not have sustained the

injury in the absence of the October 19, 2017 letter. *Lynn v. Labor Ready, Inc.*, 136 Wn. App. 295, 306, 151 P.3d 201 (2006).

In opposing the motion, Kosovan relied entirely upon a declaration of her attorney in which the attorney asserts that the USAA adjuster “told [him]” that she could not settle until Omni withdrew their demand. (CP 170). This is classic hearsay not admissible for any purpose. It is an out-of-court statement offered in evidence to prove the truth of the matter asserted. ER 801(c). Accordingly, the Court may not consider this statement in evaluating whether Kosovan established a genuine issue of material fact. *See Lynn*, 136 Wn. App. at 306 (“like the trial court, in deciding whether summary judgment was proper, we consider only admissible evidence.”).

Kosovan failed to submit any other evidence that would establish a causal connection between the October 19, 2017 letter and USAA’s alleged two-month delay in issuing payment. Notably, although the record shows that Kosovan’s attorney knew the name and contact information of the adjuster at USAA, she did not obtain a declaration from the adjuster or note her for deposition. Kosovan’s argument that USAA’s alleged delay in issuing payment was a result of any conduct on the part of Praxis or Omni is based purely on speculation. This is insufficient to avoid summary judgment. *Seven Gables Corp. v. Mgm/Ua Entm’t Co.*, 106 Wn. 2d 1, 13, 721 P.2d 1 (1986).

Because Kosovan failed to establish a causal connection between the alleged delay and the October 19, 2017 letter, the alleged delay does not satisfy the injury element of the CPA.

B. Postage for an IFCA Notice is Not a Cognizable Injury Under the CPA

The \$5.65 in postage Kosovan allegedly spent to mail the IFCA notice to the insurance commissioner also fails to establish injury to business or property. It is well established that the cost of instituting a CPA action does not itself constitute injury. *Panag*, 166 Wn.2d at 60; *Demopolis v. Galvin*, 57 Wn. App. 47, 786 P.2d 804 (1990). “Mere involvement in having to defend against [a] collection action and having to prosecute a CPA counterclaim is insufficient to show injury to her business or property.” *Sign-O-Lite Signs v. Delaurenti Florists*, 64 Wn. App. 553, 564, 825 P.2d 714 (1992). Thus, even if Kosovan could establish that the IFCA notice was somehow caused by the October 19, 2017 letter, that would not be a cognizable injury under the CPA.

Kosovan’s reliance on the IFCA notice is further undermined by the fact that her complaint contains no IFCA claim. Indeed, Kosovan could have made no IFCA claim against Praxis as IFCA is expressly limited to a denial of coverage or payment of benefits “by an insurer.” RCW 48.30.015(1). Because Kosovan could never sue Praxis for an IFCA violation, Kosovan cannot establish that the IFCA notice was proximately caused by any conduct on the part of Praxis.

IV. KOSOVAN IS NOT ENTITLED TO ATTORNEY'S FEES ON APPEAL

Kosovan is not entitled to recover her attorney's fees on appeal because she is not the prevailing party. RAP 18.1 only permits an award of attorney's fees as allowed by the "applicable law." RAP 18.1(a). "Absent a contractual provision, statutory provision or well recognized principle of equity to the contrary, a court has no authority to award attorney fees." *Klaas v. Haueter*, 49 Wn. App. 697, 707, 745 P.2d 870 (1987). While the CPA authorizes an award of fees, this provision only applies to a "successful plaintiff." *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 693, 132 P.3d 115 (2006); *see also* RCW 19.86.090. Because Kosovan cannot succeed on her CPA claims regardless of how this Court disposes of her appeal, she is not entitled to fees.

First, Kosovan did not prevail because, as set forth above, the Superior Court properly granted summary judgment in favor of Praxis. More importantly, however, Kosovan never moved for summary judgment in the Court below. As such, even if this Court agrees with her that a genuine issue of fact precluded summary judgment in favor of Praxis, the most Kosovan would be entitled to is a remand for further proceedings. Kosovan's reliance upon *Sign-O-Lite* is misplaced as that case involved a situation where the plaintiff prevailed on summary judgment and successfully defended that ruling on appeal. *See Sign-O-Lite*, 64 Wn. App. at 556, 568. Here, there is no disposition of Kosovan's appeal available to

this Court that would afford Kosovan relief under the CPA. Accordingly, she is not entitled to fees.

CONCLUSION

For these reasons, Praxis respectfully requests that the decision of the Clark County Superior Court be affirmed.

DATED this 8th day of March, 2019.

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CERTIFICATE OF SERVICE

The undersigned certifies that on the date below stated they caused the foregoing to be served upon the below party(ies) at the address(es) and via COA Div. II - E-service.

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