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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

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. Praxis did not send the letter to Kosovan. Kosovan admits she never saw or relied upon the letter. In addition, there is no evidence that the tortfeasor received, read or relied on this letter. 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, through the Honorable Daniel L. Stahnke, dismissed the claims against Praxis and Omni after consideration of separate summary judgment motions.

Judge Stahnke’s orders were 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 need not look any 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 attempting to recover directly from the tortfeasor. Such a holding would contradict decades of settled Washington precedent on subrogation. Similarly, neither *Mahler* nor the common law “made-whole” doctrine preclude a PIP 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, which is the sole alleged basis of the claims against Praxis, 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 plainly excluded from the Collection Agency Act. The Act therefore provides no basis for a CPA claim against Praxis.

In addition to failing to establish an “unfair or deceptive act,” judgment in favor of Praxis and Omni was warranted 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 relies entirely upon a hearsay declaration from her attorney regarding the tortfeasor’s insurance company’s (USAA) intentions and postage costs incurred in sending a notice to Omni pursuant to the Insurance Fair Conduct Act (“IFCA”). This notice was never directed or sent to Praxis, and it never gave rise to an actual IFCA claim. There is also no evidence showing that any act or omission of Praxis was the proximate cause of any injury to Kosovan.

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

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 Washington law allows an insurer to merely assert a subrogation interest against a third-party tortfeasor for personal injury protection benefits paid to its insured.

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.

VII. Whether postage for sending an IFCA notice to a third party satisfies the Consumer Protection Act's injury requirement when Plaintiff has not filed an IFCA claim in this case and did not actually incur any costs in sending the notice to Praxis.

VI. Whether Praxis proximately caused any injury to Plaintiff's

business or property based on USAA's decision to delay settlement payment.

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 ("Roland"). CP 1, 82, 136. Kosovan had a first party auto insurance policy with Defendant/Respondent Omni Insurance Company ("Omni"). CP 1. Roland was insured by USAA Insurance ("USAA"). CP 2. Kosovan's Policy provided \$10,000 in personal injury protection ("PIP") coverage. The Omni 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 52.

Following the accident, Kosovan underwent chiropractic treatment and massage therapy at NW Injury and Rehab. CP 83-85. On September

25, 2017, Omni received a bill from NW Injury and Rehab in the amount of \$12,370.98. CP 135. As a result, Omni paid Kosovan her \$10,000.00 PIP coverage limit on October 11, 2017. CP 2. On October 17, 2017, Omni assigned Defendant/Respondent Praxis Consulting, Inc. (“Praxis”) to seek recovery of its PIP payment. CP 130.

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 130, 248-249. As set forth in its Service Agreement, Praxis’ recovery services consist of “subrogation, arbitration, litigation, apportionment, or enforcing ... no fault loss transfer[s].” CP 177. Praxis does not engage in the collection of liquidated debts, and the subrogation recovery services it provides are limited to insurance companies. CP 309.

After receiving the assignment to recover Omni’s \$10,000.00 PIP payment, Praxis called USAA. CP 289. USAA confirmed that it insured Roland and was accepting liability for the accident. CP 289. 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 290; 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 134. This letter was sent to USAA, as the liability insurer for Roland. The letter was sent a mere 48 days before the two-year

anniversary of the subject motor vehicle accident and the running of the applicable Oregon statute of limitations. Or. Rev. Stat. § 12.110(1). The letter was addressed only 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
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 134. It is undisputed that Ms. Kosovan never saw or relied on this letter. CP 97. The letter was not sent to Kosovan by Praxis. CP 131.

USAA thereafter faxed a copy to Kosovan's attorney on October 27, 2017. CP 165, 185-190. On November 2, 2017, a legal assistant for Kosovan's attorney e-mailed Praxis to request additional information about the medical expenses paid. CP 143. Counsel's assistant then

exchanged numerous e-mails with Praxis in November. CP 139-143. These e-mails generally addressed records regarding Omni's payment of PIP for Kosovan. However, none of these e-mails ever complained about the October 19, 2017 letter sent to USAA. Nor did Kosovan's counsel inform Praxis that he believed Kosovan's damages exceeded USAA's policy limits. CP 139-143, 290.

On November 8, 2017, 20 days after the subject letter from Praxis was sent, Kosovan received a \$25,000 policy limits settlement offer from USAA. CP 165, 191, 558. Praxis did not receive a copy or notice of this offer from USAA. CP 131, 139.

On January 10, 2018, Kosovan filed this suit against Omni and Praxis. CP 1. No notice of this suit was provided by Counsel for Kosovan to Praxis before this suit was filed. CP 139. Praxis did not learn that Kosovan sought damages in excess of policy limits until after Praxis was served with a copy of the complaint filed in this action. CP 131, 139. As a result, Praxis immediately contacted Counsel for Kosovan about this suit. CP 139. Specifically, on January 23, 2018, Praxis wrote to Kosovan's attorney inquiring why the attorney had not informed her of this in November before filing suit. CP 139. In this communication, Praxis advised Counsel for Kosovan as follows:

I am not sure why we did not receive a phone call to discuss the made whole issue prior to receive the law suit. Once we received proof that USAA exhausted their 25K policy would [sic] have closed our file without the need for a lawsuit. Please contact me to discuss.

CP 139.

Kosovan's attorney responded as follows:

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 138-139. 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 137-138. Kosovan's attorney responded, "You can continue to attempt to contact me, but I will not be responding until a lawyer gets involved." CP 137. In other words, Kosovan, through her attorney, refused to attempt to resolve the dispute, even though Praxis agreed to close its file, until Praxis retained counsel. CP 132.

On February 19, 2018, USAA formally informed Praxis that it would not be reimbursing Omni for the \$10,000.00 payment because Kosovan's claimed damages exceeded its policy limits. CP 131. This was the first time USAA informed Praxis of this fact. CP 131. 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 131. As a result, Praxis immediately ceased all recovery efforts. CP 131. USAA never paid Praxis or Omni anything relating to Kosovan's claim. CP 131.

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 3. The complaint asserts that Omni violated Washington's "made-whole" doctrine by seeking recovery directly from the tortfeasor. CP 2-3. The Complaint further alleges that Praxis violated Washington law by operating as an unlicensed debt collection agency. CP 2-3. Both claims are predicated entirely upon the October 19, 2017 letter from Praxis to USAA. CP 2-3. In her deposition, however, Kosovan admitted she had never seen the letter. CP 97. 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 100, 103-104.

Praxis moved for summary judgment on June 6, 2018. CP 144-163. After hearing oral argument on July 13, 2018, the trial court, through the Honorable Daniel L. Stahnke, granted the motion and dismissed Kosovan's claims against Praxis with prejudice. CP 333-335. 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.* CP 354 (Lines 17-20). The Court further held that the October 19, 2017 letter was not deceptive as a matter of law. CP 381 (Lines 11-18). In reaching this conclusion, Judge Stahnke emphasized the fact that "all we have" here is a letter from Praxis "to USAA." CP 375

(Lines 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. CP 381 (Lines 15-18). Kosovan never sought summary judgment against Praxis.

After further dispute as to whether the trial court’s granting of summary judgment in favor of Praxis resulted in dismissal of the claims against Omni and an aborted appeal in Case No. 52364-7-II, Omni filed its own Motion for Summary Judgment on March 10, 2020. CP 391-405. The trial court granted that motion and dismissed the claims against Omni on May 15, 2020. CP 615-616. Kosovan appeals the trial court’s orders granting summary judgment in favor of Praxis and Omni. Notice of Appeal.

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).

In addition, this Court has stated that “[w]hether an action gives rise to a CPA violation is a question of law that we review *de novo*.”

Bavand v. OneWest Bank, FSB, 176 Wn. App 475, 503-04, 309 P3d 636, 651 (2013).

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)).

Each of the above elements must be established by Kosovan to prevail on a CPA claim. *Id.* Accordingly, failure to prove any one of the above elements requires this Court to affirm the trial court's granting of summary judgment. *See Baldwin v. Silver*, 165 Wn. App. 463, 473, 269 P3d 284, 289 (2011). 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 was sent to USAA and not Kosovan. Kosovan admits she never received or read the letter. CP 97. She had no contact with or knowledge of Praxis prior to this suit. CP 100-101. As a result, there is no evidence or argument as to how this letter, sent to an unrelated third-party, could ever be considered an attempt to deceive Kosovan. In fact, there is no evidence that Praxis and Kosovan interacted with each other as to any issue.

Even if Praxis and Kosovan had ever interacted, the subject letter is not deceptive because it represents nothing more than an accurate and truthful demand letter between insurance companies involved in related claims. 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 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. CP 381. 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. Washington Law Allows PIP Insurers to Assert Subrogation Claims against At-Fault Drivers

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 asserting a subrogation claim constituted an unfair act or practice based on her extraordinarily expansive reading of the Supreme Court’s holdings and analysis in *Mahler v. Szucs* 135 Wn.2d 398 (1998) (and progeny) and, more generally, the common law “made-whole” doctrine.

Kosovan’s apparent aim in this case is to overturn years of settled

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.

Washington law by completely eliminating the availability of subrogation for insurers seeking to recover PIP benefits paid on behalf of an insured from the party responsible for causing the injuries. Subrogation is an equitable legal principle that is nearly as well established as the common law itself. No Washington rule, statute or court opinion has ever held that subrogation is unavailable to insurers seeking to recovery PIP benefits paid for an insured, but that is exactly the ruling Kosovan seeks here.

Kosovan wants this Court to legislate from the bench by proscribing a blanket prohibition against insurers ever seeking to recover PIP benefits through subrogation claims against the at-fault party. Kosovan justifies this sweeping common law prohibition based on court opinions addressing tangentially-related issues that were actually determined based on the specific insurance policy contract language at issue in those cases. This Court should reject Kosovan's invitation to usurp legislative authority and uphold the longstanding insurance subrogation principles that have been relied upon by Washington insurers for decades and were correctly applied by the trial court in this case.

1. Mahler and the Made-Whole Doctrine Do Not Contradict Basic Principles of Subrogation

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.”

Brief of Appellant (“App. Br.”) at p. 16. 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 *directly from the tortfeasor.*” *Group Health Coop. v. Coon*, 4 Wn. App. 2d 737, 750, 423 P.3d 906 (2018) (emphasis added). The purpose 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 (citing RONALD C. HORN, SUBROGATION IN INSURANCE THEORY AND PRACTICE 3 (1964)) “Subrogation is always liberally allowed in the interests of justice and equity.” *J.D. O’Malley & Co. v. Lewis*, 176 Wash. 194, 201 (1934).

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 direct reimbursement from its insured. *See* App. Br. at 15-19. It did not. The decision in *Mahler* turned upon the unique language of the State Farm policy at issue in that case. Subrogation may be limited if there is an agreement that contradicts the principles of equitable subrogation. *See Richter v. Honore*, 29 Wn. App. 507, 628 P.2d 1311 (1980). That is exactly what occurred in *Mahler*, where 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 already 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.”).²

² 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 effect of the policy language at issue in *Mahler* on the general principles of subrogation was expressly recognized by this Court in *Meas v. State Farm Fire & Cas. Co.*, 130 Wn. App. 527, 535, 123 P.3d 519 (2005), where the Court stated:

Contrary to Meas’s assertion, the *Mahler* court did not proclaim a general ‘public policy’ that a ‘first-party insured must abandon his third-party claim before his insurer has any right to subrogation.’ Rather, it analyzed *specific PIP policy language* and concluded that the insured’s *policy* created only a contractual right of reimbursement, not a right to subrogation, where the insured pursues action against a third party.

Id. at 535 (emphasis original).

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 52. 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 53. 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.

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).

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 at fault.” *Id.* at 420-21. The Omni Policy contains no such limitation. *Mahler* provides no support for Kosovan’s argument.³

Furthermore, our case is factually distinguishable from *Mahler* because, unlike in our case, the *Mahler* insured had already settled her third-party claims against the tortfeasor when subrogation was pursued by State Farm. *Id.* at 407. Here, the subject letter asserting subrogation rights was sent by Praxis 20 days before settlement was offered to Kosovan by USAA and 48 days before the statute of limitations expired on her claims against Roland arising from the accident. These timing facts and the application of Oregon’s two-year statute of limitations (ORS 12.110(1)) are not disputed. App. Br. at pp. 6-7, 22-23.

The subject letter could not have interfered with Kosovan’s right to recovery. USAA’s offer did not exist when the letter was sent and there is no competent evidence showing that Praxis’ acts affected Kosovan’s settlement with USAA in any way. Kosovan’s assertion that Praxis should have known that she was pursuing a claim against Mr. Roland is nonsensical and unsupported by the record.⁴ Kosovan’s retention of counsel and purported intentions are not the same as the assertion of a claim or filing of a suit. Based on the information available on October 19,

³ *Deturk v. State Farm Mut. Auto. Ins. Co.*, 94 Wn. App. 364, 967 P.2d 994 (1998) almost exclusively applies *Mahler* and rests upon the same policy language addressed in *Mahler*. It is therefore equally inapposite.

⁴ “The fact of the contact by itself creates an inference that it did learn that fact. On that basis, it should not have sent its October letter to USAA.” App. Br. at p. 21.

2017, Kosovan and her counsel could have decided to never assert a claim or file a suit against Mr. Roland.

At the time the letter was sent, the only avenue available to Praxis and Omni to pursue recovery of the PIP payments it made to Kosovan, and for which Roland was tortiously liable, was through subrogation. Based on the information available at the time, not pursuing subrogation when it did could have resulting in extinguishment of Omni's valid claim for recovery of the PIP benefits it paid to Kosovan from the party legally liable for those costs (Roland). Kosovan's reading of *Mahler* is flawed for this reason as well. *See Mahler*, 135 Wn. 2d at 411.

Finally, Kosovan's argument is undermined by the fact that it is contrary to Washington public policy. The basic public policy behind the concept of subrogation, according to the *Mahler* court, 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, as proposed by Kosovan, 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,”⁵ 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 nearly 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, the two-year statute of limitations for an action against Roland had expired. *See* ORS 12.110(1).

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

2. 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. App. Br. at pp. 15-19, 21, 22. 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

⁵ App. Br. at 16.

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); *Daniels v. State Farm Mut. Ins. Co.*, 193 Wn.2d 563, 444 P.3d 582 (2019).

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).

In *Daniels*, the Washington Supreme Court again recognized that an insurer may pursue subrogation before an insured is made whole so long as recovered amounts are first allocated to make the insured whole. *Daniels*, 107 Wn.2d at 576. Daniels was insured by State Farm when she was involved in a motor vehicle accident. Daniels paid her \$500 deductible and State Farm paid for vehicle repairs exceeding the deductible. State Farm sought to recover its repair payments through subrogation from the at-fault driver's insurer. At the time State Farm

asserted its subrogation rights, Daniels was not “made whole” because she had not been reimbursed for her deductible payment. *Id.* at 567-68. The *Daniels* court did not raise an issue with this fact, but rather, held that “the proceeds of any recovery from a third-party tortfeasor, whether in a subrogation action or otherwise, must be allocated in such a way to first make the insured whole.” *Id.* at 576.

Hamilton and *Daniels* make sense. Allowing insurance companies to pursue subrogation independent of their insureds is the only way for an insurer to protect its rights. A subrogating insurer stands in the shoes of its insured and is subject to all of the defenses that a tortfeasor would have against an insured, including the statute of limitations. *Mut. of Enumclaw Ins. Co. v. USF Ins. Co.*, 164 Wn.2d 411, 424, 191 P.3d 866 (2008). Here, the accident occurred in Portland, Oregon on December 6, 2015. The statute of limitations for personal injury claims in Oregon is two years and would have expired on December 6, 2017. ORS 12.110(1). Praxis sent the letter that is the focus of the present appeal on October 13, 2017, less than two months before the statute of limitations would have run. By doing so, Praxis was merely protecting its subrogated right to seek recovery from the tortfeasor before the statute of limitations expired.

Washington law reflects general 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, Daniels*, and the cited WAC provisions 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. Praxis acted consistently with Washington law at all times.

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.

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 (the “CAA” or the “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.

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

Kosovan admits that “Praxis is a corporation that collects subrogation claims for insurance companies.” App. Br. at p. 4. 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 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.” RCW 19.16.100(2). 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 right to 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. App. Br. at p. 32. 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, Washington courts have made clear that “reimbursement” by definition occurs only when an insurer recovers from “its own insured.” *Winters*, 144 Wn.2d at 876. “Reimbursement,” the Supreme Court has explained, “permits an insurer to be reimbursed by its insured from proceeds that the insured collects directly from the party at fault.” *Winters*, 144 Wn.2d at 876. Praxis’s conduct here does not fit within the definition of “reimbursement” because it is undisputed that Praxis’s efforts were directed solely against the tortfeasor’s insurer. Again, recovery directly from the tortfeasor is the essence of subrogation. *Mahler*, 135 Wn.2d at 419 (“by definition, subrogation exists only with respect to rights of the insurer against third persons...”).

Third, and most 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 and it did not require a debt collector license as a matter of

law. As a result, Kosovan cannot state a claim under the CPA on this basis.

2. *The CAA Plainly 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’ subrogation recovery efforts could 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).

As discussed above, subrogation recovery does not qualify as the “collection” of “claims” under the CAA. Even if subrogation was subject to the CAA, companies like Praxis are explicitly exempted by section 5(c).

Section 5(c) applies when a person is exclusively collecting the debts owed to an insurance company and related to the insurance company’s business operations. It is creditor’s business that matters for purposes of applying the 5(c) exemption, not that of the collecting entity. *See Semper v. JBC Legal Group*, 2005 U.S. Dist. LEXIS 33591 at * 10-11

(W.D. Wash. Sept. 6, 2005) (distinguishing between collecting debt owed to an exempt entity and arising out of its operations, which is covered by the exception in 5(c), from an exempt entity that purchased debt from a non-exempt entity and seeks to collect on that debt, which is not excepted).

The text of Section 5(c) 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 of insurance benefits paid from responsible third parties. Because subrogation is directly related to the business of insurance, Praxis’ satisfies the third requirement of the statute as well.

The Court’s task in interpreting a statute is to “ascertain and carry out the Legislature’s intent, and if the statute’s meaning is plain on its face, then the court must give effect to that plain meaning as an expression

of legislative intent.” *Associated Press v. Wash. State Legislature*, 194 Wn. 2d 915, 920, 454 P.3d 93 (2019) (internal citation omitted). “Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous.” *Associated Press*, 194 Wn.2d at 920 (quoting *Whatcom Cty. v. Bellingham*, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996)).

Kosovan’s attempt to introduce additional requirements into the statute is without merit. The statute does not require Praxis to have a business other than subrogation recovery for insurance companies to be exempt from the CAA. Rather, under the plain text of the statute, Praxis’ activities must be confined and directly related to an exempt entity (i.e. an insurance company) and its operations. RCW 19.16.100(5)(c). Kosovan readily admits that Praxis only seeks recovery of subrogation for insurance companies. App. Br. at pp. 4, 37. Subrogation recovery is a fundamental business operation of an insurance company.

However, Kosovan wants this Court to ignore the words of Section 5(c) or render them meaningless by requiring that Praxis actually be an insurance company to be exempted under the statute. The Legislature plainly did not intend the narrow interpretation offered by Kosovan because the statute includes the words “confined and...directly related to.” If the Legislature only intended to exempt insurance companies from the CAA it would have not have included these words that are plainly designed to allow inclusion of entities that provide outsourced insurance

services, like Praxis. Rather, the statute would simply say that a “collection agency” does not include insurance companies. To give effect to all words of Section 5(c), it must be interpreted to include entities, like Praxis, that solely provide services to insurance companies which are within the normal business operations of insurance companies. Seeking subrogation recovery of insurance benefits paid to an insured is unquestionably a normal business operation of insurance companies. Therefore, to the extent the CAA even applies to subrogation, Praxis is exempted from the CAA under Section 5(c).

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 Cty.*, 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 673-674 (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. *See Associated Press; Whatcom Cty.* 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.” Here, the activities of Praxis solely relate to subrogation operations of Omni, an insurance company. Thus, Praxis is exempted from the CAA under Section 5(c) and it could not have violated the CPA by not having a debt collector license.

3. *The Case Law Cited by Kosovan is not Instructive and does not Support her Position that Praxis falls under the CAA.*

Kosovan’s attempt to both rely on and distinguish *Trust Fund Services* fails. Trust Fund Services collected unpaid employer contributions as assignee of multiple joint labor-management trusts. *Trust Fund Servs. v. Aro Glass Co.*, 89 Wn.2d 758, 761, 575 P.2d 716 (1978). 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).

Unlike the trustees in *Trust Fund*, “insurance companies” are specifically listed in Section 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.

Furthermore, the argument 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” contradicts the plain language of Section 5(c). This argument apparently proceeds from the premise that the statutory term “directly related” modifies the word “person.” 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. This strained interpretation renders language in the statute superfluous and meaningless, which is not allowed under Washington’s statutory interpretation principles. *Whatcom Cty.*, 128 Wn.2d at 546. The legislature plainly did not intend such a limitation under the facts of this case.

Kosovan’s reliance on federal district court opinions is also misguided because these cases are clearly distinguishable from this case. In *Cavnar v. BounceBack, Inc.*, 2015 U.S. Dist. LEXIS 93525 (E.D. Wash. July 17, 2015), Bounceback contracted with the prosecutor’s office to arrange for the collection of dishonored checks. Bounceback’s collection letters were written on the county prosecutor’s letterhead, indicated official connection with a governmental agency, and included threats of criminal prosecution. The *Bounceback* court specifically found that the legislature did not intend for Bounceback to be excluded from the CAA, citing RCW 19.16.250(4) (forbidding statements that indicate official connection with governmental agency), (13) (prohibiting threats of criminal prosecution); and *Landfried v. Spokane Cnty.*, No. CV-09-360-EFS, 2011 U.S. Dist. LEXIS 45501 (E.D. Wash. Apr. 27, 2011)

("although common sense would reveal that those sorts of entities would be excluded, in the absence of such an exemption, BounceBack qualifies as a collection agency").

Here, the subject letter was issued on Praxis' own letterhead and in no way indicated affiliation with a governmental agency or threatened criminal prosecution. Praxis is exactly the type of agency that section 5(c) seeks to exempt from the CAA. Kosovan fails to proffer any persuasive evidence of legislative intent to the contrary. Praxis seeks subrogation recovery owed to insurance companies and is not in the business of collecting contractual debts owed to anyone and only seeks subrogation recovery for insurance companies.

Paris and *Mandelas* are likewise not instructive because these cases addressed whether lawyers were categorically exempt under the CAA no matter the nature of the debt they seek to collect. *Paris v. Steinberg & Steinberg*, 828 F. Supp. 2d 1212, 1219 (W.D. Wash. 2011) (holding that Section 5(c) "only excludes those lawyers who are attempting to collect on their own debts"); *Mandelas v. Gordon*, 785 F.Supp.2d 951, 960 (W.D. Wash. 2011) (the "law firm's sole business is the collection of debts on behalf of its clients"). The analyses in these cases are truncated and not instructive given the facts of this case.

No amount of legal maneuvering or strained reading of statutes and case law can avoid the conclusion that Praxis' activities are confined and directly related to the subrogation interests of insurance companies.

Accordingly, to the extent Praxis even qualifies as a “collection agency” seeking recovery of “claims” under RCW 19.16.100, it is exempted from the CAA’s licensing requirements under the plain language of the exception set forth in RCW 19.16.100(5)(c). Praxis has not violated the CAA and, as a result, Kosovan cannot satisfy the first element of her CPA claim against Praxis.

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). What qualifies as a “public interest” in the context of a CPA claim has been treated by Washington courts as a question of law. *See Panag*, 166 Wn.2d at 54-55.

Kosovan’s complaint in this case is predicated entirely upon a letter sent by an insurance subrogation recovery agent to an insurance company. Neither Kosovan nor the at-fault driver in her motor vehicle accident ever saw or relied upon the letter.

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 bargainiers 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.

Kosovan’s assertion that Praxis should have “procedures to prevent what happened here” is entirely unsupported by Washington Law. Kosovan herself fails to proffer any legal authority evidencing that “procedures” are required or any facts supporting the assertion that Praxis lacked the same. App. Br. at p. 44. Accordingly, Kosovan is unable to satisfy the public interest requirement.

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 sent to Omni. Neither purported 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 166. 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.”). In *Lynn*, this Court upheld the trial court’s granting of the defendant’s summary judgment motion when the only evidence presented by the plaintiff establishing causation between the defendant and the claimed injury was inadmissible hearsay. *Id.* at 308-314.

As in *Lynn*, Kosovan did not submit any admissible evidence that would establish a causal connection between the October 19, 2017 letter and USAA’s alleged two-month delay in issuing payment.⁶ 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 and, at best, a hearsay statement. 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).

Kosovan’s unsupported argument also does not make sense. Any delay in settlement can only be attributed to USAA’s decision to delay payment of Roland’s policy limits and treatment of the subject subrogation letter as a lien. USAA’s insistence on written assurance before paying its limits was its own unnecessary decision. USAA should have known, as an auto insurer insurance, that any claim for PIP recovery asserted against

⁶ The legal authority cited by Kosovan is likewise inapposite where, as here, there is no evidence that Praxis’ acts caused any deprivation of property. *See App. Br.* at p. 45.

would be extinguished by its payment of policy limits to Kosovan. Contrary to Kosovan's unsupported assertions, nothing done by Praxis prevented USAA from settling with Kosovan at any time.

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 an IFCA notice/complaint regarding Omni to the Insurance Commissioner also fails to establish injury to business or property.

The alleged costs associated with mailing an IFCA Notice regarding Omni to the Office of Insurance Commissioner has no relevance to Praxis. Kosovan's reliance on the IFCA notice is further undermined by the fact that her Complaint contained no IFCA claim. Indeed, Kosovan could not have made an IFCA claim against Praxis because IFCA is expressly limited to a denial of coverage or payment of benefits "by an insurer." RCW 48.30.015(1). There is no allegation that Praxis is an insurer. Praxis did not insure Kosovan and did not deny any coverage or benefits owed to her. Because Kosovan did not and could not assert an IFCA claim against Praxis and the IFCA notice was directed at Omni, she simply cannot establish that the cost of mailing the IFCA notice was proximately caused by any conduct on the part of Praxis.

In addition, it is well established that the cost of instituting a CPA

action does not itself constitute injury. *Panag*, 166 Wn.2d at 60 (discussing *Demopolis v. Galvin*, 57 Wn. App. 47, 786 P.2d 804 (1990)). “Mere involvement in...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 related to the October 19, 2017 letter, costs related to sending that notice would not be a cognizable injury under the CPA.

C. Injury Cannot Arise From Attorney Fees or “Dealing With” An Unfair or Deceptive Act That Did Not Exist

Finally, Kosovan’s attempt to characterize attorney’s fees, “investigation,” and otherwise “dealing with” as injury recoverable under the CPA is without merit. *See* App. Br. at pp. 45-46.

First, Praxis did not engage in any unfair or deceptive act or practice at any time. Kosovan did not see the letter that is the subject of this appeal. There was no “improper reimbursement demand” or other impermissible act for Kosovan to deal with. Praxis acted in compliance with Washington law at all times.

Second, aside from the IFCA notice addressed above, there is no evidence in the record that Kosovan incurred any expenses constituting injury to her business or property. Instead, Kosovan merely argues in her brief that her attorney “took steps” and she “spent time.” App. Br. at p. 46. A party cannot establish the injury element of a CPA claim and defeat summary judgment based on self-serving and conclusory statements

regarding damages without supporting evidence. *Baldwin*, 165 Wn. App. at 471, 477-478 (Court affirmed trial court dismissal of CPA claims on summary judgment when alleged injury supported only by statements in affidavit and interrogatory responses of the plaintiff).

Furthermore, as explained above, attorney fees and costs incurred to pursue a CPA claim are not a cognizable injury to business or property under the CPA. *Panag*, 166 Wn.2d at 60 (“The cost of instituting a CPA action...could not, itself, constitute injury.”) Again, “[m]ere involvement in...having to prosecute a CPA counterclaim is insufficient to show injury to her business or property.” *Sign-O-Lite Signs*, 64 Wn. App. at 564.

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.

Kosovan did not prevail here because, as set forth above, the Superior Court properly granted summary judgment in favor of Praxis. In addition, Kosovan never moved for summary judgment against Praxis in

the Court below. As such, even if this Court finds that a genuine issue of fact precluded summary judgment in favor of Praxis, the most Kosovan should be entitled to is a remand for further proceedings. Kosovan's reliance upon *Sign-O-Lite* is misplaced because that case involved a situation where the plaintiff prevailed on summary judgment and successfully defended that ruling on appeal. *See Sign-O-Lite Signs*, 64 Wn. App. at 568. Kosovan did not prevail at the trial court level, never sought summary judgment against Praxis and her arguments on appeal fail. Accordingly, she is not entitled to fees.

CONCLUSION

For the reasons set forth above, Praxis respectfully requests that the decision of the Clark County Superior Court in this case be affirmed.

DATED this 16th day of September, 2020.

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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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