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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/Appellees

RESPONDENT OMNI INSURANCE COMPANY'S BRIEF

Scott M Collins, WSBA #28541
Attorneys for Respondent
Omni Insurance Company.
Law Offices of Scott M. Collins, LLC
7016 35th Ave NE
Seattle, WA 98115
206.729.0547
scott@smcollinslaw.com

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I. INTRODUCTION

Pursuant to Kosovan's Complaint the only legal cause of action alleged against Omni Insurance Company (hereinafter referred to as "Omni") is an alleged violation of the Consumer Protection Act (hereinafter referred to as CPA) (RCW 19.86.020, *et seq.*). On July 13, 2018 the court granted Praxis' Motion for Summary Judgment and Judge Stahnke signed an Order dismissing Plaintiff's claims against Praxis with prejudice. Thereafter, on May 15, 2020 Judge Stahnke granted Omni's motion for summary judgment.

The sole factual basis upon which Ms. Kosovan seeks to impose CPA liability on Omni is that Omni retained an independent contractor, Praxis Consulting, Inc. to pursue any potential subrogation recovery that was available to Omni. Praxis sent one letter to the tortfeasor's insurance company ("USAA"). When Praxis was made aware of the fact that the tortfeasor's liability insurance policy was insufficient to fully compensate Ms. Kosovan, no further action was undertaken by Praxis nor Omni. Neither Praxis nor Omni communicated with the tortfeasor, only the one correspondence to his insurer.

II. ASSIGNMENTS OF ERROR

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

III. STATEMENT OF THE ISSUES

1. Under the Washington Consumer Protection Act ("CPA"), does an insurer engage in a deceptive act or practice merely by referring a matter to an independent contractor who has sole authority to determine whether a PIP subrogation claim should be pursued?
2. Under the CPA, does an insurer and their independent contractor commit a deceptive act or practice by sending a demand letter to the tortfeasor's insurer prior to their insured's resolution of the underlying tort claim?
3. Does the "made whole doctrine" as set forth in *Thiringer v. American Motors Ins. Co.*, 91 Wash. 2d 215, 219, 588 P.2d 191 (1978) prohibit an insurer from invoking its right to subrogation against a third-party tortfeasor

and/or his insurer? Even when the subrogating insurer does not receive any recovery?

4. Does a single letter from one insurance carrier to another concerning subrogation rights "impact the public interest" under the CPA when no individual involved in the transaction or "consumer" even saw, reviewed or was even aware of the letter between the 2 insurers?
5. Is Omni responsible for the acts and/or omissions of its independent contractor who, pursuant to contract, had the sole right to determine whether to proceed with a subrogation claim, or how the subrogation claim was to be pursued?
6. Does a CPA claimant sustain any compensable injury due to an alleged delay in payment or for paying for postage for sending an IFCA notice when there is no evidence that the delay was proximately caused by an unfair or deceptive act by Omni and the plaintiff has not, in fact, ever filed an IFCA claim?

IV. STATEMENT OF THE CASE

Plaintiffs alleged cause of action arises out of an attempted recovery of Personal Injury Protection ("PIP") benefits paid by Omni on behalf of Aliona Kosovan. On December 6, 2015 Ms. Kosovan was injured in an automobile accident. (CP 81) Omni insured Ms. Kosovan pursuant to the terms and conditions of its policy. Omni paid Ms. Kosovan (her medical providers for treatment arising out of the accident) \$10,000 for medical expenses under its PIP coverage. (CP 581) This represented payment of the full policy limits. USAA Insurance ("USAA") is the insurance carrier for the tortfeasor. (CP 187) USAA accepted liability for this incident. (CP596)

As is the standard in automobile insurance policies in Washington, Omni's policy with Ms. Kosovan contained a subrogation and reimbursement clause. This clause provides, in pertinent part, as follows:

A. OUR RIGHT TO RECOVER PAYMENT

If **we** make a payment under this policy and the person to or from 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 it is necessary to enable **us** to exercise **our** rights; and
2. Nothing after loss to prejudice them....

(CP 56-57).

Praxis provides subrogation and reimbursement recovery services to Omni pursuant to a service agreement. (CP 172-175, CP177). Praxis and Omni are separate companies. They have no relationship other than principal and agent. There is no common ownership among the 2 companies. They do not share office space. (CP 310).

In October 2017 Omni sent to Praxis a list of closed files where PIP payments were made for Praxis to determine whether there was subrogation potential and to pursue those cases consistent with industry standards. Omni sends a list to Praxis of any file that is closed in any given month to determine whether subrogation potential exists. Praxis, as an independent contractor, has the authority through its agreement with Omni to identify, investigate, pursue and collect recovery against 3rd parties arising out of or related to the client's claims using customary industry collection practices. (CP 406-408). Customary industry collection practices may include, but are not limited to traditional subrogation, arbitration, litigation, apportionment, or enforcing a no-fault loss transfer. The sole

discretion as to how to best go about enforcing the subrogation rights or determining whether there is subrogation potential, lies with Praxis. (CP 406-408).

At the time the file was transferred to Praxis (October 2017), that statute of limitations for Kosovan's claim was set to expire on December 6, 2017. Pursuant to 2017 ORS 12.110, the statute of limitations is 2 years. The motor vehicle accident which is the subject of this lawsuit occurred on December 6, 2015. (CP 81) At that time, plaintiff had not yet filed suit to protect her rights and there is no indication that any settlement agreement was reached with the tortfeasor. Certainly, nothing that was ever conveyed to Praxis and/or Omni.

After receiving the referral, Praxis contacted USAA (the tortfeasor's insurer) and USAA confirmed that it was providing coverage for the at fault driver and accepted liability for causing the accident. On October 19, 2017 Praxis sent USAA a correspondence seeking reimbursement of Omni's PIP payment. (CP 185).

Additionally, Praxis sent a letter to USAA on October 27, 2017 along with a PIP ledger showing what has been paid. On November 2, 2017, a representative from plaintiff attorney's office acknowledged the October 27 letter to USAA and requested an itemized ledger showing what has been paid, dates of service and the amounts and total. This letter also discussed the rapidly approaching statute of limitations (in the next month) and requested a prompt response. (CP 130). No statement was made regarding the impropriety of the letter or of the fact that it was holding up a "settlement". On November 3 Praxis provided the letter of October 19, 2017 and the information that was requested by Kosovan's attorney. *Id.* Another follow-up email was made on the same day asking

for a more detailed ledger. *Id.* The records were sent by Praxis to plaintiff counsel on the same day. On November 8, USAA sent a letter to plaintiff counsel offering its policy limits to settle contingent on releases from Omni/Praxis and the doctor (CP 191). There is no evidence that either Omni or Praxis was made aware of this policy limits tender.

The next communication between Praxis and plaintiff counsel was on January 23, 2018 after this lawsuit was filed. In that email, Debra Ryan inquired as to why Praxis never received a phone call to discuss the whole issue prior to receiving the lawsuit. (CP 130) At that time, she told plaintiff counsel that once she received proof that USAA exhausted their limits they would have closed the file without the need for a lawsuit. (*Id.*). Plaintiff counsel responded: "in my experience, I often need a lawsuit to resolve issues like this. Adjusters often are familiar with Washington law, and I spent a lot of time explaining how it all works. Some of the time, the people I'm talking to don't believe me. So I found it is best for me to not to assume the role of training insurance adjusters on Washington subrogation law, but instead to file a lawsuit..." (*Id.*).

Plaintiff filed her complaint on January 10, 2018. (CP 1-2). Praxis made no further attempts to collect the subrogation claim. On February 19, 2018, USAA informed Praxis that it would not be reimbursing Omni for the PIP paid by Omni because plaintiff's damages exceeded the liability coverage available under the USAA policy at issue. (CP 131). Based on that representation, Praxis advised USAA that it would not be seeking reimbursement of the PIP on behalf of Omni and USAA could proceed with the settling of the claim. (CP 131) Neither Praxis nor Omni received payment on behalf of Omni from USAA or the tortfeasor.

On April 24, 2018 the deposition of plaintiff (CP 75) was conducted by Praxis and Omni. Amongst other admissions, plaintiff testified that she did not recall ever seeing the October 19, 2017 letter between Praxis and USAA, she was not aware of any interactions between her attorney and Praxis regarding a PIP lien; she was not aware of the status of any negotiations between her attorney and USAA regarding her bodily injury claim, and, plaintiff testified that she did not have an understanding as to why she sued Praxis or Omni, admitted she never spoke to anybody from Praxis, did not know who Praxis is, never received anything in writing from Praxis or could not identify anything that Omni or Praxis did that would be inappropriate or unfair. (CP 75). Furthermore, plaintiff testified that she could not identify any injury or damage that she may have sustained as a result of Praxis activities in writing a letter to USAA to inquire about pursuing the subrogation claim. (CP 75).

V. ARGUMENT

A. 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).

The Defendant may support a motion for summary judgment by merely challenging the sufficiency of that party’s evidence as to any material issue. *Young v. Key*

Pharmaceuticals, 112 Wn.2d 216, 770 P.2d 182 (1989); *Las v. Yellow Front Stores*, 66 Wn.App.196, 831 P.2d 744 (1992). A complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial *Guile v. Ballard Community Hospital*, 70 Wn. App. 18, 23, 851 P.2d 689 (1993).

B. KOSOVAN CANNOT CREATE A GENUINE ISSUE OF MATERIAL FACT FOR A CPA CLAIM AGAINST OMNI

Appellant's entire claim is based on the Washington State Consumer Protection Act. The Consumer Protection Act declares unlawful "unfair or deceptive acts or practices in the conduct of any trade or commerce." *RCW 19.86.020*. A private plaintiff must prove five elements: (1) unfair or deceptive act or practice (2) occurring in trade or commerce, (3) public interest impact, (4) injury to plaintiff in his or her business or property, and (5) causation. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780, 719 P.2d 531 (1986). The CPA prohibits 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).

"[W]hether the [alleged] conduct constitutes an unfair or deceptive act can be decided by the court as a question of law." *Leingang v. Pierce County Med. Bureau, Inc.*, 131 Wn.2d 133, 150, 930 P.2d 288 (1997).

1. Omni Did Not Engage in Any Deceptive Act or Practice

The act does not define the term “deceptive,” but implicit in that 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), *rev'd on other grounds*, 138 Wn.2d 248 (1999). To be “deceptive,” the act or practice must be one that “misleads or misrepresents something of material importance”. *Nguyen v. Doak Homes, Inc.*, 140 Wn.App. 726, 167 P.3d 1162, 1166 (2007). Kosovan cannot identify one fact (let alone a material one) that Omni misled her and thus cannot show deception.

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).

Omni took no action in this matter that could have possibly deceived Ms. Kosovan. There is no allegation that Omni failed to communicate with her during the handling of the claim. There is no allegation that Omni failed to extend coverage or somehow failed to pay or honor her PIP claim. Simply, there are no facts or evidence that Omni did any act that could be perceived as “deceptive” under the CPA. The only “act” performed by Omni as alleged by Ms. Kosovan, is that Omni should not have transmitted the PIP subrogation referral to Praxis. Nowhere in Ms. Kosovan's briefing does she

indicate that this sole act is deceptive. Therefore, this cannot form the basis of any claim against Omni.

a) Praxis' Act Was Not Deceptive

The one "act" that was performed by Praxis is the letter of October 19, 2017 from Praxis to USAA. The October 19, 2017 letter is not deceptive because it is an accurate and truthful demand letter from one insurance company to another. There is nothing "deceptive" in sending a letter to a tortfeasor's insurance company to advise that a carrier is intending on enforcing their contractual subrogation rights. Furthermore, plaintiff has testified under oath that she was never aware of this correspondence and never communicated in any way with Praxis or USAA (CP 75). How can Ms. Kosovan indicate she was somehow "deceived" when she was completely unaware of any communication between Praxis and USAA? How can this one letter written between two insurance companies be deceptive to the public at large? It can't. A subrogation demand letter may be deceptive if it mischaracterizes the interest being pursued, however; there is nothing deceptive about a letter that simply demands payment from an alleged tortfeasor's insurer. *Stephens v. Omni Ins. Co.*, 138 Wn. App. 151, 167, 159 P.3d 10 (2007), *aff'd sub nom.* "[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. *Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 34 (2009).

2. Omni Did Not Engage in Any Unfair Act or Practice

Because there was no deception on the part of Omni, Ms. Kosovan's claim centers around the mere "act" of sending a potential subrogation file to Praxis. It is Ms.

Kosovan's position that the mere act of transmitting a file to Praxis to potentially pursue subrogation is violative of the "made whole" doctrine under *Thiringer*. This, Ms. Kosovan argues, is an "unfair act". No court in Washington has ever taken such a bold and expansive reading of the "made whole" doctrine.

In *Alvarado v. Microsoft Corp.*, 2010 WL 715455 (W.D. Wash. 2010), Plaintiffs based their CPA claim on "unfair" conduct, rather than deceptive conduct, and argued that they "need only plead that [Defendant's] conduct is 'unfair,' not per se unfair [as declared by the Legislature], to satisfy the CPA." *Id.* at 3. The court rejected that view as "attempt[ing] to stretch the [CPA]," holding that "[c]onduct that is alleged to be simply unfair is not sufficient," and that "Hangman Ridge remains the law in Washington and **requires that the conduct be per se unfair, not merely labeled unfair by the Plaintiff.**" *Id.* (emphasis added). Only the legislature may designate certain acts to be "per se" unfair. *Hangman Ridge*. at 787 ("Where the Legislature specifically defines the exact relationship between a statute and the CPA, this court will acknowledge that relationship.") Allegations that certain conduct is unfair is not sufficient.

The only way to establish CPA unfairness is by pointing to a statute identifying Defendant's conduct as per se unfair trade practice. *Id.*; *Minnick v. Clearwire US LLC*, 683 F.Supp.2d 1179, 1186 (W.D. Wash.2010) ("Hangman Ridge...requires the Legislature to make determinations of unfairness"). In the instant matter, Kosovan merely states that the first prong of the CPA can be satisfied when Omni "breaches its duty of good faith as set out in RCW 48.01.030". This court should be reminded that Ms. Kosovan has not pursued bad faith claim in this action. Though there is no legal support

for her allegation, Ms. Kosovan opines that Omni's "act" of transmitting the potential assignment to Praxis to determine subrogation potential was an act of "bad faith".

Plaintiff asserts that pursuant to *Mahler v. Szucs*, 135 Wn. 2d 398, 957 P.2d 632 (1998) that Omni cannot even "attempt" to recover their PIP subrogation claim because Ms. Kosovan has not been made whole. Plaintiff tries to support her case by conflating "seeking to recover" as actually "recovering". Omni did not recover anything. Praxis stopped any attempt to recover the subrogation claim once they were notified that the tortfeasor's insurance policy was insufficient to cover plaintiff's alleged damages.

a. **"Recovering" is Different that "Attempting to Recover"**

Kosovan's main argument in this case is whether the act made by Omni to send the file to Praxis to explore the possibility of protecting their subrogation rights and the October 17, 2017 subrogation notice sent by Praxis to USAA was unfair.

There are, in effect, two features to subrogation. The first is the right to reimbursement. The second is the mechanism for the enforcement of the right. The right to reimbursement may arise by operation of law, termed legal or equitable subrogation, or by contract, called conventional subrogation. *Mahler v. Szucs*, 135 Wn. 2d 398, 412 (1998); *Ross v. Jones*, 174 Wash. 205, 216, 24 P.2d 622 (1933). By virtue of payments made to a subrogor stemming from the actions of a third party, a subrogee has a right of reimbursement under general subrogation principles. That reimbursement may be enforced as a type of lien against any recovery the subrogor secures from the third party. Alternatively, 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. *Mahler Id. at 413.*

In general, the right of reimbursement in the insurance setting may arise by contract or equitable means. The right may be enforced contractually by an insurer's right to recover from the insured the amount of payments made from any recovery the insured secures from a third-party tortfeasor **OR** by a legal action in the name of the insured against the tortfeasor. Washington Courts have articulated these basic principles of subrogation in the insurance setting in *Mahler; Metropolitan Life Ins. Co. v. Ritz*, 70 Wn.2d 317, 422 P.2d 780 (1967); *Thiringer v. American Motors Ins. Co.*, 91 Wn.2d 215, 588 P.2d 191 (1978); and *Leader Nat'l Ins. Co. v. Torres*, 113 Wn.2d 366, 779 P.2d 722 (1989).

According to the insurance policy, and Washington law, subrogation rights exist the moment the insurer makes payment to their insured under the policy. When the rights come into existence, PIP insurers always send notice letters to the tortfeasor's insurers to advise them of the potential subrogation claim. Most of the time, these letters go out upon first payment and before the full extent of the PIP insured's injuries and damages are known. Neither Washington case law or the "made whole doctrine" preclude an insurer from merely invoking its right to subrogation. Washington law only requires that when an insurer asserts its rights against the tortfeasor and obtains recovery, it must first apply the proceeds of any recovery to the uncompensated damage of the insured. There was no recovery by Praxis or Omni.

Ms. Kosovan appears to be arguing (without authority) that an insurer may only pursue a subrogation claim/recovery from its own insured. Ms. Kosovan argues that once an insurer is placed "on notice" that their policyholder may be intent on pursuing a claim on her own, the insurer no longer possesses any subrogation rights and must merely wait for their policyholder to reimburse them once recovery is made. Again, there is absolutely no authority for this proposition.

Kosovan argues that an insurer may only pursue recovery from its own insured. Kosovan conflates the equitable remedy of "subrogation" with the separate 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.

It appears to be Kosovan's position that that *Mahler* limited a PIP insurer's right of recovery to reimbursement from its insured. The rules set forth in *Mahler* and its progeny are meant to ensure that an insured obtains a full recovery before his first party insurer is allowed to retain any settlement proceeds that they obtain or before they can request reimbursement from their insured.

This expansive reading of *Mahler* is not the holding of this case, however; more importantly, the language analyzed by the court is different than that contained in the Omni policy with Ms. Kosovan. Omni's policy states:

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.
- However, **our** rights in this Paragraph (A.) do not apply under Part D, against any person using **your covered auto** with an **insured's** express or implied permission and within the scope of the permission granted.
- 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. However, any reimbursement due to **us** shall be reduced by **our** pro rata share of any reasonable and necessary costs and expenses, including deposition costs, witness fees and attorney's fees, incurred in bringing the claim.

State Farm's language in *Mahler* is more limiting. The language analyzed by the *Mahler* court stated: "we are subrogated to the extent of our payment to the proceeds of any settlement the insured recovers from any party liable..." It was based upon this language that the court determined that State Farm only possessed a right of reimbursement from their insured (Kosovan's position herein). That is not what Omni's policy states. In fact, the *Mahler* court goes to great lengths to articulate the basis of their holding when they state:

“Paragraph B of the State Farm policy establishes State Farm's right to reimbursement, but it articulates two distinct mechanisms for enforcement of the right.

In the first paragraph of Paragraph B, the phrase "[w]e 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 or property damage" is significant. First, this phrase refers only to the proceeds of settlements, and not to the proceeds of any judgments the insured might obtain. _ Second, the phrase speaks of the "proceeds of any settlement," thereby suggesting State Farm's contractual right to recover payments from its insureds under PIP or UIM coverage arises only *after* settlement.

There are obviously no proceeds of a settlement until the settlement occurs”

Mahler, 135 Wn.2d 419.

The *Mahler* acknowledged the different methods to which the insurer can' pursue their subrogation rights when they stated: “These cases are consistent with the general view that subrogation creates in the insurer, by contract or equity, a right to be reimbursed. The enforcement of the interest, whether by a type of lien against the subrogor/insured's recovery from a tortfeasor or by an action by the subrogee/insurer in the name of the insured against the tortfeasor, is governed by the general public policy of full compensation of the insured, tempered by the principle that the insured and/or a tortfeasor may not knowingly prejudice the right of the insurer to be reimbursed.”

Mahler, 135 Wn.2d 417-418. To use this holding as the basis to argue that an insurer cannot even “attempt to collect” monies paid out on behalf of their insured until the insured is fully compensated is erroneous.

Additionally, 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 56-57). The Omni Policy then incorporates the made-whole doctrine by stating that its entitlement to recover subrogation arises once the insured has been made whole. (CP 56-57). 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, the mere act of asserting subrogation rights, without obtaining actual recovery, does not violate the made-whole doctrine.

Ms. Kosovan also cites *Daniels v. State Farm Mut. Auto. Ins. Co.* 193 Wash. 2d 563, 444 P.3d 582 (2019) for the overly broad notion that an insurer is not entitled to "recover" what it is paid until the insured is made whole. Again, plaintiff conflates actual recovery-which did not occur in this case- vs. attempting to recover. In *Daniels*, the distinct difference is the carrier actually obtained the money and the issue was whether they had to "fully reimburse". The Court found that the "made whole doctrine" required the insurer to pay proceeds of any subrogation action to the plaintiff first, until they were made whole. Nowhere in the *Daniels* decision to the court rule that the insurer was not even allowed to attempt to seek subrogation before their insured was made whole. That is different from what happened here. Neither Omni nor Praxis received any money from the tortfeasor or their insurer.

The fallacy in Ms. Kosovan's position is made even clearer under the facts of this case. By Ms. Kosovan's counsel's own correspondence to Praxis, at the time of the October 17, 2017 letter, the statute of limitations in the underlying claim against the

tortfeasor was to run in less than two months. At that time, plaintiff had not yet filed suit to protect her rights and there is no indication that any settlement agreement was reached with the tortfeasor. There is no evidence this was ever conveyed to Praxis and/or Omni. If Ms. Kosovan's position is to be the law of the state, there would be no way for the insurer to protect itself and their subrogation rights if the PIP insured does not file suit or settle her claim against the tortfeasor. This would lead to absurd results.

In this case, Ms. Kosovan merely alleges that the “act” of transmitting a potential subrogation file to an independent entity, who, in turn, sent a letter to the tortfeasor’s insurer advising them of their subrogation interest is “unfair”. Ms. Kosovan then bootstraps that proclamation that this “act” is an act of bad faith prohibited by the WAC. Unfortunately, there is no legal precedent for her proclamation. As such, Kosovan has no facts or evidence to support "unfairness" under the CPA.

Additional authorities undermine the expansive position taken by Kosovan. The Washington Supreme Court has never announced a rule that prohibits an “attempted” subrogation recovery. *See, e.g. Thiringer v. American Motors Insurance Co.*, 91 Wn.2d 215, 219, 588 P.2d 191 (1978). Following *Thiringer*, the Court has stated 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 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. 22. The Supreme Court stated an insurer could fulfill its obligations under the made-whole doctrine 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).

b. The Praxis Letter at Issue is Not Deceptive Nor Unfair

Plaintiff's reliance on *Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 34 (2009) and *Stephens v. Omni Ins. Co.*, 138 Wn. App. 151, 158 (2007) is also without merit. In fact, a careful reading of both decisions supports the conclusion that in this case there has been no unfair or deceptive act or practice. Specifically, in both cases the credit collection agency wrote directly to the alleged tortfeasor and represented to that tortfeasor that they were pursuing a collection action for an established debt. The Court concluded in that the form of a notice to the alleged tortfeasor was potentially deceptive.

In this case, there was no correspondence notification, or anything ever sent to the Kosovan by Praxis. The notification of a claim was sent to USAA on October 14, 2017. There is no explanation by Kosovan as to how she could be potentially deceived in regard to a letter that was never even seen by her. There is no evidence that USAA was ever deceived or confused at all by the correspondence that was sent to USAA by Praxis.

As set forth above, the notice was not even sent to Kosovan in this case. Regardless, even if it had been sent to the Plaintiff as opposed to USAA then even under the *Stephens* and

Panag analysis there would be no deception given the language of the notice.

The Praxis' October 19, 2017 notice to USAA provided as follows:

Our investigation of the accident referenced below indicates liability risks with your insured... On behalf of our client we now turn to you for reimbursement under the Personal Injury Protection Law for benefits and expenses incurred by them to date in the amount of \$10,000.

(CP 185).

The Court also addresses what is necessary to establish a deceptive practice. The Court clearly held whether the questions of the conduct **had the potential to deceive the alleged injured party** (emphasis added). Moreover, the Court specifically held that whether actions are deceptive is reviewable as a question of law. See *Stephens* at 166, and *Leingang v. Pierce County Medical Bureau Inc.*, 131 Wn. 2nd. 133, 930 P. 2nd 288 (1997).

Subsequent Washington case law has also drawn a clear distinction between the facts in *Panag* and cases where a collection notice was not deceptive. For example, in *Kelly v. Cavalry Portfolio Servs. LLC*, 2016 Wash. App. LEXIS 3090 (Dec. 28, 2016) (unpublished decision) the Court pointed out that implicit in the definition of “deceptive” is the understanding that the practice misrepresents something of “material importance” *Id.* at 7. The Court held that the notice that was sent was not deceptive due to the fact it simply set forth a claim even though the letter misidentified the owner with the debt. Once again, that is what occurred in this case.

Finally, the very case law relied upon by Appellant specifically states that there is no Washington law prohibition on an insurer or its agents attempting to recover a subrogated interest. The only limitation is that the insurer or its agent cannot act in a

deceptive manner. This is further made clear in the *Stephens v. Omni Ins. Co.*, 138 Wn. App. 151, 158 (2007) decision where the Court held:

Our holding does not infringe on the right of insurance companies to recover subrogation interests or to employ collection agencies to do so, but they may not overreach by using deceptive means to accomplish that objective.

Stephens at 171.

Here, there was never any correspondence or notification, or any other document or communication sent to Ms. Kosovan. Appellant fails to explain how she could potentially be deceived by a letter she never saw. There is no evidence that USAA was ever deceived or confused by the correspondence. Simply put, there is no evidence that anyone was engaged in a misleading or deceptive act or that anyone, in fact, was misled or deceived.

Kosovan cannot set forth any evidence that Omni engaged in any unfair act or practice.

C. THERE IS NO COMPENSABLE INJURY OR CAUSATION

1. ALLEGED DELAY IN SETTLEMENT

Kosovan relies on an alleged delay in payment in her third party claim from USAA. However, there is no evidence that the alleged delay was caused by any conduct on the part of 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 Omni's transmittal of the file to Praxis. *Lynn v. Labor Ready, Inc.*, 136 Wn. App. 295, 306, 151 P.3d 201 (2006).

To support her claim of injury, Kosovan has 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. 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. Though Kosovan's attorney knew the name and contact information of the adjuster at USAA, he did not obtain a declaration from the adjuster or conduct her 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 transmittal of the file to Praxis or the October 19, 2017 letter, the alleged delay does not satisfy the injury element of the CPA.

Additionally, there is enough evidence for the court to conclude that the alleged "delay" was proximately caused by the actions of Kosovan. As is stated in the facts

above, Praxis sent a letter to USAA on October 27, 2017. Less than one week later, a representative from plaintiff attorney's office acknowledged the October 27 letter to USAA and requested an itemized ledger showing what has been paid, dates of service and the amounts and total. This letter also discussed the rapidly approaching statute of limitations (in the next month) and requested a prompt response. (CT 130). No statement was made regarding the impropriety of the letter or the fact that it was holding up a "settlement". On November 3 Praxis provided the information that was requested. *Id.* Another follow-up was made on the same day asking for a more detailed ledger. *Id.* The records were sent by Praxis to plaintiff counsel on the same day. On November 8, USAA sent a letter to plaintiff counsel offering its policy limits to settle contingent on releases from Omni/Praxis and the doctor (CP 191). There is no evidence that either Omni for Praxis was made aware of this policy limits tender.

The next communication between Praxis and plaintiff counsel was on January 23, 2018 after this lawsuit was filed. In that email, Debra Ryan inquired as to why Praxis never received a phone call to discuss the whole issue prior to receiving the lawsuit. At that time, she told plaintiff counsel that once she received proof that USAA exhausted their limits they would have closed the file without the need for a lawsuit.(CP 130). Plaintiff counsel responded "in my experience, I often need a lawsuit to resolve issues like this. Adjusters often are unfamiliar with Washington law, and I spent a lot of time explaining how it all works. Some of the time, the people I'm talking to don't believe me. So I found it is best for me to not to assume the role of training insurance adjusters on Washington subrogation law, but instead to file a lawsuit..." *Id.*

Plaintiff's argument that it was that the actions of Omni/Praxis that caused the "delay" in the USAA liability funds from being released. It can equally be said, that the delay was caused primarily by plaintiff and her attorneys failing to communicate in any substantive way with Praxis and/or Omni to advise them that the policy limits have been tendered or discuss Omni's claim in any way. Instead, they chose to file a lawsuit. Which delayed the resolution further Ms. Kosovan's argument that the alleged delay was caused solely by Praxis and/or Omni is unsupported by any admissible evidence in this case.

2. IFCA Mailing

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). Once again, it must be pointed out that Ms. Kosovan has not alleged an IFCA claim in the instant lawsuit.

D. KOSOVAN DOES NOT SATISFY THE PUBLIC INTEREST PRONG OF A CPA CLAIM

Appellant's sole argument directed towards Omni concerning the public interest issue is a simple cursory conclusion that since Omni allegedly failed to “adhere to the terms of its own policy which incorporates the rules set out in *Thiringer v. American Motors Ins.*, *supra*, and *Mahler v. Szucs*, *supra*”, this amounted to a breach of its duty of good faith. Appellant also alleges that Omni acted without reasonable justification in breach of a WAC

violation and therefore, it is of public interest. These self-serving conclusory declarations by the appellant in no way conform a basis to satisfy this element of a CPA claim.

Kosovan further argues that the public interest requirement is satisfied because allegedly Omni does not have any procedures in place to determine whether an insured is pursuing a claim against a tortfeasor or whether the damages are in excess of the tortfeasor's liability policy. Therefore, she concludes, this affects the public interest. Nowhere in Ms. Kosovan's lower court's submission does she set forth any admissible facts to support the following allegations. Mere allegations are insufficient to create a genuine issue of material fact on summary judgment.

The whole purpose of summary judgment procedure would be defeated if a case could be forced to trial by a mere assertion that an issue exists without any showing of evidence. *3 Barron and Holtzoff, Federal Practice and Procedure § 1235*, p. 141. Unsupported allegations do not create a question of fact. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989).

There is no evidence as to what Omni did or did not do. Appellant is merely presenting a legal argument without factual or legal support.

Concerning the letter at issue, it is a demand letter sent by one insurance company to another. Ms. Kosovan never saw the correspondence and did not rely upon it in any fashion. 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 must fail.

E. OMNI IS NOT RESPONSIBLE FOR THE ACTIONS OF PRAXIS

Plaintiff’s only allegation against Omni is that since Omni retained Praxis to pursue a subrogation claim and Praxis sent a letter to USAA that Omni is liable for Praxis actions. Plaintiff’s allegations in the complaint are as follows: “defendant Omni made itself liable under the Consumer Protection Act, RCW 19.86.020., et seq., when its: a) attempted to collect a PIP reimbursement directly from the Plaintiff’s tortfeasor; attempted to collect PIP reimbursement when the plaintiff was not “made whole”; hired an unlicensed debt collector to collect its PIP reimbursement from the plaintiff.”

Omni retained a professional service to pursue a subrogation claim. Omni referred the matter to Praxis by sending copies of medical bills and supporting documentation they had in their possession regarding the claim. Once the referral was sent to Praxis, Praxis has the sole discretion and authority to even determine whether they would proceed to attempt to collect the subrogation claim.

Omni has no relationship to Praxis and retained them as an independent contractor. Plaintiff admits that Praxis is an independent contractor. After sending the materials to Praxis, Omni had no more involvement in Praxis efforts to collect the

subrogation claim. *Id.* Omni doesn't exercise control over how Praxis pursues recovery of subrogation claims. *Id.* Omni does not review letters or notices sent by Praxis and has no input or involvement in the generation of those letters. (*CP*). Praxis has sole discretion over the collection of the claim and whether the claim should be pursued, compromised, or abandoned. (*CP*). Praxis is an independent contractor. (*CP*).

Omni is not a joint tortfeasor with Praxis. *See Elliott v. Barnes*, 32 Wn. App. 88, 90, 645 P.2d 1136 (1982). Omni is not a concurrent tortfeasor. Concurrent tortfeasors are those whose independent acts breaching separate duties concur to produce the injury. *Seattle-First Nat'l Bank v. Shoreline Concrete Co.*, 91 Wn.2d 230, 235, 588 P.2d 1308 (1978). The mere referral of potential subrogation claims to Praxis breached no duty. To the extent that Kosovan argues that Omni should be vicariously liable for Praxis' acts either as a joint venturer or on the theory that Praxis was Omni's agent, Omni had no right of control over Praxis means of collection. (*CP*). The right to control is indispensable to vicarious liability. *See Adams v. Jahnston*, 71 Wn. App. 599, 610-11, 860 P.2d 423 (1993) (joint venturers must have an equal right of control); *Kroshus v. Koury*, 30 Wn. App. 258, 267, 633 P.2d 909 (1981) (principal liable only for agent's activities over which principal has a right of control). Because Kosovan cannot show that Omni controlled any aspect of notices sent by Praxis, there is no basis upon which to impose vicarious liability.

The essential difference between the two relationships is the control over, or right to control, the manner or means of performing the work. If the employer or principal exercises or retains the right of control over the manner or means by which the work is to be performed, then the one performing the work is an agent. On the other hand, if

the principal exercises or retains only the right to control the result of the work and not the manner or means by which it is to be accomplished, then the one performing the work is an independent contractor. *See generally DeWolf and Allen, 16 Washington Practice: Tort Law and Practice § 3.12 (3d ed.); Hollingbery v. Dunn, 68 Wn.2d 75, 411 P.2d 431 (1966).*

WPI 50.11 is very clear when it states: “an independent contractor is a person who undertakes to perform work for another but who is not subject to that other person’s control of, or right to control the manner or means of performing the work. One who engages an independent contractor is not liable to others for the negligence of the independent contractor.”

It is not disputed, and has been admitted by the plaintiff, the Praxis is an independent contractor. Even if Praxis wasn’t negligent (which they weren’t), Omni is not responsible for their actions. Plaintiff’s only allegations against Omni arise from the actions of their independent contractor.

F. 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.

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.

VI. CONCLUSION

One must not lose sight of the essential facts in this case, which are not in dispute. Ms. Kosovan is not alleging that Omni improperly denied coverage or improperly withheld benefits. They did not. Plaintiff has not alleged an insurance bad faith claim. Plaintiff has not alleged that Omni violated the Insurance Fair Conduct Act (IFCA). Plaintiff has only alleged that Omni's actions were in violation of the Washington Consumer Protection Act.

It is plaintiff's sole allegation in support of her cause of action for an alleged violation of the CPA, that Omni transmitted a file to an independent contractor (Praxis) they retain to perform subrogation services. This independent contractor had the sole authority to determine whether subrogation should be pursued, and how it was pursued. The independent contractor sent one letter to the tortfeasor's insurance company to advise of the subrogation claim. When the independent contractor realized that Ms. Kosovan's claim was more than the tortfeasor's insurance policy, the claim was not pursued. There was never any contact by Omni and there was never any contact or communication

between Omni, Praxis or Ms. Kosovan. Praxis took no further action on behalf of Omni.
That is the claim.

Plaintiff's sole basis to impose liability is the allegation that neither Omni nor Praxis should have even attempted to "seek" subrogation under the facts of the case. There is no legal authority for this proposition. The lower court's ruling should stand.

RESPECTFULLY SUBMITTED this 16th day of September, 2020

Scott M. Collins
Scott M. Collins
Attorney for Respondent
Omni Insurance Company

DECLARATION OF SERVICE

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

Via electronic mail:

Counsel for Plaintiff/Appellant Aliona Kosovan
Gideon D. Caron
Caron, Colven, Robison & Shafton
900 Washington Street, Suite 1000
Vancouver, WA 98660
E-mail: gcaron@ccrslaw.com

Counsel for Respondent Praxis Consulting, Inc.
Thomas Lether
Westin McLean
Lether & Associates PLLC
1848 Westlake Ave. N, Ste. 100
Seattle, WA. 98109
E-mail for Mr. Lether: tlether@letherlaw.com
E-mail for Mr. McLean: wmclean@letherlaw.com

DATED at Seattle, Washington on the 16th day of September, 2020.

_____/s/
Shannon Tomsheck
Shannon Tomsheck, Paralegal

LAW OFFICES OF SCOTT M COLLINS

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