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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
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COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

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GARY WADDOUPS

v.

NATIONWIDE LIFE INSURANCE COMPANY, ET AL.

Benton County Superior Court Cause No. 13-2-00759-0

Court of Appeals Division III Cause No. 332578

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REPLY BRIEF

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## I. INTRODUCTION

Gary Waddoups does not question his father's wisdom in purchasing the subject annuity, rather he questions the respondents' honesty in selling the annuity to his father. Nationwide and Permann rely heavily on Permann's account of his interactions with Marr in their effort to uphold summary judgment. For summary judgment, all of the evidence must be viewed in a light most favorable to the non-moving party. *Holiday Resort Community Ass'n v. Echo Lack Associates, LLC*, 134 Wn. App. 210, 219, 135 P.3d 499 (2006). Here, the documents tell a different story from what Permann recounts. The annuity application and contract give the impression that the annuity provided a death benefit because they required Marr to name a beneficiary. In addition, the contract information page listed his wife Elizabeth Waddoups as his primary beneficiary, and nowhere is the absence of a death benefit fairly disclaimed, as required by law.

A consumer should be able to rely on the annuity contract and other sales documents to determine exactly what is being purchased. Gary Waddoups contends that his father did not have that opportunity in this case. To get around this, Nationwide and Permann twist the common meanings of critical terms like "beneficiary". They also rely on a brochure that was for a different insurance product than what was actually sold, and they rely on Permann's testimony about conversations he allegedly had with Marr. *CP* 419-21. If Nationwide and Permann must rely on verbal communications to show that they conveyed critical information to Marr,

that is strong evidence that the documents themselves are unfair and deceptive. Nationwide cannot show that any of the documents related to the sale clearly communicated the absence of a death benefit to Marr. This includes the “supplemental agreement” which confusingly describes a “straight life” annuity not the “single life” annuity that Marr purchased. *CP* 766. In addition, it is undisputed that the annuity contract was delivered to Marr three weeks late, after he had started receiving payments, and there is no evidence that he actually received the supplemental agreement. *CP* 694; 765-67.

On top of this, Permann has no correspondence with Marr evidencing their conversations about the annuity purchase to show what Marr did or did not understand. At the time of sale, Permann gave Marr a buyer's guide brochure for deferred annuities. *CP* 759-64. The annuities Marr purchased prior to this annuity were all deferred annuities. *CP* 555-56. Deferred annuities generally provide a death benefit, and Marr's deferred annuities all had death benefits. *Id.* However, Marr was not sold a deferred annuity, he was sold an immediate annuity with no death benefit, which is an entirely different product. *CP* 674. As a consequence, the brochure's title implied that the product Marr purchased was a deferred annuity and that it contained a death benefit like the other deferred annuities Marr had previously purchased.

Because they documentation to support their position, Nationwide and Permann rely on Permann's account of his conversations with Marr to

show, as they allege, that Marr knew exactly what it was he was purchasing and that he bought what he wanted. This overlooks that for summary judgment purposes, Permann cannot be taken at his word. *Balise v. Underwood*, 62 Wn.2d 195, 381 P.2d 966 (1963). A reasonable juror could find that Permann lacks credibility and that his accounts of his dealings with Marr are self-interested and inconsistent with his prior statements and with the documentation in this case. In addition, Marr is no longer alive to contradict Permann's uncorroborated account.

Based on the documentation alone, a reasonable juror could find that Marr understood and was relying on the annuity's provision of a death benefit. CP 677, 684. Marr's ledger book, contemporaneously written in his own hand, shows his calculations of the annuity's value decreasing on a month by month basis. CP 385-86; *see also attached*. Marr's entries for the subject annuity are on the same pages that show the cash value figures for all the other annuities Marr owned. The cash values he entered for the other annuities were the actual death benefit amounts. His ledger pages also show that Marr added the cash value of this annuity into a grand total for all of his annuities. His accounting was clearly incorrect, but that incorrect accounting is clear evidence from which a jury could find that he misunderstood what he had been sold. Marr's misunderstanding was perpetuated by Permann's preparation of account summary statements which showed the annuity as an asset with a cash value, rather than as a stream of monthly income with zero cash value. CP 563-76. In addition,

one account summary statement incorrectly shows Elizabeth Waddoups as the annuity's beneficiary well after the annuity purchase, which is inconsistent with the respondents' explanation of the contract definition of "beneficiary". *CP 565*. This repeated presentation to Marr that the annuity had a cash value and the naming of his wife as its beneficiary was deceptive. Respondents spend very little time addressing these facts in their briefing, and for good reason. Marr was sold this no death benefit annuity at a time when he suffered from numerous life-threatening medical conditions. He was eight-five years of age, and based on the nearly six years it would take for him to merely recover his initial premium, the annuity was highly unsuitable. Permann made no effort to properly evaluate the suitability of the annuity. *CP 413*. From these facts, a reasonable trier of fact could find that Permann breached his fiduciary duty and that Nationwide and Permann's unfair and deceptive acts and practices caused Marr's estate to suffer this loss. Consequently, this matter must be remanded for trial.

## II. ARGUMENT

### **A. The Sale Of The Annuity Was Per Se Deceptive As The Form Of The Annuity Violated The Statute And Under The "Capacity To Deceive" Test, Marr's Understanding Of The Annuity Is Irrelevant As To Whether The Annuity Is Deceptive As A Matter Of Law.**

The sale of the annuity to Marr was deceptive as a matter of law because the annuity violated RCW 49.23.490 by failing to provide notice of no death benefit in a prominent place in the contract and because the contract had the capacity to deceive.

**1. The Annuity's Failure To Provide A Prominent Statement That No Death Benefit Was Included Violates RCW 49.23.490 And Is Per Se Deceptive As A Matter Of Law.**

The Court should conclude that the sale of the annuity with no death benefit which did not include “a statement in a prominent place in the contract that such benefits are not provided” is in violation of RCW 48.23.490. In their brief, respondents argue that their violation of the statute is waived and that the statute means something other than what it says. *Respondents' Joint Brief, pgs. 20-21*. Both of these arguments are incorrect. Gary Waddoups consistently argued at the trial court that the lack of disclosure regarding the death benefit was a deceptive act in violation of the CPA. Further, there is no reasonable interpretation of RCW 48.23.490 which would result in the annuity contract complying with the statute. Therefore, the Court should conclude that the annuity contract was deceptive as a matter of law.

**a. Appellant Has Consistently Argued Both At The Trial Court And On Appeal The Failure Of The Annuity To Disclose The Absence Of A Death Benefit Preserving The Issue For Appeal.**

Nationwide's lack of disclosure that the annuity did not include a death benefit was properly preserved for this appeal. Under RAP 2.5(a) “[t]he appellate court may refuse to review any claim of error which was not raised in the trial court.” A matter is raised so “long as the basic argument has been made at the trial court level.” 14A Wash. Prac., Civil Procedure § 34:1 (2d ed.). “[A]ppellate courts will be willing to consider

newly-discovered authorities —statutes, court rules, and case law— for the first time on appeal.” *Id*; see e.g. *Osborn v. Pub. Hosp. Dist. I, Grant Cnty.*, 80 Wn.2d 201, 206, 492 P.2d 1025, 1028 (1972) (“The defendant argues we should not consider RCW 70.41 [...] since they were not brought to the attention of the trial court, and were raised for the first time on appeal. We disagree.”); *Walla Walla Cnty. Fire Prot. Dist. No. 5 v. Washington Auto Carriage, Inc.*, 50 Wn. App. 355, 358 n. 1., 745 P.2d 1332, 1334 (1987) (“Here, the [appellant] did request prejudgment interest at the trial court level. There is no rule preventing an appellate court from considering case law not presented at the trial court level.”); *State Farm Mut. Auto. Ins. Co. v. Amirpanahi*, 50 Wn. App. 869, 872, 751 P.2d 329, 330 (1988) (“Although appellants did not argue [a specific case] to the trial court, they did argue the basic reasoning that the parties to the arbitration determined the scope of the arbitration which corresponded to the policy limits and that the arbitrator exceeded his authority”).

Here, there is no serious dispute that appellant adequately preserved this issue for appeal. The Court need look no further than Gary Waddoup’s memorandum in opposition to summary judgment. See e.g. *CP 584* (“The sales materials, annuity application and contract did not disclose the absence of a death benefit.”); *CP 589* (“Washington law recognizes a private cause of action for violation of insurance statutes and regulations under the Consumer Protection Act (‘CPA’)”); *CP 595* (“a reasonably prudent consumer in H. Marr Waddoups’ position might well have been

totally unaware that the annuity contract provided no death benefit.”); *CP* 596 (“The only document that addresses the absence of a death benefit, and only in fine print, is the Supplemental Agreement Data Page for Individual Annuity Contract, which describes the annuity as a ‘straight life’ annuity”); *Id.* (“The evidence clearly reflects that Nationwide's failure to disclose a material term, that is the absence of a death benefit, deprived H. Marr Waddoups the opportunity to make a knowing and intelligent buying decision.”). Respondents’ bare assertion that appellant failed to preserve this error before the trial court is completely unsupported by the record. Therefore, the issue is properly before the Court.

**b. RCW 48.23.490 Prohibits The Sale Of An Annuity With No Benefit Unless The Absence Of A Death Benefit Is Stated In A Prominent Place In The Contract.**

The Court should conclude that the contract’s failure to include “a statement in a prominent place in the contract that such [death] benefits are not provided” violated RCW 48.23.490. Statutory interpretation is a question of law. *Bostain v. Food Exp., Inc.*, 159 Wn.2d 700, 708, 153 P.3d 846, 850 (2007). The goal is to effectuate the legislature's intent. *Id.* (citing *State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 281 (2005)). “Plain meaning is determined from the ordinary meaning of the language used in the context of the entire statute in which the particular provision is found, related statutory provisions, and the statutory scheme as a whole.” *Id.*

RCW 48.23.490 reads as follows:

**Statement required in contract without cash surrender or death benefits.**

Any contract which does not provide cash surrender benefits or does not provide death benefits at least equal to the minimum nonforfeiture amount prior to the commencement of any annuity payments shall include a statement in a prominent place in the contract that such benefits are not provided.

The statute speaks for itself. If an annuity does not provide cash surrender or death benefits, it must state so in a prominent space. Pushing against the plain reading, respondents seek to latch onto “prior to the commencement of any annuity payments” without realizing that this portion of the statute is providing a calculation input for the formula provided in RCW 48.23.440.

RCW 48.23.440 provides:

The minimum values as specified in RCW 48.23.450, 48.23.460, 48.23.470, 48.23.480, and 48.23.500 of any paid-up annuity, cash surrender, or death benefits available under an annuity contract shall be based upon minimum nonforfeiture amounts as defined in this section.

RCW 48.23.440 (emphasis added). In other words, if an annuity is going to provide cash surrender or death benefits, they need to be more than the “minimum nonforfeiture amount” calculation set forth in the statute. For policies with cash surrender benefits, the benefits must “not be less than the present value as of the date of surrender of that portion of the maturity value of the paid-up annuity benefit which would be provided under the contract at maturity arising from considerations paid prior to the time of cash surrender...” RCW 48.23.460. In such contracts, the death benefit “shall be at least equal to the cash surrender benefit.” *Id.* This amount equals the

“minimum nonforfeiture amount” required as increased under RCW 48.23.440(2) (essentially, an interest rate of 3% or lower based on the provided formula) and as decreased under RCW 48.23.440(1) (allowable annual fee, any borrowing against the annuity by the annuitant, etc.). Where there is no cash surrender value or death benefit, the “minimum nonforfeiture amount” is calculated “on the basis of such interest rate and the mortality table specified in the contract for determining the maturity value of the paid-up annuity benefit” as modified by RCW 48.23.440(1-2). RCW 48.23.470.

When reviewing the interplay between these statutes, it shows that the “minimum nonforfeiture amount prior to the commencement of any annuity payments” referenced in RCW 48.23.490 is providing the time when the minimum non-forfeiture amount is being measured. With this, the language of the statute is best understood as follows:

**Statement required in contract without cash surrender or death benefits.**

Any contract which does not provide cash surrender benefits or does not provide death benefits at least equal [to X amount] shall include a statement in a prominent place in the contract that such benefits are not provided.

RCW 48.23.490. This is also supported by the practical implications of the respondents’ interpretation. Under respondents’ interpretation, the statute would only apply in the perverse scenario where there was: (1) an annuity; (2) with no death benefit; and (3) the annuitant’s beneficiary received nothing even if the insurer was yet to make a single payment to the

annuitant. Such a contract would be the definition of an unfair contract prohibited under the CPA. As this is not a reasonable interpretation of the statutory scheme, the Court should squarely reject the respondents' proffered interpretation and conclude that the statute requires that the lack of a death benefit be stated in a prominent place in the contract. As there is no dispute that the contract did not contain such statement, the violation of RCW 48.23.490 is a per se unfair act in violation of the CPA.

**2. The Annuity Is Deceptive Because It Had The Capacity To Deceive Any Reasonable Consumer In Marr's Position.**

From the consumer's perspective, the challenge with an annuity is that it is a contract and not a tangible asset. A consumer's only opportunity to "kick the tires" on a potential annuity purchase is his or her opportunity to read the contract paperwork. If the annuity paperwork fails to clearly describe or in fact misrepresents how the annuity works, so as to build a false impression of what the annuity provides and does not provide, it is by definition deceptive whether or not any particular consumer was actually deceived.

Washington law recognizes the "capacity to deceive" test. *Dwyer v. J.I. Kislak Mortg. Corp.*, 103 Wn. App. 542, 547, 13 P.3d 240 (2000). An act or practice is "deceptive" if it has the capacity to deceive a substantial portion of the public. *Id.* "Neither intent to deceive nor actual deception is required." *Panag v. Farmers Ins. Co. of Washington*, 166 Wn.2d 27, 37, 204 P.3d 885 (2009). A communication is deceptive if the "net impression"

is likely to deceive. *Id.* at 50. Furthermore, *caveat emptor* no longer applies to consumer transactions where material facts are not readily observable. *Nguyen v. Doak Homes, Inc.*, 140 Wn. App. 726, 731, 167 P.3d 1162 (2007). This is particularly true in the context of the insurance industry. *Chandler v. State, Office of Ins. Com'r*, 141 Wn. App. 639, 659-60, 173 P.3d 275 (2007). Failure to disclose a fact which a seller is in good faith bound to disclose is inherently deceptive and in some cases will even rise to the level of fraud. *Testo v. Russ Dunmire Oldsmobile, Inc.*, 16 Wn. App. 39, 51, 554 P.2d 349 (1976)(seller's failure to disclose that vehicle placed for sale in a used car lot was used as a race car was inherently dishonest because of buyer's inability to perceive through normal means).

In this case, the annuity application and contract are inherently deceptive because they do not clearly disclaim the absence of a death benefit. *CP 677*, 680-93. The fact that a primary beneficiary was officially designated on the application and contract, including such details as the allocation to her and the listing of her social security number, her relationship to the annuitant and birth date, communicates to the buyer that the annuity would pay a death benefit. Having a buyer designate a beneficiary when there is no benefit is deceptive. As respondents' point out, the body of the contract does state that payments will cease upon the death of the annuitant. *CP 689*. However, this can be understood to mean that although the monthly payments will cease the annuity nonetheless

provides a death benefit payable to the primary beneficiary listed on the application and contract information sheet. *CP 677, 684.*

No reasonable consumer would understand “beneficiary” to mean only the person to whom a refund is paid if the annuitant dies before the contract has commenced. Nationwide’s misleading use of the term “beneficiary” is akin to a consumer making a return to a store. If the product's box is unopened, the store may take the product back as a return. Likewise, if the annuitant paid a single premium and then passed away before the contract payments commence, there is an expectation of a full return of that premium, but the person that would receive the return of premium is not a “beneficiary” of a death benefit. The common use of the term “beneficiary” denotes more than just the return of the purchase price, before any benefits are received, lasting in this case for a period of only 28 days. This is particularly deceptive when all the annuities Marr owned and was familiar with provided a true death benefit. It is unimaginable to any reasonable consumer that an insurance product's beneficiary designation and therefore death benefit would expire after 28 days. This critical information about the abnormal use of the term “beneficiary” was never disclosed to Marr. The respondents’ use of the term “beneficiary” and their failure to clearly disclose how they actually used the term was a deceptive practice. It would have been easy for Nationwide to clearly disclaim the absence of a death benefit, and for one reason or another, they failed to do

so. Consequently, without any consideration to Marr's state of mind or his understanding, the annuity was deceptive as a matter of law.

**B. A Reasonable Juror Could Find The Annuity Sale Unfair and In Violation Of Permann's Fiduciary Duty.**

Marr was eight-five years old when he was sold the Nationwide annuity. Marr had been diagnosed with multiple serious medical conditions prior to the sale, including chronic renal failure, uncontrolled diabetes, and peripheral vascular disease, which severely affected his feet and his ability to walk and put his feet at risk of amputation. *CP* 416; 897-900. The respondents imply throughout their response that having diabetes is of little consequence to life expectancy. However, all of Marr's pre-existing medical conditions are well understood in the insurance industry and were known by respondents to greatly decrease the life expectancy of a person suffering from them. *CP* 894-95. Nationwide's own Life Underwriting Requirements Guide reflects this understanding. *Id.* Marr's age and medical condition made this annuity a very risky purchase. If Marr's death occurred prior to the breakeven point of the payment schedule, it meant the forfeiture of the entire unpaid portion of the initial \$100,000 premium. If death arrived even one day after the first monthly payment, the entire \$100,000 less that first payment would be forfeited. Anyone would consider such an agreement by an elderly man to be very risky indeed. Marr's life was only extended as long as it was by having to suffer through kidney dialysis treatments four days a week, eight hours per day, for the last two years of his life. *CP* 452-55. Contrary to the testimony of Cheryl

Miller, Marr's stepdaughter, Marr had been on dialysis for two years before he died and his death came as no surprise to his family. *CP* 370; 452-55. Other than Permann's statement that he was aware that Marr suffered from diabetes, Permann has little to say about Marr's medical condition prior to the sale. Permann did not make any effort to inquire into Marr's medical conditions. *CP* 416, 417. Permann completely ignored the fact Marr suffered from diabetes and other medical conditions when making his recommendation that the annuity was suitable for Marr. *CP* 679. Permann does not even recall discussing Marr's health with him before he sold Marr the annuity. *CP* 417.

As a consumer, for Marr to properly evaluate this purchase, critical information regarding the risks associated with his decreased life expectancy would have to be disclosed to him. *Testo*, 16 Wn. App. at 51-52. A proper life expectancy evaluation was never done, and Permann has acknowledged that he was not even sure how to do it. *CP* 415. In addition, there is no evidence that Marr was presented with suitable alternative products or strategies and the annuity contract was not provided for him to review in a timely manner, not until well after the annuity's first payment was made. *CP* 680, 415, 684, 694. Permann was not just a life insurance salesman, as respondents state, he was Marr's financial advisor and as such he owed Marr a fiduciary duty of loyalty and care. *CP* 558-59. In addition, selling two similar immediate annuities to Marr's wife, who had been diagnosed with dementia, does not help Permann's case. *CP* 353.

Combined, all of this evidence made the recommendation and the sale of the annuity unethical and unscrupulous. Under these circumstances, a reasonable trier of fact could clearly find that the annuity recommendation and sale was unfair and breached Permann's fiduciary duty to Marr.

**C. Permann's Testimony Is Subject To A Credibility Determination And As Such Cannot, Standing On Its Own, Support Summary Judgment.**

Permann has given conflicting statements throughout this case regarding whether he recommended the no-death-benefit annuity purchase to Marr and has tried to shift the blame for the injury the sale caused away from himself on to Marr and Marr's family. Days after Marr's death, Permann told Gary Waddoups in a meeting that he only sold the annuity to Marr because Marr "would have just gone elsewhere to buy it." *CP* 599. This was a transparent attempt to shift the blame for the sale and it is what triggered the appellant to begin investigating the annuity sale. *CP* 599. Permann's statement to the appellant was very disturbing. The appellant knew a financial advisor holding a fiduciary duty could not properly recommend and sell an insurance product and earn a commission for the sale just because the client would have gone elsewhere to buy it. At this same meeting, Permann did not tell the appellant, who by then was appointed as Marr's personal representative, that only one day before he had instructed his assistant, Sharon Smith to, "...go into Mar's [sic] Nationwide annuity account and put zero as the total value." *CP* 876. This quick correction had to be done with forethought, as it was done just days after

Marr's death and the day before Permann was to meet with Gary Waddoups to review his father's accounts. This is evidence Permann knew full well he had been deceiving Marr all along about the Nationwide annuity and he knew he would not be able to continue the deception with the appellant. This also meant that the stated cash value of the Nationwide annuity went from \$100,000 to zero with the push of a button. *CP 571, 573*. Permann's failure to inform the personal representative of Marr's estate of this quick fix is a breach of Permann's fiduciary duty, a duty that transferred to the estate, upon his client's (Marr's) death and calls into question every statement Permann has made regarding this annuity sale.

In addition, in his initial answer to complaint, Permann stated that he "advised against" the annuity purchase and did so in the presence of the appellant. *CP 25, 27*. Permann implies that Gary Waddoups is therefore the negligent party and the one to be blamed for the annuity purchase. *CP 28*. However, Gary Waddoups was not present at any part of the annuity purchase. *CP 599*. Gary had no knowledge of the annuity purchase until he began investigating it after his father's death and he had never met Permann or set foot in Permann's Kennewick office, where the sale took place, until approximately 18 months after the sale occurred. *CP 599*. This account that Gary Waddoups was present at the purchase conflicts with the appellant's testimony and can only be seen as Permann's bizarre attempt to shift the blame for the sale away from himself. Permann later recanted portions of this statement, however he oddly leaves in his amended answer

that Gary Waddoups was still somehow negligent for the purchase. *CP* 36, 37.

In addition to this, Permann also stated in an email after Marr's death that the annuity was “maybe a bad idea”. *CP* 612. Nevertheless, Permann signed a suitability form as part of the application process, indicating that he recommended the annuity as a suitable purchase for Marr to make. *CP* 679. This evidence demonstrates that Permann has spoken at cross-purposes regarding central issues in the case – whether the annuity was suitable, whether he recommended the annuity to Marr and who was responsible for the sale.

The documentary evidence also shows Permann attempted to cover up the fact he had repeatedly presented false account values to Marr. *CP* 876. The appellant contends Permann's account of Marr bringing into him a New York Life annuity that Marr wanted to match is a fabrication similar to Permann's account summary statement fabrications. There is no copy of the supposed New York Life quote. Permann's disclosure of his emails with another agent Erik Pielstick on this issue were provided to appellant late only shortly before the summary judgment hearing. *CP* 600-10. This was also addressed on reconsideration. *CP* 871. All of this calls Permann's credibility into question, which can only be resolved at a trial.

Although a party cannot avoid summary judgment merely by pointing to impeachment evidence, *Young v. Key Pharms. Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989), appellant has direct evidence, consisting of

his father's contemporaneous entries in his ledger book, fabricated account summary statements, and the deceptive annuity application and contract, all from which a reasonable trier of fact could find that Marr mistakenly understood the annuity would provide a death benefit. In addition, Marr's death means that Permann is the sole living witness to their conversations about the annuity purchase, which should be excluded. Permann's inconsistencies demonstrate that insofar as the respondents' rely on Permann's account of the purchase, there is a genuine credibility question as to his testimony which may only be resolved at a trial. *Balise v. Underwood*, 62 Wn.2d 195, 381 P.2d 966 (1963). Consequently, Permann's testimony does not support summary judgment.

**D. Causation Is A Question Of Fact Which Must Be Decided By A Jury.**

Respondents' urge the court that the evidence is uncontroverted that Marr bought exactly what he wanted. However, this conclusion depends on Permann's testimony that Marr was not deceived by the respondents into making the purchase and that he, Permann, did not breach his fiduciary duty to Marr and thus did not cause the injury. At summary judgment, Permann's testimony was that of an interested witness and must be subject to a credibility determination. Moreover, this overlooks the evidence put forward by the appellant, specifically that respondents required Marr to name a beneficiary on the annuity application, Marr's ledger book entries show he understood an annuity death benefit would be paid out, and the falsified account summary statements Permann repeatedly prepared and

presented to Marr perpetuated Marr's misunderstanding that the annuity had an ongoing cash value that would be paid out as a death benefit upon his death. CP 677; 385; 386; 563-577. A series of deceptive communications to Marr from the respondents regarding critical terms and conditions of the annuity and their failure to fully disclose critical information to him about the annuity caused Marr to purchase the annuity. The deception continued well after the sale, causing Marr to continue to believe the annuity had the death benefit he wanted. A trier of fact could decide that but for this series of deceptive and unfair acts and practices by the respondents and but for serious breaches of fiduciary duty by Permann, the injury would not have occurred.

Causation under the CPA is a question of fact. *Indoor Billboard/Washington, Inc. v. Integra Telecom of Washington*, 162 Wn.2d 59, 83, 170 P.3d 10 (2007). Appellant has shown documentary evidence that Marr was contemporaneously tracking a cash value in his ledger book, on pages devoted to posting the monthly cash values of all his annuity assets. CP 385-86. This shows Marr believed that the annuity was an asset with a cash value and with a death benefit just like his other annuities. In fact, the cash values of the other annuities on these ledger pages were paid out as death benefits just as Marr posted them. CP 442. Because there is sufficient documentary evidence that respondent's deceptive communications deceived Marr into believing the annuity he was sold had a death benefit and because other deceptive practices and breaches of

fiduciary duty caused the injury suffered, this matter must be remanded for trial.

**E. The Trial Court Erred By Excluding The Testimony Of Appellant's Expert John Olsen.**

In addition to its grant of summary judgment, the trial court erred when it excluded the testimony of John Olsen because his testimony will be helpful to the trier of fact. *CP* 848-49. Expert testimony is admissible “[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact issue.” *ER* 702. Clearly, the type of annuity at issue in this case is outside the competence of an ordinary layperson. *Reese v. Stroh*, 128 Wn.2d 300, 308, 907 P.2d 282 (1995). Moreover, Mr. Olsen’s testimony regarding the suitability of the annuity based on Marr’s health is entirely appropriate to appellant’s breach of fiduciary duty claim and is not based merely on conjecture or speculation. *CP* 544-82; 806-16.

**III. CONCLUSION**

In this matter, the respondents have engaged in both per se and objectively unfair and deceptive conduct which is prohibited under the Consumer Protection Act. Additionally, this matter also presents triable issues for a jury as to causation and damages. Because summary judgment was granted by the trial court on the appellant’s CPA claim on the basis of the causation element alone, this court must reverse the trial court’s granting of summary judgment because Permann’s testimony is subject to a credibility determination at trial and because under *Indoor Billboard*

causation is a question of fact to be determined at trial. Fees should be awarded to appellant under the CPA, RCW 19.86.090, should he ultimately prevail. For all of the reasons described in appellant's opening brief and in this reply, appellant's claims must be remanded to the trial court for trial proceedings in this matter.

RESPECTFULLY SUBMITTED this 28<sup>th</sup> day of August, 2015

WALKER HEYE MEEHAN & EISINGER, PLLC  
*Attorneys for Appellant*

By: \_\_\_\_\_

ERIC B. EISINGER, WSBA #34293

A handwritten signature in black ink, appearing to be 'E. Eisinger', written over a horizontal line. The signature is stylized and loops back under the line.

# **APPENDIX - A**





On the 28<sup>th</sup> day of August, 2015, I served a true copy of:

Reply Brief

By e-mail per stipulated e-service/facsimile agreement to:

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I certify the foregoing to be true and correct under the penalty of  
perjury under the laws of the State of Washington.

Executed this 28<sup>th</sup> day of August, 2015, at Richland, Washington.

  
HOLLY R. HARRIS, Legal Assistant