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No. 57068-4-I

COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

OMNI INSURANCE COMPANY, a foreign insurance
company; and CREDIT CONTROL SERVICES, INC. d/b/a
CREDIT COLLECTION SERVICES,

Petitioners,

v.

MICHAEL STEPHENS

Respondent.

APPELLANT OMNI INSURANCE
COMPANY'S OPENING BRIEF

FILED
COURT OF APPEALS DIVISION I
STATE OF WASHINGTON
2006 FEB 28 AM 10:39

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I. ASSIGNMENTS OF ERROR

Appellant Omni Insurance Company assigns error to the trial court's entry of the Order Granting Plaintiff's Motion for Summary Judgment, holding that Omni and appellant Credit Control Services Inc., ("CCS") violated the Consumer Protection Act. (CP 584-85)

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Omni retained CCS to pursue recovery of its subrogation interest against Stephens after Omni made payments to and on behalf of one of its insureds relating to injuries sustained in an automobile accident caused by Stephens. Did Omni violate the CPA? Specifically:

1. Did Omni commit an unfair or deceptive act or practice when it referred its subrogation interest to CCS?
2. Did Omni's acts with regard to its subrogation interest against Stephens occur in trade or commerce?
3. Can Omni be held liable for CCS's actions?
 - a. Can Omni be held liable as a matter of law as a joint tortfeasor with CCS when the evidence

does not demonstrate that the parties engaged in a concert of action?

b. Can Omni be held vicariously liable as a matter of law for CCS's actions in attempting to recover the subrogation interest from Stephens when the evidence demonstrates Omni retained no control over CCS's actions?

4. If Omni could be held liable for CCS's actions, did CCS violate the CPA as a matter of law, specifically:

a. Did CCS commit an unfair or deceptive act or practice by requesting that Stephens pay the subrogation claim or provide insurance information to CCS?

b. Did CCS's acts with regard to Stephens occur in trade or commerce?

5. Did Stephens establish the injury element of his CPA claim by showing he took time away from his business to find and retain an attorney when his business was not the target of CCS's collection efforts?

6. Did Stephens establish causation as a matter of law when a jury could reasonably conclude from the timing of events that Stephens purchased a credit report and credit watch service simply as a means to create injury?

III. STATEMENT OF THE CASE

A. Factual Background

This matter arose from Omni's attempts to recover benefits it paid to its insured, Carrine York, as a result of an automobile accident caused by Respondent Michael Stephens on June 9, 2003.

1. Payments Made by Omni

As part of its investigation of the automobile accident, Omni sent Stephens three letters dated August 5, 2003. (CP 224, 226, 228) The letters requested that Stephens contact the Omni claims adjuster and provide information regarding whether he had automobile insurance. (*Id.*) Omni's claim file includes no record of a written or verbal response to the letters. (CP 216)

Omni determined that York's vehicle had been rear-ended by a vehicle driven by Stephens and Stephens was,

therefore, liable for any damage caused to York's vehicle. (CP 215) York's vehicle sustained damage of \$544.09. (CP 216) After application of the \$100.00 deductible, Omni paid \$444.09 for the damage. On October 10, 2003, Omni sent two letters to Stephens, informing him that the company had paid its insured \$444.09. (CP 230, 232) Omni also informed Stephens that its investigation had determined Stephens was at fault for the accident, that Omni was seeking reimbursement from him, and that he had "a right to dispute any or all of" Omni's claims. (CP 230) In addition, Omni asked whether Stephens was covered by insurance and requested the details of such coverage. (*Id.*) One letter requested that Stephens contact Omni immediately upon receipt of the letter. (CP 232) It also advised him that failure to respond within 30 days may result in legal action against him. (*Id.*) The other letter stated that, if Stephens did not dispute the claim within 30 days of receiving the letter, Omni would assume the claim was valid. (CP 230) The letter specifically referred to Omni's "rights of subrogation." (*Id.*)

On November 6, 2003, Omni received a check in the amount of \$444.09 from Stephens. (CP 216) Omni received no other communication from Stephens. (*Id.*)

2. Omni's Relationship with CCS

In addition to the payment for property damage, Omni paid its insured \$5,112 for medical expenses and \$1,300 for bodily injury she sustained in the accident. (CP 216) Omni retained Credit Collection Services ("CCS") to pursue recovery of its subrogation claim against Stephens for these payments. (*Id.*) Omni sent CCS a copy of the medical bills and supporting documentation regarding the claim. (*Id.*) Omni had no further involvement in CCS's efforts to collect the claim from Stephens. (CP 216-17) The only evidence in the record regarding Omni's knowledge of CCS's efforts to collect the claim was the testimony of David Quigley, Omni's Subrogation Team Leader. Quigley testified:

Specifically, Omni does not exercise control over how CCS pursues recovery of subrogation claims. For example, Omni does not review letters or notices sent by CCS and has no input or involvement in wording, typeface, or format of these letters. Once a matter is referred to

CCS, *CCS has sole direction over collection of the claim.* CCS has sole discretion over whether to compromise the claim or agree to payment plans. Omni had no contact with Stephens regarding recovery of its subrogated interests relating to the benefits paid under Ms. York's policy.

(CP 217; emphasis added)

3. Collection Efforts by CCS

CCS's first contact with Stephens was in writing, on April 16, 2004. (CP 388-89) The written communication stated it was a formal collection notice and indicated it related to a subrogation claim in the amount of \$6,412.00.

(CP 388) The notice included the following statement:

You were involved in an incident which resulted in the above referenced damages being paid by our client. Please be advised that the amount reflected on this notice is an amount already incurred, and any further damages paid as a result of this incident will be added to this amount. Should this occur, you will be so advised.

Unless you can provide this office with evidence of insurance coverage that existed on the date of loss, our client will consider you financially responsible.

(*Id.*; emphasis in original) The notice also advised Stephens that, "to avoid the possibility of legal action

and/or license suspension,” he could make payment by check or credit card. (*Id.*)

CCS’s internal notes show that Stephens telephoned on April 27, 2004, and said he did not feel he owed the amount stated in the April 16, 2004, notice. (CP 386)

On May 7, 2004, CCS sent Stephens another notice, advising him to act immediately. (CP 390) The notice stated that Stephens had “failed to respond to our notice requesting full payment -or- evidence of insurance coverage that existed on the date-of-loss.” (*Id.*)

On May 12, 2004, Stephens sent a letter to CCS, stating that he disputed the charges and requesting that CCS send him proof of payment showing the alleged amount due. (CP 386) On May 19, 2004, CCS received a call from a Geico Insurance employee, confirming that Stephens was insured by Geico on the date of the loss. (*Id.*) CCS immediately stopped sending notices to Stephens. (*Id.*)

4. Stephens's Alleged Injury

In his declaration filed in support of his Motion for Summary Judgment Against Defendants, Stephens testified that he took time away from his landscaping business to perform "several tasks" he "deemed necessary and important." (CP 69) Those tasks were:

(1) locating, hiring, and consulting with an attorney to [sic] regarding the validity of the alleged debt being pursued by CCS; and (2) of my own accord, researching and procuring a credit report and credit watch service."

(*Id.*) The credit report was purchased on June 23, 2004.

(CP 79) The credit watch service was purchased on July 23, 2004. (CP 82)

B. Facts Relating to Litigation

Stephens filed this action on June 29, 2004. (CP 5-

17) He filed the action as a putative class action, stating:

This matter is brought as a class action pursuant to Washington Superior Court Civil Rule 23 on behalf of all persons defined below as the "Class," asserting claims against Omni Insurance Company and Credit Control Services, Inc., for violations of the Washington Consumer Protection Act ("CPA"), RCW § 19.86.010, *et seq.* Plaintiff seeks, *inter alia*, damages and injunctive relief.

(CP 6) The class has not yet been certified.

1. Resolution of Omni's Subrogation Claim

Omni asserted a counterclaim in the present action for recovery of its subrogation claim. Stephens executed a confession of judgment for the full amount of Omni's claim. (CP 189-90) Geico paid the judgment in full. (CP 192-96)

2. Summary Judgment Procedural History

Stephens filed Plaintiff's Motion for Summary Judgment Against Defendants on August 19, 2005. (CP 48-66) After the trial court entered its Order Granting Plaintiff's Motion for Summary Judgment (CP 584-85), Omni moved for reconsideration. (CP 632-45) The court denied that motion. (CP 718-23) Omni timely filed its Notice of Discretionary Review. On Omni's motion, the trial court entered an Order on Certification Pursuant to RAP 2.3(4). (CP 782-84) This Court accepted review on December 29, 2006, stating "the parties may raise any issues arising out of the partial summary judgment."

IV. SUMMARY OF ARGUMENT

The facts are undisputed that Stephens caused an accident injuring York, Omni paid York's medical expenses, and Omni was thereby subrogated to York's claim against Stephens to recover its payments. The facts are undisputed that Omni retained CCS to recover its subrogation claim against Stephens. And the facts are undisputed that Omni informed CCS of the amount of its claim against Stephens, but did not otherwise direct CCS with regard to how it pursued the claim or retain any control over CCS's actions.

The trial court's ruling that these undisputed facts are sufficient, as a matter of law, to establish that Omni acted unfairly and deceptively, in trade or commerce, proximately causing injury to Stephens's business or property is wrong. There can be no question that Omni is entitled to make a claim against Stephens without first suing him, and there can be no question that Omni may retain others to pursue that claim. Stephens does not argue to the contrary.

Thus, Omni's liability can be established on summary judgment only if (1), as a matter of law, Omni can be held vicariously liable for CCS's fault, or otherwise jointly responsible with respect to CCS's actions, *and* (2) CCS is at fault as a matter of law. Neither proposition can be established in this case.

First, Omni cannot be vicariously liable for CCS's fault when Omni does not direct CCS's actions in any manner or retain the right to do so. Similarly, Omni cannot be liable as a joint tortfeasor because it does not act in concert with CCS for the purpose of pursuing the subrogation claim simply by retaining CCS to pursue a that claim.

Moreover, as more fully developed in CCS's arguments, the elements of a CPA claim cannot be established against CCS as a matter of law. Stephens is not a consumer of CCS's services, CCS's methods were not unfair or deceptive, and Stephens cannot establish a harm cognizable under the CPA.

V. ARGUMENT

To prevail on his CPA claim, Stephens was required to establish five distinct 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 (5) causation.¹

Failure to establish even one element defeats plaintiff's case. As discussed below, Stephens cannot establish elements one, two, four, or five against Omni or CCS.² With regard to elements one and two, Omni did not commit an unfair act or practice by referring its subrogation claim to CCS, and it had no relationship with Stephens in trade or commerce. Moreover, Stephens cannot rely on a theory of vicarious liability to establish the first two elements against Omni because the facts do not support the conclusion that Omni is vicariously liable for CCS's actions. Even if vicarious liability were appropriate under

¹ *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780, 719 P.2d 531 (1986).

² The parties did not address the third element, public interest impact, below and Omni, therefore, does not address that element herein.

the facts of this case, Stephens cannot establish CCS's actions were unfair or deceptive or that CCS engaged in trade or commerce. Finally, given the nature of the injury claimed and the evidence submitted in support of the alleged injury, a determination that the elements of injury and causation had been established was inappropriate on summary judgment.

A. Omni's actions are insufficient to sustain a CPA claim.

By paying York's damages caused by Stephens, Omni gained a right of subrogation against Stephens. Omni did not pursue the claim itself; it retained CCS to do so. As argued in this section below, Omni did not act unfairly or deceptively by engaging CCS. Moreover, it did not establish any direct relationship with Stephens, much less a relationship occurring in trade or commerce.

1. Omni did not commit an unfair act or practice by referring its subrogation claim to CCS.

The trial court erred in concluding Omni committed an unfair or deceptive act. "[T]o be unfair or deceptive, conduct must have a tendency or capacity to deceive a

substantial portion of the public.”³ The only action Omni took with regard to Stephens was to retain CCS to pursue a subrogation interest.⁴ Once the claim was referred to CCS, Omni had no control over CCS’s actions. (CP 216-17) The mere referral of the subrogation interest cannot be considered an unfair or deceptive act. Indeed, in his summary judgment pleadings Stephens did not even attempt to argue that it was.⁵ The referral cannot be the basis for finding Omni committed an unfair or deceptive act or practice.

³ *Blake v. Fed. Way Cycle Ctr.*, 40 Wn. App. 302, 310, 698 P.2d 578 (1985) (citing *Haner v. Quincy Farm Chems., Inc.*, 97 Wn.2d 753, 759, 649 P.2d 828 (1982)).

⁴ Omni had previously sought and received reimbursement from Stephens of the \$444.09 Omni had paid for property damage to its insured’s vehicle. (CP 216, 230, 232) However, Stephens’s allegations in this lawsuit are not based upon that subrogation claim. Rather, they rest exclusively on CCS’s efforts to collect the amounts paid for medical expenses and bodily injury. (CP 7-11)

⁵ At oral argument on the motions for discretionary review, counsel for Stephens conceded that he was not arguing Omni’s referral of the subrogation interest to CCS was an unfair or deceptive act or practice.

2. With regard to the collection efforts, Stephens has no relationship with Omni and Omni's conduct, therefore, did not occur in trade or commerce.

At issue in this case is whether a claim under the CPA must involve some type of commercial relationship between the claimant and the defendant. The need for such a relationship can be found in the second required element of a CPA claim—that the act complained of occurred in trade or commerce. In the present matter, there is no business, contractual, or otherwise commercial relationship between Stephens and Omni. Omni's acts with regard to Stephens, therefore, did not occur in trade or commerce.

Washington appellate courts have never before addressed whether an insurer's retention of a collection agency to pursue a subrogation interest is an act occurring in trade or commerce with regard to the individual from whom recovery of the subrogation interest is sought. In addressing the issue, the language of the statute provides a logical starting place. The CPA defines trade and commerce as follows:

“Trade” and “commerce” shall include the sale of assets or services, and any commerce directly or indirectly affecting the people of the state of Washington.⁶

The CPA also defines “assets”:

“Assets” shall include any property, tangible or intangible, real, personal, or mixed, and wherever situate, and any other thing of value.⁷

Omni did nothing with regard to Stephens that could be construed as the sale of assets or services. Although the Act does not define “services,” the Court may look to a dictionary definition of that word for guidance⁸:

service . . . n. . . . 6. Work done for others as an occupation or business: provides full catering service. **7.** Installation, maintenance, or repairs provided or guaranteed by a dealer or manufacturer. . . .⁹

Under this definition, it is clear that Omni was not performing services for Stephens.

⁶ RCW 19.86.010(2).

⁷ RCW 19.86.010(3).

⁸ *Scoccolo Constr., Inc. v. City of Renton*, 125 Wn. App. 150, 157, 103 P.3d 1249 (2005) (citing *Shoreline Cmty. Coll. Dist. No. 7 v. Employment Sec. Dep't*, 120 Wn.2d 394, 842 P.2d 938 (1992)).

⁹ THE AMERICAN HERITAGE DICTIONARY (2nd College ed. 1991) at 1121.

The only other option for fulfilling the trade or commerce requirement is by showing the act complained of occurred in commerce. A dictionary definition of that term is as follows:

commerce . . . *n.* **1.** The buying and selling of goods, esp. on a large scale, as between nations. . . .¹⁰

Omni did not buy or sell goods to Stephens.

Therefore, the only relationship that arguably occurred in trade or commerce was between Omni and CCS. Nothing in the reported cases regarding the CPA supports the conclusion that the existence of a business relationship between Omni and CCS is sufficient to sustain a CPA claim against Omni by Stephens.

Cases addressing who may pursue a CPA claim show there must be some relationship between the CPA claimant and the defendant. For example, in *Washington State Physicians Insurance Exchange & Association v. Fisons Corporation*,¹¹ the nature of the relationship between the

¹⁰ *Id.* at 297.

¹¹ 122 Wn.2d 299, 858 P.2d 1054 (1993).

parties was central to the court's decision regarding whether the CPA claim could be pursued. In determining whether a physician is "a logical person to be the 'private attorney general'" to pursue a CPA claim against a drug company, the court in *Fisons* first examined "the nature of the relationship between a drug manufacturer, a prescribing physician and a patient" and noted, "[I]t is the physician who compares different products, selects the particular drug for the ultimate consumer and uses it as a tool of his professional trade."¹² Moreover, the drug company fulfills its duty to the patient by giving warnings regarding a prescription drug to the physician prescribing the drug.¹³ The court held this "unique relationship results in the physician being comparable to the ordinary consumer in other settings."¹⁴ The physician is, therefore, a logical person to be the "private attorney general" under RCW

¹² 122 Wn.2d at 313 (emphasis added).

¹³ *Id.*

¹⁴ *Id.*

19.86.090.¹⁵ If the CPA required no relationship between the parties, the court's detailed discussion of the nature of the relationship between the CPA claimant and the defendant in *Fisons* would have been unnecessary.

The importance of the relationship between the parties in a CPA action is reinforced by *State Farm Fire and Casualty Company v. Huynh*,¹⁶ a case which also involved what the court termed a "unique" relationship. In that case, State Farm had paid a medical provider for services rendered to individuals insured by State Farm. State Farm was allowed to pursue a CPA claim against the medical provider because "the relationship between a doctor and his patients' insurer is . . . unique."¹⁷ Because the insurer is the party paying the medical bills submitted to it by the medical provider, the insurer is "a logical party

¹⁵ *Id.*

¹⁶ *State Farm Fire and Cas. Co. v. Huynh*, 92 Wn. App. 454, 459, 962 P.2d 854 (1998).

¹⁷ 92 Wn. App. at 459.

to be the private attorney general” with regard to a CPA claim.¹⁸

In contrast, the present case includes no facts from which one could conclude there is a unique relationship between Stephens and Omni sufficient to make Stephens comparable to a consumer and a logical party to assert a CPA claim against Omni. The trial court, therefore, erred in concluding Stephens had established the trade or commerce element of his CPA claim against Omni.

B. Omni cannot be held liable under the CPA for CCS’s collection efforts.

Because Omni did not commit an unfair act or deceptive act or practice occurring in trade or commerce, the only basis upon which Omni could be held to have violated the CPA is if it is held liable for CCS’s actions. The record does not support such a determination.

In his summary judgment pleadings, Stephens first claimed Omni and CCS were joint tortfeasors, citing *Elliott*

¹⁸ *Id.* at 460.

v. Barnes.¹⁹ *Elliott* held that, to find two parties are joint tortfeasors, “the following three elements must all exist: (1) A concert of action; (2) a unity of purpose or design; (3) two or more defendants working separately but to a common purpose and each acting with the knowledge and consent of the others.”²⁰ Assuming without conceding that tort principles apply to a statutory cause of action under the CPA, only the second joint tortfeasor element is even arguably present under the facts of this matter. CCS was attempting to recover a subrogation claim, and Omni had an interest in that claim. Whether the shared interest in the claim amounts to a “unity of purpose or design” within the meaning of *Elliott* is debatable. Regardless, there was no concert of action; CCS was solely responsible for the collection efforts. In addition, Omni had no knowledge of how CCS was attempting to collect the claim, did not consent to CCS’s specific actions, and was not itself taking any action to collect the claim. (CP 216-17) Stephens

¹⁹ 32 Wn. App. 88, 90-91, 645 P.2d 1136 (1982) (Tab 10 at 13).

²⁰ *Id.*, 32 Wn. App. at 91.

presented no evidence on summary judgment refuting the nature of the relationship between Omni and CCS. The trial court, therefore, could not conclude on summary judgment that the parties acted in concert.

Stephens also argued that Omni could be held vicariously liable for Omni's actions. First, he argued that, because Omni admitted CCS was its agent, vicarious liability automatically attached.²¹ Omni, however, admitted only that "CCS was an *independent* agent of defendant Omni for purposes of pursuing recovery of its subrogation claim."²² Moreover, "the label 'employee,' or 'agent' does not *per se* create vicarious tort liability."²³ Rather, "[v]icarious tort liability arises only where one engaging another to achieve a result controls or has the right to control the details of the latter's physical movements."²⁴

²¹ Tab 10 at 13.

²² Tab 11, Ex. 3 at 2 (emphasis added).

²³ *Kroshus v. Koury*, 30 Wn. App. 258, 263, 633 P.2d 909 (1981) (quoting *McLean v. St. Regis Paper Co.*, 6 Wn. App. 727, 732, 496 P.2d 571 (1972)).

²⁴ *Id.*

The only evidence in the record regarding that issue demonstrated that CCS did not retain the right to control CCS. Once a claim was referred to CCS, “CCS [had] sole direction over collection of the claim.” (CP 217) Stephens offered no evidence to refute that fact. The trial court, therefore, erred when it concluded Omni could be held vicariously liable for CCS’s actions.

C. Stephens failed to establish a CPA claim against CCS.

Even if, contrary to the evidence, Omni could be held vicariously liable for CCS’s actions, Stephens’s CPA claim would still fail because Stephens failed to establish the required CPA elements against CCS.

- 1. CCS’s relationship with Stephens is insufficient to sustain a CPA claim and CCS’s conduct, therefore, did not occur in trade or commerce.**

Sending collection notices regarding a subrogated insurance claim is insufficient to establish a relationship subject to the CPA. Washington courts have not addressed this question. The Eleventh Circuit did, however, address a similar issue in an analogous situation in *Hawthorne v. Mac*

*Adjustment, Inc.*²⁵ Although *Hawthorne* involved a claim under the Fair Debt Collection Practices Act, 15 U.S.C. § 1692, *et seq.* (“FDCPA”), the court’s reasoning is directly applicable to the present matter.

In *Hawthorne*, Liberty Mutual Insurance Co. provided Mac Adjustment with subrogation rights based upon payment made by Liberty Mutual. Mac Adjustment then attempted to recover the subrogation claim by sending a letter to the allegedly liable party. As CCS did in the present matter, Mac Adjustment requested either payment or information regarding insurance covering the claim.²⁶ The person from whom Mac Adjustment requested payment filed a lawsuit, alleging a violation of the FDCPA.

In upholding the trial court’s dismissal of the action, the Eleventh Circuit analyzed whether the subrogation claim was a “debt” under the terms of the FDCPA. The FDCPA defines “debt” as “any obligation or alleged

²⁵ *Hawthorne v. Mac Adjustment, Inc.*, 140 F.3d 1367 (11th Cir. 1998).

²⁶ *Id.* at 1369.

obligation of a consumer to pay money arising out of a transaction”²⁷ The court then noted that, “when we speak of ‘transactions,’ we refer to consensual or contractual arrangements, not damage obligations thrust upon one as a result of no more than her own negligence.”²⁸ In addition, the court noted the transaction had to be a *consumer* transaction.²⁹ The court concluded that the subrogation claim did not arise out of a consumer transaction.³⁰

Likewise, the present case involves legislation that exists to protect *consumers*.³¹ Under the reasoning of *Hawthorne*, an attempt to collect a subrogation claim arising from an accident allegedly caused by the party from whom payment is sought cannot be considered a consumer

²⁷ *Id.* at 1371.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ See *Wickswat v. Safeco Ins. Co.*, 78 Wn. App. 958, 970, 904 P.2d 767 (1995).

transaction. Because the relationship between CCS and Stephens does not arise in trade or commerce, the trial court erred in concluding that relationship was sufficient to support a CPA claim.

2. CCS's collection efforts were not unfair or deceptive.

The trial court also erred when it concluded CCS's actions were unfair or deceptive. As previously stated, to satisfy this element, a claimant must show the conduct has "a tendency or capacity to deceive a substantial portion of the public."³² "Implicit in the definition of 'deceptive' is the understanding that the actor *misrepresented* something of material importance."³³ CCS's communications with Stephens were not unfair or deceptive because they accurately portrayed the state of affairs regarding Omni's subrogation interest.

The first notice CCS sent to Stephens informed him it related to a subrogation claim from Omni Insurance. (CP

³² *Blake*, 40 Wn. App. at 310.

³³ *Hiner v. Bridgestone/Firestone, Inc.*, 91 Wn. App. 722, 730, 959 P.2d 1158 (1998).

388) Stephens had already received three letters from Omni regarding the property damage subrogation claim. Therefore, he was aware that Omni insured York, the driver he had hit in the accident. The notice from CCS also stated that CCS's client would consider Stephens responsible for the \$6,412.00 *if* he did not provide CCS with evidence of insurance coverage on the date of the loss. (*Id.*) The second notice informed Stephens that if he did not pay the claim a lawsuit could be filed against him. (CP 390) There is nothing deceptive or unfair about these notices. They accurately state the facts. The trial court, therefore, erred in concluding Stephens had established this element of his CPA claim.

D. Stephens did not establish the injury element as a matter of law.

Stephens alleged three types of injuries—time lost from work to retain an attorney, money spent on a credit report, and money spent on a credit watch service. (CP 69) These injuries are insufficient to support the finding of a CPA violation as a matter of law.

1. **Time and money spent in connection with retaining an attorney to defend the collection action do not constitute injury under the CPA.**

Pursuant to *Sign-O-Lite Signs, Inc. v. DeLaurenti Florists, Inc.*, the time and money incurred in retaining an attorney is insufficient to establish injury under the CPA:

Here, DeLaurenti's mere involvement in having to defend against Sign's collection action and having to prosecute a CPA counterclaim is insufficient to show injury to her business or property, contrary to the trial court's conclusion. To hold otherwise would be to invite defendants in most, if not all, routine collection actions to allege CPA violations as counterclaims.³⁴

Moreover, to the extent that *Sign-O-Lite* allows a CPA claimant to show injury based on time away from work, that case is of no assistance to Stephens. As noted by the trial court in its certification order, the subrogation claim was against Stephens in his personal capacity. (CP 783) Therefore, time lost from his *business* cannot constitute injury for purposes of his CPA claim.

³⁴ *Sign-O-Lite Signs, Inc. v. DeLaurenti Florists, Inc.*, 64 Wn. App. 553, 564, 825 P.2d 714 (1992).

Sign-O-Lite addressed time away from a business as a form of injury. In that case, the party asserting the CPA claim (i.e., the party claiming injury) was a corporation. The sole owner of the claimant corporation “testified that because of her involvement with Sign [the target of the CPA action], she was unable to tend to her store the way she normally would have.”³⁵ In addition, she was drawn away from the business for at least three hours each month for four years to address matters regarding her contract with Sign.³⁶ She had, therefore, presented sufficient evidence to support an inference that there was some injury to her *business*. Here, the only injury Stephens conceivably has shown is injury to his business. However, his business was the not the target of the collection effort and is not a party to this action. Therefore, *Sign-O-Lite* does not support a claim of injury in this matter.

³⁵ 64 Wn. App. at 564.

³⁶ *Id.*

2. Material issues of fact exist regarding whether CCS's actions caused Stephens's claimed injury.

Stephens's second claimed injury is also insufficient to sustain a CPA claim as a matter of law. Stephens claims he purchased a credit report and credit watch service due to Omni's collection efforts. However, the timing of those events belies that allegation, and the trial court erred in granting summary judgment.

The first notice CCS sent to Stephens stated:

Unless you can provide this office with evidence of insurance coverage that existed on the date of loss, our client will consider you financially responsible.

(CP 388) Stephens's insurance company, Geico, contacted CCS on May 19, 2004. (CP 386) Thus, by that date, it was clear that Stephens had insurance coverage and CCS did not consider him financially responsible for the subrogation claim. Nonetheless, on June 23, 2004, after Geico had contacted CCS and after Stephens had retained an attorney, he purchased a credit report. (CP 79) Based upon these facts, there is a material issue of fact as to whether the

actions of Omni and CCS caused Stephens's injury or whether he simply purchased the credit report in an effort to create an injury. That question should be answered by the trier of fact.³⁷

Stephens also claims his purchase of a credit watch service was an injury under the CPA. But, he did not purchase the credit watch service until *after* he had filed the present lawsuit. Again, there is a question of fact as to whether CCS's actions caused Stephens to purchase the credit watch service. The trial court, therefore, erred in concluding Stephens had proved causation as a matter of law.

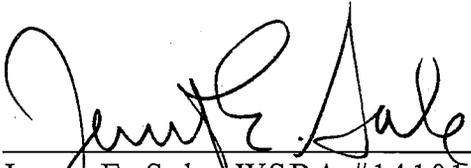
VI. CONCLUSION

For the reasons set forth above, Omni respectfully requests the Court REVERSE the trial court's order granting summary judgment to Stephens and remand for further proceedings.

³⁷ *Hartley v. State*, 103 Wn.2d 768, 778, 698 P.2d 77 (1985).

DATED February 27, 2006.

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CERTIFICATE OF SERVICE

The undersigned certifies that on this 27th day of
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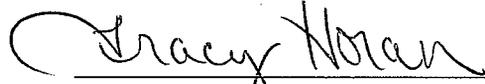
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I declare under penalty of perjury under the laws of
the State of Washington this 27th day of February, 2006, at
Seattle, Washington.



Tracy Horan

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