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CERTIFICATION FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
IN

(CONSOLIDATED CASES)

Case No. C18-1173RSL

KRISTA PEOPLES,
Appellee/Plaintiff,

v.

UNITED SERVICES AUTOMOBILE ASSOCIATION, ET AL.
Appellants/Defendants

Case No. C18-1254RSL

JOEL STEDMAN, ET AL.
Appellees/Plaintiffs,

v.

PROGRESSIVE DIRECT INSURANCE COMPANY,
Appellant/Defendant.

REPLY BRIEF OF APPELLANTS/DEFENDANTS
UNITED SERVICES AUTOMOBILE ASSOCIATION AND
USAA CASUALTY INSURANCE COMPANY

Michael A. Moore WSBA No. 27047
John T. Bender, WSBA No. 49658
CORR CRONIN LLP
1001 Fourth Avenue, Suite 3900
Seattle, WA 98154-1051
Tel: (206) 625-8600
Fax: (206) 625-0900
mmoore@corrchronin.com
jbender@corrchronin.com

Jay Williams, *admitted PHV*
David C. Scott, *admitted PHV*
SCHIFF HARDIN LLP
233 S. Wacker Dr., Suite 7100
Chicago, Illinois 60606
(312) 258-5500
jwilliams@schiffhardin.com
dscott@schiffhardin.com

ATTORNEYS FOR APPELLANTS/DEFENDANTS
United Services Automobile Association and
USAA Casualty Insurance Company

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INTRODUCTION

In their Opening Brief, Defendants demonstrated that this Court should answer “no” to both certified questions. Plaintiff’s alleged injuries indisputably arise from, and are the direct financial consequence of, the personal injuries she sustained in an automobile accident. This Court’s most recent interpretation of the CPA injury requirement confirmed that not only are personal injuries outside the scope of the CPA, but “[t]he financial consequences of such personal injuries are also excluded.” *Frias v. Asset Foreclosure Servs., Inc.*, 181 Wn.2d 412, 431, 334 P.3d 529 (2014); *see, e.g., Ambach v. French*, 167 Wn.2d 167, 175, 216 P.3d 405 (2009); *Washington St. Physicians Ins. Exch. & Assocs. v. Fisons Corp.*, 122 Wn.2d 299, 317, 858 P.2d 1054 (1993).

Plaintiff does not dispute that she sustained “personal injuries” in an auto accident. Nor does she dispute that the healthcare bills for which she is seeking reimbursement (under her *Personal Injury* Protection coverage, no less) are for those very same personal injuries, and are the “financial consequences” of her personal injuries. Indeed, Plaintiff does not even mention this Court’s decision in *Frias*. Instead, Plaintiff does her level best to argue everything *but* her alleged injuries. She contends that Defendants’ Reasonable Fee (RF) Methodology is a “*per se* unfair practice.” She argues that this Court should focus on Defendants’ alleged conduct rather than the nature of her alleged injury. She asserts that she is not seeking to hold Defendants liable as tortfeasors under a negligence theory. She notes that

PIP is a no-fault coverage and that her claim does not depend on the negligence of the third-party driver. She contends that it would be unfair to deprive her of the variety of extracontractual remedies potentially available under the CPA.

All of these arguments ignore the fundamental defect of her CPA claim: her alleged injuries all derive from, and are the financial consequence of, her personal injuries. In enacting the CPA, the legislature could have followed the lead of other states and permitted claims for any type of “consumer injury.” Instead, the legislature made the clear choice to restrict Washington CPA claims to those involving injuries to “business or property.” That limitation is meaningful, and cannot be circumvented by Plaintiff’s argument that any “monetary” or “economic” loss is necessarily an injury to business or property. This Court and the Court of Appeals consistently have held that personal injuries are not cognizable under the CPA, and federal courts interpreting these Washington decisions uniformly have rejected CPA claims against PIP insurers for reimbursement of healthcare bills—precisely the claim Plaintiff has brought here. (*See Defs.’ Open. Br. at 13-20 (citing cases).*) Defendants respectfully request that the Court do the same.

PLAINTIFF’S MISSTATEMENTS OF THE RECORD

Plaintiff’s answering brief contains a number of misstatements of the record. Defendants address below the most serious of those

misstatements involving the district court's rulings and Defendants' RF Methodology.

First, Plaintiff incorrectly asserts that the district court ruled in her favor on the issue of CPA injury, yet proceeded "nevertheless" to certify the questions "in order to confirm its understanding of Washington law." (Pl.'s Br. at 4, 19; *see id.* at 3-4 (Plaintiff claiming that district court "rejected USAA's argument that her unfair insurance practice claim was a claim for 'personal injury' rather than for monetary loss or 'injury to property' " yet "[n]evertheless" certified question); *id.* at 3 (Plaintiff suggesting that district court "ruled that Ms. Peoples alleged she sustained 'injury to her property and damages including, but not limited to, reduced insurance benefits, investigative expenses and out-of-pocket costs caused by USAA's practice' "); *id.* at 19 (Plaintiff arguing that district court had "rejected USAA's assertion that the CPA claim was barred because Ms. People's [sic] claim was 'derivative' of the negligence of the other driver"); *id.* at 31 (Plaintiff claiming that district court had found *Ambach* "inapplicable").)

To the contrary, the district court did not rule that Plaintiff had sustained a valid CPA injury. Indeed, to the extent the district court said anything about the merits of Plaintiff's CPA injury claim, it correctly stated that, under this Court's prior decisions, including *Frias*, "[d]amages arising from personal injury, including medical expenses, pain and suffering, and reimbursement for lost wages, are not injuries to business or property and are therefore not recoverable under the CPA." (Dkt. 50 at 3 (citing *Frias*))

(emphasis added).)¹ The district court *declined* to rule on the CPA injury issue and certified the CPA injury questions for this Court’s ruling. (Dkt. 50 at 7; *see* Dkt. 49 at 3 (in ruling on motion to dismiss, declining to rule whether Plaintiff’s alleged injuries “are cognizable under the CPA” and certifying question to this Court).)² It would have made no sense for the district court to rule on the CPA injury issue but then ask for this Court’s ruling on that same issue.

Second, although the nature of Plaintiff’s injury—not the validity of Defendants’ claims adjusting process—is at issue in this proceeding, Plaintiff nevertheless devotes a significant portion of her brief to recounting her own *allegations* regarding Defendants’ RF Methodology. The record before this Court does not afford Defendants the opportunity to refute each of Plaintiff’s false assertions; nor are those assertions relevant to this proceeding. Defendants are compelled to note, however, that a Washington court—and Plaintiff’s own counsel—previously agreed that Defendants’ RF Methodology did *not* violate Washington law. That case is *MySpine, PS v. USAA Cas. Ins. Co.*, No. 12-2-32635-5 SEA (Wash. Super. Ct. Sept. 11, 2015). (Dkt. 12 at 7-10.) Plaintiff cites *MySpine* as an example of a

¹ In its Order certifying the questions to this Court, the district court merely referred to Plaintiff’s *allegation* that she had sustained injury to her business or property. (*See* Dkt. 50 at 6.)

² The district court’s order denying Defendants’ motion to dismiss (Dkt. 49) is not part of the certified record. Because Plaintiff has misstated the terms of that order (without providing the Court with an actual copy of the order), Defendants have filed contemporaneously with their Reply Brief a Motion to Take Judicial Notice of that district court order.

Washington trial court denying a motion to dismiss on the ground that a healthcare provider—not, as is the case here, the insured who sustained personal injuries—had alleged a CPA injury. (*See* Pl.’s Br. at 20.) What Plaintiff does not say is that the court in *MySpine* subsequently approved a class action settlement that, among other things, authorized Defendants’ continued use of the very same RF Methodology at issue here as fair and reasonable to class members. (Dkt. 12 at 7-10.)

Indeed, the Final Approval Order made several specific findings approving the RF Methodology. The trial court specifically ruled that Defendants may “continue using the RF Methodology or any Amended RF Methodology.” (Dkt. 12-1 ¶ 27.) The court further ruled that Defendants “shall be free to use the RF Methodology or any Amended RF Methodology as a tool in paying PIP and MedPay claims in Washington,” and shall be free to pay health care provider bills based on “the amount recommended by the RF Methodology.” (*Id.* ¶ 28.) And the court ruled that Defendants’ continued use of the RF Methodology does not breach any duty or obligation under Washington law: “The use of the RF Methodology and any Amended RF Methodology as a tool in paying PIP and MedPay claims does not in and of itself breach any duty or obligation under any applicable law or contract requiring the USAA Entities to pay or reimburse ‘reasonable and necessary’ charges for covered treatment.” (Dkt. 12-1 ¶ 27.)³

³ Plaintiff also misstates the nature of her claimed injury, asserting that she had “paid her provider’s bill when USAA denied her PIP claim.” (Pl.’s Br. at 3; *see id.* at 11, 19.) Plaintiff never made such an allegation with respect to her “reasonable fee” claim, or the bills subject to a reasonable fee reduction, which is

Accordingly, the findings made by the *MySpine* court, with which Plaintiff's own counsel agreed, contradict Plaintiff's conclusory assertions that Defendants' claims adjusting process is systemically flawed.

ARGUMENT

I. QUESTION 1: Plaintiff's Claim for Reimbursement of Medical Expenses Under Her PIP Coverage Is Not Injury to "Business or Property" Under the CPA.

A. Plaintiff Does Not Dispute That Her Alleged Damages Are the Financial Consequences of Personal Injuries.

In their Opening Brief, Defendants traced the history of the CPA statutory requirement of an injury to "business or property," culminating in this Court's most recent pronouncement in *Frias*: "The CPA's requirement that injury be to business or property excludes personal injury, mental distress, embarrassment, and inconvenience. The financial consequences of such personal injuries are also excluded." *Frias*, 181 Wn.2d at 431; *see* Defs.' Open. Br. at 13-18.

Plaintiff does not dispute that her alleged damages are the direct "financial consequence" of the personal injuries she sustained in her auto accident. Instead, the central premise of Plaintiff's brief is that *Ambach* does not bar CPA claims that are "derivative" of a personal injury. (*See, e.g.,* Pl.'s Br. at 7, 19, 21, 25-26.) Plaintiff asserts that her unreimbursed

the subject of this proceeding. (*See* Dkt. 33 ¶¶ 3-5.) In any event, whether Plaintiff personally paid her healthcare bills is irrelevant, because those bills are still medical bills arising from her personal injuries, which are not cognizable under the CPA. *See infra* pp. 6-17.

healthcare bills are an “economic” or “monetary” loss that is cognizable under the CPA. (Pl.’s Br. at 9, 22-23, 25, 29, 37.)

Plaintiff’s argument misses the point entirely. Plaintiff ignores—indeed, never once mentions—this Court’s decision in *Frias*. Plaintiff’s argument against the “derivative” nature of her claims is simply an indirect attempt to dispute the *Frias* “financial consequences” standard. But Plaintiff fails to explain why *Frias* is incorrect. It is not.

Plaintiff’s “economic loss” argument is similarly misplaced and ignores key points from this Court’s *Ambach* ruling and the unbroken line of federal decisions rejecting CPA claims for reimbursement of PIP medical expenses. In *Ambach*, this Court expressly rejected the plaintiff’s attempt to “focus on her loss of money as a qualifying CPA injury.” *Ambach*, 167 Wn.2d at 174. This Court held that “payment for medical treatment, like *Ambach*’s payment for surgery, does not transform medical expenses into business or property harm.” *Id.* at 175. This Court held that the plaintiff’s claimed damages of “medical expenses, wage loss, loss of earning capacity, and out-of-pocket expenses” were the types of personal-injury-related injuries that were not compensable under the CPA—even though they were economic losses. *Id.* at 174.

Under *Ambach* and *Frias*, then, the fact that a plaintiff has sustained an “economic loss” or monetary damage does not satisfy the requirement that the injury be to “business or property,” if that economic loss is a financial consequence of the plaintiff’s personal injury. Federal courts

uniformly have followed suit, holding that claims against PIP insurers for reimbursement of healthcare expenses arising from personal injuries do not satisfy the CPA requirement of injury to “business or property.” (See Defs.’ Open. Br. at 18-20 (citing cases).) Plaintiff’s argument that any monetary loss is injury to business or property within the meaning of the CPA would render that statutory requirement meaningless.⁴ As this Court held in *Ambach*, the payment of medical expenses does not “transform” such economic losses into an injury to business or property.

B. Plaintiff Improperly Focuses on the Identity of the Defendant and the Nature of the Defendant’s Conduct Rather Than on the Nature of the Plaintiff’s Injury.

Unable to establish that she sustained an injury to “business or property,” Plaintiff next attempts to shift the focus to Defendants’ alleged conduct. According to Plaintiff, this Court should look not to the nature of Plaintiff’s injury, but instead to “the *act of the defendant* that caused the claimed injury” and whether that act was a “but for” cause of monetary loss.

⁴ Plaintiff cites *Panag v. Farmers Insurance Co.*, 166 Wn.2d 27, 57, 204 P.3d 885 (2009), to argue that any “economic loss” constitutes injury to property supporting a CPA claim. (See Pl.’s Br. at 24. 36-37.) That argument misstates *Panag* and ignores the limitations imposed by this Court’s subsequent decisions in *Ambach* and *Frias*, which plainly state that economic losses arising from personal injury are not injury to property under the CPA. See *supra* pp. 6-7. *Panag* did not hold otherwise. In fact, *Panag* did not involve issues of personal injury; rather, the plaintiffs there sued a collections agency that had tried to enforce an insurer’s subrogation interest against them and sought expenses for investigating the legal status of the alleged debt. *Panag* itself recognized that certain economic losses may not be viable CPA injuries. 166 Wn.2d at 62, 65 (explaining that costs incurred in “consulting an attorney to institute a CPA claim” are not viable CPA injuries and that “other expenses incurred as a result of the deceptive practice *may* satisfy the injury element”) (emphasis added). *Ambach*, which was decided six months after *Panag*, rejected CPA claims for economic losses arising from personal injuries. See *Ambach*, 167 Wn.2d at 174.

(Pl.’s Br. at 6 (emphasis in original).) Plaintiff notes that PIP is a “no fault” coverage, and then proceeds to argue that unless her PIP claim turns on a showing of negligence by the other driver involved in the accident, she has adequately alleged an injury to her business or property. (*Id.* at 5-6, 16.) Plaintiff essentially argues that *Ambach* is limited to the context of a claim against the tortfeasor who caused the personal injuries. (*See id.* at 22-23.)

Plaintiff’s argument has no basis in law. This Court’s analysis in *Ambach* did not turn on the identity of the defendant or the nature of the conduct allegedly causing the injury. Not surprisingly, this Court looked to the *nature of the injury* to determine if it was an injury to business or property within the meaning of the CPA. This Court began by reviewing dictionary definitions of “business” and “property”; next held that the legislature’s use of the phrase “is restrictive of other categories of injury and is ‘used in the commercial sense [to] denote a commercial venture or enterprise’ ”; and concluded that the plaintiff’s medical expenses, wage loss, and other out-of-pocket expenses were all “personal injury damages” not cognizable under the CPA. *Ambach*, 167 Wn.2d at 172, 174 (quoting *Stevens v. Hyde Athletic Indus.*, 54 Wn. App. 366, 370, 733 P.2d 871 (1989)).

This Court never suggested that its holding was limited to personal injury claims against the tortfeasor who caused the injuries. Nor did the Court suggest that the complained-of loss would be recoverable under the CPA if the plaintiff had sought damages from a party who was not the

tortfeasor causing the personal injuries. Indeed, this Court considered the possibility of a second source of Ambach’s alleged injuries, but still rejected the CPA claim. The Court emphasized that the CPA does not provide personal injury claimants with “backdoor access to compensation they were denied in their personal injury suits.” 167 Wn.2d at 179 n.6; *see, e.g., Fisons*, 122 Wn.2d at 317 (rejecting similar “backdoor access” to personal injury damages through CPA claim when doctor sought damages for pain and suffering allegedly caused by both the CPA-defendant drug company and the patient who had sued doctor for malpractice).

Ambach, its predecessors, and its progeny all focused the analysis on the nature of the injury, rather than the conduct that caused the injury, and rejected CPA claims arising from personal injuries. Indeed, the Court of Appeals has looked to the types of damages “commonly awarded in personal injury actions”—such as medical expenses, lost wages, and damages to a vehicle—and held that such damages cannot support a CPA claim because they are personal injuries, “not injuries to ‘business or property’ as contemplated by the CPA.” *Hiner v. Bridgestone/Firestone, Inc.*, 91 Wn. App. 722, 730, 959 P.2d 1158 (1998), *rev’d on other grounds*, 138 Wn.2d 248, 978 P.2d 1158 (1999). The Court of Appeals rejected the plaintiffs’ efforts to reclassify personal injuries “into a pseudo-property structure.” *Id.*; *see also Association of Washington Pub. Hosp. Dists. v. Philip Morris Inc.*, 241 F.3d 696, 705 (9th Cir. 2001) (“Expenses for personal injuries are not injuries to business or property under the CPA.”);

Fisons, 122 Wn.2d at 317 (“[H]ad our Legislature intended to include actions for personal injury within the coverage of the CPA, it would have used a less restrictive phrase than injured in his or her ‘business or property.’ ”); *Stevens*, 54 Wn. App. at 370 (“actions for personal injury do not fall within the coverage of the CPA,” without limitation to particular acts or defendants). Remarkably, Plaintiff’s brief fails to address these cases.⁵

Plaintiff’s attempt to distinguish the authorities interpreting federal statutes with a similar “business or property” injury requirement fails for the same reasons. (See Pl.’s Br. at 35-36; Defs.’ Open. Br. at 22-24.) Those cases also explicitly turned on the nature of the injury, not the nature or conduct of the defendant. See *Jackson v. Sedgwick Claims Management Services, Inc.*, 731 F.3d 556, 566 (6th Cir. 2013) (personal injuries do not become “property” under RICO statute even when plaintiff attempts to have injuries “filtered through” insurance claims); *Brown v. Ajax Paving Industries, Inc.*, 752 F.3d 656, 657-58 (6th Cir. 2014) (applying *Jackson* to claims brought directly against insurers and claims administrators). Indeed, *Brown* specifically rejected the same argument Plaintiff makes here: the

⁵ Plaintiff cites several Washington state court cases that have allowed CPA claims to proceed without ever addressing whether the injuries alleged by those plaintiffs were personal injuries not compensable under the CPA. (Pl.’s Br. at 26.) Plaintiff claims that “USAA admits each case stands for the proposition that the plaintiff asserting her insurer failed to pay medical expenses in violation of the WAC insurance regulations and Washington law states a cognizable CPA claim.” (*Id.*) In fact, none of those cases stands for that proposition and, as Defendants made clear in their Opening Brief, none of those cases even addressed the question presented to this Court. (Defs.’ Open. Br. at 27-28.) Those cases are irrelevant to this Court’s decision on these certified questions.

court held that whether the injury is one to business or property “turns on the nature of the *injury*—that the plaintiff was ‘injured in his business or property’ ” and “does not turn on the nature of the *defendant*.” 752 F.3d at 658 (emphasis in original). The court could not “see how the same harm, loss of expected workers’ compensation benefits, could count as an injury to business or property against some defendants but not against other defendants.” *Id.*

Finally, Plaintiff’s argument that Defendants’ actions were a “proximate cause” of her economic injuries similarly misses the point. Plaintiff argues that when an insurer’s alleged unfair practice is the “proximate cause” of a plaintiff’s economic loss, courts recognize that plaintiff “may recover that loss from the defendant through a CPA action.” (Pl.’s Br. at 25-26.) Yet the cases Plaintiff cites do not support that assertion or address the “personal injury” question presented to this Court. *Indoor Billboard* stands for the unremarkable proposition that proximate causation is a necessary element of a CPA claim; it does not hold that proximate causation of an economic loss is sufficient to establish a CPA injury—a separate element of a CPA claim. *Indoor Billboard/Wash., Inc. v. Integra Telecom*, 162 Wn.2d 59, 83, 170 P.3d 10 (2007). The Court of Appeals’ decision in *Folweiler* is similarly irrelevant to the certified questions here. *Folweiler* involved a claim by a provider, not an insured, and never addressed the question whether medical expenses arising from personal injury constitute injury to “business or property.” *Folweiler Chiropractic*,

PS v. American Fam. Ins. Co., 5 Wn. App. 2d 829, 839-40, 429 P.3d 813 (2018). In short, Plaintiff identifies no authority holding that a financial consequence of a personal injury is an injury to business or property so long as a plaintiff can point to some intervening cause of the financial loss other than the original cause of the personal injury.⁶

C. Plaintiff’s “One Act” Theory Is Not Supported by Washington Law.

Plaintiff’s related “one act” theory is likewise not supported by Washington law. (See Pl.’s Br. at 28.) Plaintiff seizes upon a sentence in *Ambach*—“Where plaintiffs are both physically and economically injured by one act, courts generally refuse to find injury to ‘business or property’ as used in the consumer protection laws”—to argue that *Ambach* applies *only* when the plaintiff is economically and personally injured by “one act.” (Pl.’s Br. at 28.) This statement in *Ambach*, however, is simply illustrative of one situation in which there is no injury to business or property. This Court did not limit its reasoning to claims involving “one act.” Indeed, as this Court’s decision in *Frias* makes clear, the *Ambach* principle applies not only to personal injuries, but to the “financial consequences” of personal injuries. See *supra* pp. 6-8. And courts consistently have rejected CPA

⁶ Plaintiff’s citation to *Short v. Demopolis*, 103 Wn.2d 52, 691 P.2d 163 (1984), for the proposition that this Court has found CPA injury in claims of “professional negligence” is mystifying. (Pl.’s Br. at 8-9.) *Short* stands only for the limited proposition that CPA claims may be asserted based on losses caused by “certain entrepreneurial aspects of the practice of law.” 103 Wn.2d at 60. It did not address whether those losses arose from “personal injury,” and it explicitly rejected some of plaintiff’s CPA claims that “amount[ed] to allegations of negligence or malpractice that are exempt from the CPA.” *Id.* at 61-62.

claims when the financial consequences of personal injuries are caused by defendants other than the tortfeasor who caused the personal injury. (*See* Defs.' Open. Br. at 18-22 (citing cases).)

Plaintiff does not cite any authority relying on the *Ambach* statement Plaintiff identifies to permit CPA claims for the financial consequences of personal injuries when those injuries were not caused by "one act" of the same defendant. Plaintiff's reliance on the Court of Appeals' decision in *Williams v. Lifestyle Lift Holdings, Inc.* is misplaced. 175 Wn. App. 62, 302 P.3d 523 (2013); *see* Pl.'s Br. at 31-33. As Defendants explained in their Opening Brief, the court in *Lifestyle Lift* did *not* permit a claim for personal injury to proceed, but instead limited the plaintiff's CPA claim to the cost of deceptively marketed surgery, which did "not depend on proof that she sustained a personal injury as a result of the surgery." 175 Wn. App. at 73-74. The CPA claim that survived, therefore, was not for medical expenses resulting from personal injury or the financial consequences of personal injury. Whether "one act" caused the plaintiff's injury was not the issue.

By contrast, all of Plaintiff's claimed damages here "depend on proof that she sustained a personal injury." Without a personal injury to Plaintiff caused by a covered automobile accident, Defendants would have no obligation to pay Plaintiff *anything* under her Personal Injury Protection coverage. (Defs.' Open. Br. at 5.) Unlike the claim in *Williams* for deceptive marketing of the surgery, Plaintiff's CPA claim here is for personal injuries. Had Plaintiff been injured in her "business or property"

as required under the CPA, her PIP coverage would not even apply. (*Id.* at 26.)

D. Defendants' Position Is Consistent with Washington Insurance Regulations.

Plaintiff also argues that Defendants' position "cannot be squared" with regulations issued by the Insurance Commissioner deeming it an "unfair practice" for an auto insurer to improperly deny payment of reasonable healthcare bills. (Pl.'s Br. at 5, 7-8, 34-35.) Plaintiff contends—without citing any supporting Washington cases—that precluding insureds from asserting a CPA claim under these circumstances would "nullify" the Washington regulations, because a violation of the regulation is allegedly a *per se* violation of the CPA. (*See id.*)

Plaintiff's argument fails on multiple levels. First, the Washington regulations are not part of the CPA and do not exist for the purpose of authorizing private CPA claims. The "unfair practice" language of the regulations refers not to the CPA, but to the statutes and regulations governing unfair insurance claims practices. *See* WAC 284-30-300. There is no private right of action under the regulations, *see, e.g.*, WAC 284-30-400, and compliance with the regulations is ensured through administrative actions by the Commissioner. *See, e.g.*, RCW 48.30.010; RCW 48.05.140; WAC 284-30-400.

Finally, even if violation of the regulations were a *per se* "unfair practice" under the CPA, that would address only the first element of a CPA claim. There are five elements to a CPA claim: (1) an unfair or deceptive

act or practice that (2) occurs in trade or commerce, (3) a public interest impact, (4) injury to the plaintiff in its business or property, and (5) a causal link between the unfair or deceptive act and the injury suffered. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780, 719 P.2d 531 (1986). Even if plaintiffs establish an unfair act, they still must satisfy the other elements of a CPA claim, including an injury to “business or property,” which is the focus of this proceeding. Accordingly, a “no” answer to the certified questions would not disturb precedent regarding what constitutes a *per se* unfair or deceptive act; it would merely set out the circumstances under which a plaintiff can or cannot satisfy the separate requirement of an injury to business or property.

E. A Ruling in Defendants’ Favor Would Not Deprive Plaintiff of a Meaningful Remedy.

Plaintiff contends that she would have no effective remedy without a CPA claim because her newly pleaded claim for breach of contract would not provide for recovery of attorneys’ fees and costs or treble damages. (Pl.’s Br. at 37-38.) Of course, whether Plaintiff has stated a valid CPA claim does not depend on her wish to invoke the CPA’s remedies. The logical result of Plaintiff’s argument would be the obliteration of the elements of a CPA claim whenever a plaintiff unilaterally deems a contract claim “ineffective.”

Moreover, Plaintiff’s argument ignores the fact that courts have denied CPA claims—including those based on the lack of an injury to “business or property”—notwithstanding that such a denial would

“deprive” the plaintiff of the full panoply of CPA remedies. Indeed, in *Ambach* the plaintiff’s alternative remedy was a “professional negligence” claim. 167 Wn.2d at 169 & n.2. But like Plaintiff’s claim for breach of contract here, a professional negligence claim does not provide for the same remedies as a CPA claim. *See, e.g., Short*, 103 Wn.2d at 61-62 (discussing limited remedies for professional negligence relative to CPA remedies, but nevertheless rejecting claims that “amount to allegations of negligence or malpractice and are exempt from the CPA”). This Court, nevertheless, still rejected *Ambach*’s CPA claim.

Just like the plaintiffs in the other cases whose CPA claims were rejected for lack of an injury to business or property, Plaintiff here seeks to shoehorn into the rubric of the CPA a claim for injuries that properly are addressed in a claim for breach of contract. But the restrictive nature of the CPA’s requirement of injury to “business or property” demonstrates that the legislature did not intend to redress every possible consumer grievance through the CPA. If Plaintiff can establish that Defendants did not properly reimburse her healthcare bills, she has a perfectly adequate claim for breach of contract—which she is currently pursuing in the district court.

II. QUESTION 2: The Court Should Decline to Address Certified Question 2 or, Alternatively, Rule That None of the Items of Alleged Damages Are Compensable Here.

In their Opening Brief, Defendants demonstrated that this Court (1) should not address the issues in Certified Question 2 because the record is insufficient to enable the Court to evaluate those items of alleged damages or, alternatively, (2) should rule that none of the damages theories are

cognizable injuries to business or property within the meaning of the CPA. (Defs.' Open. Br. at 29-33.) Of the three types of damages set forth in Question 2 (excess premiums, investigative costs, and "lost time"), Plaintiff alleged only "investigative costs." (*Id.* at 31.)⁷ The other items were raised by the plaintiffs in the Progressive case (albeit only tangentially), and for this reason, Defendants incorporated the arguments in Progressive's opening brief, and now incorporate the arguments in Progressive's reply brief as well. All of these alleged items of damage, however, suffer from the same defect: they are the "financial consequences" of Plaintiff's personal injuries, and therefore are not cognizable under the CPA, just as Plaintiff's claims for reimbursement of healthcare expenses were not injury to business or property, either. (Defs.' Open. Br. at 31-33; *supra* pp. 6-8.)

Plaintiff's answering brief fails to address Defendants' arguments. Most significantly, Plaintiff does not dispute that her alleged injuries are the financial consequence of her personal injuries. Instead, Plaintiff asserts that courts have ruled that investigative expenses and other items of damages are CPA injuries. (Pl.'s Br. at 40.) These courts ruled, however, that such damages *may* be cognizable CPA injuries only under certain circumstances. *See Panag*, 166 Wn.2d at 41, 62-64 (explaining that case "does not involve a contest over liability or damages resulting from an automobile accident" and finding costs to investigate collection agency notices could constitute

⁷ Plaintiff now asserts, without citation, that she alleged that she "lost the full value of the premium dollar paid to USAA." (Pl.'s Br. at 13.) In fact, Plaintiff nowhere made that allegation.

CPA injury, but noting exceptions); *Frias*, 181 Wn.2d at 432 (“expenses incurred in investigating their legality *may be* compensable” under the CPA in case that did not involve personal injury) (emphasis added). These decisions did not alter the longstanding rule that damages arising from personal injuries are not compensable under the CPA. (See Defs.’ Open. Br. at 31-32 (citing cases).)

Here, Plaintiff’s CPA claim exists solely because she is seeking reimbursement of medical expenses incurred due to a personal injury. Consistent with this Court’s prior decisions and the answer to Question 1, this Court should hold that investigative expenses and out-of-pocket costs incurred in pursuit of reimbursement for medical expenses arising from a personal injury are not a cognizable CPA injury.

CONCLUSION

For the foregoing reasons, as well as those set forth in Defendants’ briefing in the district court and in the briefing by Progressive Direct Insurance Company in the consolidated case, Defendants respectfully submit that the Court should answer Question 1 in the negative, and either decline to address Question 2 or answer it in the negative.

RESPECTFULLY SUBMITTED THIS 20th day of June, 2019

CORR CRONIN LLP

s/ Michael A. Moore

Michael A. Moore WSBA No. 27047

John T. Bender, WSBA No. 49658

Attorneys for Appellants-Defendants
United Services Automobile Association
and USAA Casualty Insurance Company

CERTIFICATE OF SERVICE

I hereby certify that on June 20, 2019, I caused a true and correct copy of the foregoing document to be served on the following attorneys of record via the Washington State Appellate Courts' Portal E-Service:

David E. Breskin
Brendan W. Donckers
Breskin Johnson & Townsend PLLC
1000 Second Ave., Suite 3670
Seattle, WA 98104
Phone: (206) 652-8660
Email: dbreskin@bjtlegal.com
bdonckers@bjtlegal.com

Young-Ji Ham
Washington Injury Lawyers PLLC
1001 Fourth Ave., Suite 3200
Seattle, WA 98154
Phone: (425) 312-3057
Email: youngji@washinjurylaw.com

Attorneys for Appellee/Plaintiff Krista Peoples

Duncan Calvert Turner
Daniel Andrew Rogers
Badgley Mullins Turner, PLLC
19929 Ballinger Way NE, Suite 200
Shoreline, WA 98155-8208
Email: dturner@badgleymullins.com
drogers@badgleymullins.com

Randall C. Johnson Jr
Law Office of Randall C. Johnson
P.O. Box 15881
Seattle, WA 98115-0881

Daniel R. Whitmore
Law Offices of Daniel R. Whitmore, PS
2626 15th Avenue W, Suite 200
Seattle, WA 98119-2195
Email: dan@whitmorelawfirm.com

Attorneys for Appellees/Plaintiffs Joel Stedman and Karen Joyce

Casie Collignon
Justin Winqvist
Paul G. Karlsgodt
Baker Hostetler LLP
1800 California Street, Suite 4400
Denver, CO 80202
Email: ccollignon@bakerlaw.com
jwinqvist@bakerlaw.com
pkarlsgodt@bakerlaw.com

James Raymond Morrison
Baker Hostetler
999 3rd Avenue, Suite 3600
Seattle, WA 98104-4040
Email: jmorrison@bakerlaw.com

Philip A. Talmadge
Talmadge/Fitzpatrick
2775 Harbor Avenue S.W., Third Floor, Suite C
Seattle, WA 98126
Phone: (206) 574-6661
Email: phil@tal-fitzlaw.com

Attorneys for Appellant/Defendant Progressive Direct Ins. Co.

s/ Michael A. Moore

Michael A. Moore

CORR CRONIN MICHELSON BAUMGARDNER FOGG &

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- phil@tal-fitzlaw.com
- pkarlsgodt@bakerlaw.com
- rcjj.law@gmail.com
- sdamon@corrcronin.com
- youngji@washinjurylaw.com

Comments:

Appellants United Services Automobile Association and USAA Casualty Insurance Company

Sender Name: Michael Moore - Email: mmoore@corrcronin.com
Address:
1001 4TH AVE STE 3900
SEATTLE, WA, 98154-1051
Phone: 206-621-1502

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