NO. 96261-8
(Court of Appeals No. 75864-1-I)

IN THE SUPREME COURT
FOR THE STATE OF WASHINGTON

FOLWEILER CHRIOPRACTIC, PS, a Washington corporation,

Petitioner,

v.

FAIR HEALTH, INC. a New York corporation,

Respondent.

PETITION FOR REVIEW

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I. INTRODUCTION

The petitioners are Folweiler Chiropractic, P.S., and a certified class of health care providers who treated people injured in auto accidents covered by "personal injury protection" (PIP) insurance. The providers billed the Progressive Insurance Company for treating its insureds, but Progressive automatically refused to pay in full any charges that exceeded the 90th percentile of charges in a database owned and marketed by the respondent, FAIR Health, Inc. ("FH"). Auto-reducing health care bills under PIP insurance is an unfair trade practice under the Washington Consumer Protection Act (CPA). The providers brought this class action against FH for knowingly facilitating Progressive's unfair practices.

The trial court denied FH's motion to dismiss for lack of personal jurisdiction, certified the class, then granted summary judgment to FH. Both sides appealed. The Court of Appeals held that Washington courts lack personal jurisdiction over FH, even though it designed its database to be used in Washington, and as the trial court found, that use "would have a known and intended effect on individuals in Washington." CP 870. Then, despite concluding it lacked jurisdiction, the Court of Appeals decided the merits, holding FH could defeat CPA liability with a boilerplate disclaimer, even if it intended the disclaimer to be ignored. The court also

held causation under the CPA requires proof of not only "but-for" causation, but also "legal causation," which Plaintiffs failed to establish.

The providers moved for reconsideration, which the court denied on August 3, 2018. It awarded FH $96,000 in attorney's fees and costs under the long-arm statute, remanding for additional fees in the trial court. This Court should accept review under RAP 13.4(b) and reverse.

II. ISSUES PRESENTED FOR REVIEW

1. Do Washington courts have personal jurisdiction over a foreign defendant that collected information in Washington to be used in Washington where the use of the information caused injury in Washington?

2. Did the Court of Appeals err in awarding a foreign defendant all its "reasonable" fees and costs under the long-arm statute, rather than only the added fees for defending here, and without considering the liberal construction of and the chilling effect on CPA enforcement?

3. Can a written disclaimer alone immunize a company from CPA liability, even if the company knows the disclaimer is ignored and its product is being used to harm consumers?

4. Should a private CPA claimant have to prove not only but-for causation but also "legal" causation?

III. STATEMENT OF THE CASE

A. Auto insurers' use of a charge database to automatically reduce payment of PIP claims violates the CPA.

Washington law requires auto insurers to provide PIP coverage and requires insurers to pay "all reasonable and necessary" medical expenses incurred as a result of a covered accident. RCW 48.22.005(7). The terms

"reasonable" and "necessary" are given their ordinary meaning, and insurers may not restrict their meaning to deny or limit coverage. *Durant v. State Farm Mut. Auto Ins. Co.*, --Wn.2d--, 2018 Wash. LEXIS 355, *7, *11 (June 7, 2018). An insurer must investigate before denying or limiting any expense as "unreasonable." WAC 284-30-330.

In August 2012, a King County jury unanimously found that Progressive's practicing of using a database of charges organized by region to set the maximum amount it would pay for medical expenses under PIP coverage violated the foregoing rules and constituted an unfair trade practice under the CPA.[1] CP 2577-79.

The database Progressive had been using (with its bill-reviewer, Mitchell Medical) was called Ingenix. CP 2529, 2853-54. As a result of an investigation and lawsuit by the New York Attorney General, in 2011 the Ingenix database was transferred to a new company, Defendant Fair Health. CP 5. FH re-named the database and began marketing it to the same customers, including Progressive's bill reviewer, Mitchell Medical. CP 2853-54; 3183. Progressive used FH's database the same way it had used Ingenix: to automatically reduce providers' bills when they exceeded the 90th percentile of the charges in the database. CP 12, 2163, 3010.

[1] Progressive set the maximum payment at the 90th percentile of the charges from that region in the database, and reduced any higher bills to that amount, without ever determining that the higher amount was not "reasonable." CP 12, 2163.

The FH database, just like its predecessor, cannot be used to determine what is or is not a "reasonable" charge for a given medical treatment. Like Ingenix, FH uses eight geo-zip areas to sort and display the data it collects from Washington.[2] CP 2878, 2900. FH admits it has no idea what percentage of providers in each geo-zip is represented in its database. CP 1827. Thus, FH's data simply *cannot* determine what 90% of all providers charge for any procedure in any geo-zip area. CP 1826-27, 2905-06. FH cannot even get a margin of error or an average charge rate for any treatment in any geo-zip area. CP 1827-28. Its efficacy for that purpose is literally random. *See* CP 2164.

Even if the data in each geo-zip were reliable and complete, a geo-zip area does not correspond to a reasonable medical market. CP 3010; *see* CP 2900-01. A geo-zip area includes data from high-density urban areas like Everett with disparate, sparsely populated rural areas in the San Juan Islands. CP 3010.[3] It does not organize data by the city where treatment was provided or by provider (such as their credentials, certifications, or years of experience). CP 3009-11, 2868-71, 1832.

FH admits the flaws in its database. It admits that it cannot be used to determine the reasonableness of any charge rate for any procedure

[2] A geo-zip area corresponds to the first three digits of the area's zip code.

[3] Both areas are within the '982' geo-zip. CP 3010.

in any geo-zip area. CP 2871, 2873-74, 1832-33. In fact, FH includes a disclaimer among the boilerplate in its user guides stating that the database "is not a fee schedule" and does not determine the reasonableness of fees charged. CP 2314; *see* CP 2858. But FH does not enforce this disclaimer or undertake any efforts to ensure that auto insurers who use its database understand it. *See* CP 1828, 2909-12. It does not, for instance, tell auto insurers that the 90th percentile of its database does not correspond to what 90 percent of providers charge in a given geo-zip area. CP 1826-27.

B. FH knows and intends for its database to be used to reduce bills submitted to auto insurers under PIP policies.

FH knows and intends that auto insurers use its database to reduce providers' bills to a certain percentile.[4] During the transition from Ingenix, insurers made clear they would have little interest in the FH database if doing so increased their costs over Ingenix. CP 1805-06, 2966-67. In January 2012, six months after the transition, FH's president attended a conference where insurers were assured they could expect the same results using the FH database as with the Ingenix database. CP 1787-88.

[4] Progressive's bill reviewer told FH which auto insurers were using its database. CP 3183 (email from Mitchell to FH attaching "[t]otal bills entered into our products by Product Line & Customer"). FH's contract with Mitchell "calls for Mitchell to provide [FH] with the list of their customers." CP 687. FH denies it received such lists, but the email shows that it did. CP 3183. FH refused to produce the actual lists attached to the email. *See* CP 3208:9-13.

In fact, FH actively supports the use of its database to determine "reasonableness" under PIP policies. It regularly testifies on behalf of auto insurers to defend their use of the database to set reimbursement rates. CP 2451-52, 2929-30. And it provides statistical analyses of data in its database to defend auto insurers' reductions to providers' bills. CP 2863-65. It has done this *for Progressive in Washington*. CP 1579-92 (emails from FH to Mitchell to respond to Corley Chiropractic Clinic in Everett, attaching "charge distribution" tables for its geo-zip); CP 2863, 2868 (explaining the information "gives [Corley] an idea of the underlying data that the percentiles are based on.").[5] Notwithstanding that FH qualifies as a "non-profit," it makes approximately a million dollars a year from auto insurers' use of its data.[6]

C. FH knew and intended for its database to be used in this manner in Washington.

As noted, FH's data is collected and organized by region. Thus, FH collects Washington-specific data from its customers doing business in Washington and then sorts the Washington data according to eight geo-zip regions in Washington. CP 681, 699-703; *see* CP 2900. As FH's CR 30(b)(6) witness explained, FH's "product" consists of "a procedure code

[5] FH would not provide discovery unless it pertained to "Progressive, Mitchell, and Washington." CP 3105.

[6] During a recent six-year period, FH made approximately $6 million from bill reviewers like Mitchell that adjust PIP claims for auto insurers. CP 2167.

and a geozip and what the charges are." CP 2873. The *only* use for the Washington-specific data is for companies doing business in Washington to set the payments to Washington providers. *See* CP 681, 2873. And, as noted above, FH knew some of those providers treated Washington insureds under Washington PIP claims.[7]

IV. ARGUMENT

A. The Court of Appeals misapplied the federal Due Process Clause, improperly limiting the jurisdiction of Washington courts.

This Court should accept review because the Court of Appeals' decision on jurisdiction misinterpreted this Court's precedents and the United States Constitution, improperly limiting the jurisdiction of Washington courts. RAP 13.4(b)(2-3).

Washington's "long-arm statute" is intended to extend the jurisdiction of its courts to the furthest limits permitted by the Due Process Clause. *Deutsch v. W. Coast Mach. Co.*, 80 Wash. 2d 707, 711 (1972). The Due Process Clause permits a state court to exercise personal jurisdiction over a foreign defendant who has "purposeful minimum contacts" with Washington if the plaintiff's injuries "arise out of or relate to those minimum contacts." *State v. LG Elecs., Inc.*, 186 Wn.2d 169,

[7] *See supra* notes 4-5 and accompanying text.

176-77 (2016) (internal quotations omitted).[8] The trial court, Judge William L. Downing, found this standard met here:

> I am persuaded that the defendant's collection, compilation and use of data that is Zip Code specific constitutes a sufficiently purposeful involvement in the state of Washington …. Although the defendant was not manufacturing a product that would physically land in this state (as in the more traditional case), it was licensing a database that would have a known and intended effect on individuals in Washington.

CP 870.

The Court of Appeals did not directly disagree; it acknowledged FH "has contacts in Washington," and that it "collects data from Washington to be used in Washington." Slip Op. at 8. Yet, it concluded that the providers' claims were not "related to" those contacts. *Id.* at 8-9. "FAIR Health has customers in Washington, but the class's claims did not arise out of those contacts." *Id.* This is plainly wrong; the charge data that FH collected from health insurers in Washington are exactly the same charge data it provided Mitchell and Progessive to unlawfully reduce the providers' bills. *See* CP 681, 2873.

[8] This test is for "specific" or "case-specific" personal jurisdiction; defendants who reside in the forum or have "continuous and systematic" contact with the forum are subject to "general" personal jurisdiction and can be sued even for acts unrelated to the forum. *Goodyear Dunlop Tires Ops., S.A. v. Brown*, 564 U.S. 915, 919 (2011). Folweiler does not claim and has not ever claimed that FH is subject to general personal jurisdiction in Washington.

The Court of Appeals appeared to believe a foreign defendant must have "direct contact" with a Washington plaintiff in order for there to be jurisdiction. Slip Op. at 8-9. It observed that FH did not collect charge data "from auto insurers, like Progressive, or health care providers, like the class members." *Id.* This kind of direct contact is not required, and never has been required.[9]

Washington courts take a "but for cause" approach to determining whether the plaintiff's claims arise out of or relate to defendant's contacts with the forum state.[10] Even the Court of Appeals acknowledged the evidence is sufficient to meet that test. Slip Op. at 18. "But for" FH's collection and arrangement of Washington state charge data and its licensing of the data for Mitchell's use in setting auto insurance reimbursements to Washington providers, the providers would not have been injured in violation of RCW 48.22.005(7) and the CPA.

It is well-established that a foreign defendant need not "sell its products directly to Washington consumers," nor even "conduct any business in Washington" for there to be personal jurisdiction. *LG Elecs.*,

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[9] The Court of Appeals also relied primarily on a recent case that bears no resemblance to this one, *Bristol-Myers Squibb Co. v. Superior Court of California*, 137 S. Ct. 1773, 1779-81 (2017). It held California lacked jurisdiction over a foreign defendant on claims by *foreign plaintiffs* who had no connection to California.

[10] *Shute v. Carnival Cruise Lines*, 113 Wn. 2d 763, 772 (1989) (citing *Shute v. Carnival Cruise Lines*, 863 F.2d 1437 (9th Cir. 1988), *withdrawn*, 872 F.2d 930 (1989)).

186 Wn.2d at 174. It does not matter whether FH got its Washington charge data from auto insurers or health insurers; the point is that it collected and assembled *Washington* charge data that was used to cause harm to health care providers *in Washington*. *See Calder v. Jones*, 465 U.S. 783, 788-89 (1984) (Florida author and editor subject to personal jurisdiction in California for story "drawn from California sources" where "the brunt of the harm … was suffered in California."). The providers are Washington health care providers, and their claims arise out of and relate to the charge data FH collected in Washington.

FH did not argue otherwise in the courts below. Instead, it argued that its contacts did not amount to "purposeful availment," because it simply licensed its data (including Washington data) to Mitchell, in California, and played no role in Mitchell's decision to use the data to reduce auto insurers' bills in Washington. Yet, as this Court held in *LG Elecs.*, it is enough that a foreign manufacturer "seeks to serve the forum state's market" and placed its goods "in the stream of commerce" knowing they will be used in the forum. 186 Wn.2d at 177.

In *LG Elecs.*, the state had alleged the defendant manufacturers had placed their cathode ray tubes (CRTs) "into the stream of commerce with the knowledge and intent" that they would be used in televisions sold "throughout the United States, including in large numbers in Washington."

Id. at 178. The key was the allegation that the foreign defendants *knew and intended* their product to be used to cause harm in Washington. *Compare Noll v. American Biltrite, Inc.*, 188 Wn.2d 402, 406-07(2017) (holding that Wisconsin asbestos manufacturer was not subject to personal jurisdiction in a wrongful death case by a Washington worker, because the worker had *not* alleged the manufacturer *knew or intended* that the asbestos would be used in products sold in Washington).

The providers make such allegations here, *e.g.*, CP 3 ¶ 2.13, and the evidence of record supports those allegations.[11] The evidence shows that FH knew and intended its data—including its Washington data—to be used by bill reviewers and auto insurers to set reimbursement rates to providers, CP 685, 2868, 1579-92, even though it also knew its data was unfit for such use. CP 2314.

The providers do not accuse FH of "mere untargeted negligence." *Calder*, 465 U.S. at 789. They claim FH's "intentional, and allegedly tortious, actions were expressly aimed at" Washington. *Id.* FH purposely collected charge data from Washington to be used by auto insurers like Progressive to determine how much to pay Washington providers.

[11] When deciding personal jurisdiction, the Court must treat the allegations in the complaint as "established." *LG Elecs.*, 185 Wn. App. at 406. When there is evidence presented outside the pleadings but no evidentiary hearing, the evidence should be construed in favor of the plaintiff. *Id.* (citing *State v. AU Optronics Corp.*, 180 Wn. App. 903, 912 (2014)).

Washington providers should not have to go to New York to seek redress from companies who knowingly cause injury in Washington. *Id.* at 790. This Court should take review and reverse.

B. The Court of Appeals should not have awarded fees and costs against the class.

The Court of Appeals also erred in awarding FH nearly $100,000 in attorney's fees and costs to FH, just for the initial appeal. Slip Op. at 21-22; Not. Ruling (8/30/2018).[12] Under Washington's long-arm statute, an award of fees and costs is not mandatory, and is "left to the trial court's discretion." RCW 4.84.185; *see Fluke Capital & Management Servs. Co. v. Richmond*, 106 Wn.2d 614, 625 (1986). Many trial courts have declined to make an award in circumstances like those presented here, where there is no evidence of bad faith and the jurisdictional question was debatable.[13] The question is at least a close one here, and there is no

[12] The providers will move to modify the Commissioner's ruling. FH previously sought, and likely will seek again, nearly $400,000 in fees in the trial court. CP 4433.

[13] *Cabell v. Zorro Prods*., 2015 U.S. Dist. LEXIS 180861, *3-7 (W.D.Wash. March 23, 2015) (Robart, J.) (jurisdictional issues were "far from clear" and Plaintiff acted in good faith and the court finds a fee award under the long-arm statute "inappropriate"); *Perkumpulan Investor Crisis Ctr. Dressle-WBG v. Wong*, 2014 U.S. Dist. LEXIS 103885, *12 (W.D.Wash. July 29, 2014) (Couhgenour, J.) (denying fees under the long-arm statute where it "cannot" be said that the suit was "frivolous, made in bad faith, or meant to harass.") (internal citations omitted); *Johnson v. Venzon*, 2012 U.S. Dist. LEXIS 123934, *17 (W.D.Wash. Aug. 30, 2012) (Lasnik, J.) (denying fees because the issue of jurisdiction was "complicated and close" and "far from frivolous"); *Amazon.com, Inc. v. Kalaydijan*, 2001 U.S. Dist. LEXIS 26376, *3 (W.D.Wash. Mar. 27, 2001) (Rothstein, J.) (finding that good faith in bringing the claim rendered fees "inappropriate and unnecessary.").

evidence of bad faith. *See* CP 807 (Downing, J. finding jurisdiction); CP 4343-54 (Commissioner Kanazawa finding jurisdiction debatable and denying interlocutory review).

A request for fees under the long arm statute must be limited to the added costs of litigating in Washington. *Scott Fetzer Co. v. Weeks*, 114 Wn.2d 109, 122 (1990). The Court of Appeals ignored this limit, and awarded what it found was a "generous" amount to cover *all* of FH's reasonable fees on appeal. Not. Ruling (8/30/2018).

Further, any award must balance the purpose of "recompensing an out-of-state defendant for its reasonable efforts" with "encouraging the full exercise of state jurisdiction" and should not have the effect of chilling plaintiffs and causing them to abandon otherwise valid claims "merely out of fear of the possibility of fee shifting." *Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 149 (1993). Potential chilling effects are especially important to consider in any award of fees against a plaintiff in a CPA case because of the heightened public interests at stake. The legislature has declared that the CPA should be interpreted liberally. RCW 19.86.920. Private CPA actions are "an integral part of CPA enforcement." *Scott v. Cingular Wireless*, 160 Wn.2d 843, 853 (2007). "Private citizens act as private attorneys general in protecting the public's interest against unfair and deceptive acts and practices in trade and commerce." *Id.* Any award of

attorney's fees, particularly in the extraordinary range sought by FH, would have a serious impact on private citizens' willingness to challenge foreign companies' trade practices under the Washington CPA. The Court of Appeals did not consider any of these concerns; it should have remanded to the trial court to consider these and other factors. *Scott Fetzer Co.*, 114 Wn.2d at 125 (remanding to trial court to determine "what, if any, award [defendant] is entitled to for its appellate efforts.").

C. The Court of Appeals' holdings on the merits contradict established law and raise issues of substantial public interest.

If the Court has jurisdiction, it should also review the Court of Appeals' decision on the merits, which is unprecedented and wrong.[14] It held first that a defendant can defeat a CPA claim if it has a disclaimer against unfair use of its product, regardless of how the product was actually used, and even if the defendant knew and intended that use. Second, it held a consumer must prove not only cause-in-fact, or "but-for" causation, but also "legal causation," which has never before been required in a CPA case. These holdings contradict well-established precedent and would significantly curtail the CPA's application, implicating substantial public interests. RAP 13.4(b)(1), (2), (4).

[14] If the Court of Appeals lacked personal jurisdiction it should not have decided the merits of the claims. *State v. Northwest Magnesite Co.*, 28 Wn.2d 1, 42 (1947), *quoted in Noll*, 188 Wn.2d at 409 and *Hous. Auth. of City of Everett v. Kirby*, 154 Wn. App. 842, 851 (2010).

1. An unfair practice cannot be excused simply by having a written disclaimer.

The first essential element in a private suit under the CPA is an unfair or deceptive trade practice. *Hangman Ridge Training Stables v. Safeco Title Ins. Co*., 105 Wn.2d 778, 785 (1986). These terms are defined broadly, depending on the facts and circumstances of each case. *Klem v. Wash. Mut. Bank*, 176 Wn.2d 771, 785-86 (2013). An "unfair" practice may include a practice that violates a statute or regulation or one that adversely impacts the public interest or offends other policies or the common law. *Id.* at 786; *see also Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 47 (2008).

This Court recently confirmed that any policy or practice by an auto insurer that restricts the meaning of "reasonable and necessary treatment" violates RCW 48.22.005(7). *Durant*, 2018 Wash. LEXIS 355, *12. And a King County jury determined that Progressive's practice of reducing providers' bills based solely on a set percentile in a charge database is an unfair trade practice. CP 2577-79. The question posed in this case is whether the supplier of the database can also be held liable. Under established precedents, the answer is yes.

It is clear that no "direct consumer or business relationship" is required between the plaintiff and the defendant. *Holiday Resort Cmty.*

Ass'n v. Echo Lake Assocs., 134 Wn. App. 210, 221-22, 135 P.3d 499 (2006); *Panag*, 166 Wn2d at 27. "The CPA is 'a carefully drafted attempt to bring within its reaches *every* person who conducts unfair or deceptive acts or practices in *any* trade or commerce.'" *Holiday Resort* at 220 (emphases in original) (quoting *Short v. Demopolis*, 103 Wn.2d 52, 61, 691 P.2d 163 (1984)). In *Holiday Resort*, the defendant was a non-profit trade association for mobile home owners. *Id.* at 214. The court held it could be liable under the CPA for a form rental agreement it had "drafted and disseminated" to owners and contained a provision that violated Washington law, harming the tenants forced to sign it. *Id.* at 227-28. Similarly, here, FH created, marketed, and disseminated a database to allow auto insurers to limit reimbursements to providers under PIP insurance, which is unlawful under Washington law.

Federal law is in accord; as the Court of Appeals acknowledged, Washington courts look to cases brought under the federal Fair Trade Commission Act (FTCA) when determining whether a practice is unfair. RCW 19.86.920; *Klem*, 176 Wn.2d at 787.[15] Under the FTCA, companies

[15] The Washington Legislature declared in the statute that the CPA should be guided by the decisions of the federal courts and "determination of the relevant market or effective area of competition *shall not be limited by the boundaries of the state of Washington*. To this end this act shall be liberally construed that its beneficial purposes may be served." RCW 19.86.920 (emphasis added).

that "facilitate or contribute to" another party's unfair practice by supplying the necessary means to accomplish that practice are independently liable under the CPA. *See FTC v. Neovi, Inc.*, 604 F.3d 1150, 1156 (9th Cir. 2010). "One who places in the hands of another a means of consummating a fraud or competing unfairly in violation of the [FTCA] is himself guilty of a violation of the Act." *Regina Corp. v. Federal Trade Comm'n*, 322 F.2d 765, 768 (3d Cir. 1963).

In *Regina Corp.*, the defendant manufacturer had supplied "suggested retail price lists" to retailers to use in advertising, which it "represented … as the usual and customary prices although it was aware that the usual and customary prices were generally lower." *Id.* The court affirmed liability, even in those instances where the manufacturer had no direct involvement in the misrepresentations to consumers, because it had supplied the lists, knowing they were misleading. *Id.*

In *Neovi*, the defendant managed a website that created and delivered unverified checks for its users. 604 F.3d at 1152. Many "con artists and fraudsters" used the website to bilk consumers. *Id.* at 1154. The Ninth Circuit rejected the same argument FH makes here, that "it did not

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A practice is unfair under the FTCA if (1) the practice has a capacity to cause substantial harm (2) that is not avoidable by the consumer (here care providers), and (3) is not outweighed by countervailing benefits for consumers or competition. *See Rush v. Blackburn*, 190 Wn. App. 945, 962-972 (2015); *see also* 15 U.S.C. § 45(n).

'obtain, input or direct' the delivery of consumer information nor facilitate the theft.'" *Id.* at 1155. "Courts have long held" that the FTCA reaches not only direct perpetrators but also "those whose practices facilitate, or contribute to, ill-intentioned schemes if the injury was a predicable consequence of those actions." *Id.* at 1156. That is precisely what FH did here. It collected, marketed, and sold charge data that it knew would be used by auto insurers to set reimbursement rates, even though such use is unlawful.

The Court of Appeals rejected this analysis, based on a single fact: the boilerplate disclaimer in FH's user guide. Slip Op. at 15-17 (quoting CP 2314). According to the court, having a disclaimer that warns against using its product in an unfair manner *proves* FH did not engage in an unfair trade practice. Slip Op. at 15-16. This astonishing assertion, if allowed to stand, would up-end much of this Court's precedent, and create a giant loophole in the CPA.

The Court of Appeals tacitly acknowledged that a disclaimer alone could not possibly be legally *dispositive*, stating "[b]ut [it] is still evidence of what the product is, what it is not, and how it should be used." Slip Op. at 16. Yet, even so, this only begs the question whether there is any *contrary* evidence; if so, then summary judgment would be improper. The court did not even consider that question. *Id.* It ignored the substantial

evidence offered by the providers that FH executives knew that the product *was* being used in exactly the manner that its disclaimer said it could not be, and that it knew that use was causing harm to health care providers and PIP insureds. *See* CP 2868, 1579-92, 2966-67. The Court should accept review and reverse the Court of Appeals' decision.

2. "Legal causation" has never been and should not be required in a CPA claim.

In order to establish causation under the CPA, the plaintiff must establish that "but for the defendant's unfair or deceptive practice, the plaintiff would not have suffered an injury." *Indoor Billboard/ Washington, Inc. v. Integra Telecom of Wash., Inc*., 162 Wn.2d 59, 84 (2007). The Court of Appeals acknowledged the evidence supports such a finding here, but held that a CPA plaintiff must also prove "legal causation," and that Plaintiffs failed to do so here. Slip Op. at 17-19. In the 45 years since the CPA cause of action was enacted, no case has ever required a plaintiff to prove "legal causation."

"Legal causation" was devised by courts in the tort context—where courts make the rules for liability—in order to permit courts to limit how far the consequences of a defendant's acts extend. *Colbert v. Moomba Sports, Inc.*, 163 Wn.2d 43, 51 (2008); *Schooley v. Pinch's Deli Market, Inc.*, 134 Wn.2d 468, 478 (1998). Legal causation is "intertwined" with

the notion of duty, and allows courts to determine "whether, as a matter of policy, the connection between the ultimate result and the act of the defendant is too remote or insubstantial to impose liability." *Michaels v. CH2M Hill, Inc.*, 171 Wn.2d 587, 611 (2011); *Schooley*, 134 Wn.2d at 478-79. Such judicial policy analysis has no place in legislatively-determined consumer protection law.[16]

Such a move would not only be inconsistent with legislative intent and precedent, but also raise separation of powers concerns. By adopting "legal causation" as an additional element, the Court of Appeals added a new, entirely judicial prerogative to test CPA claims. The Court should accept review and reverse.

V. CONCLUSION

Petitioners request that this Court accept review of the Court of Appeals'decision under RAP 13.4(b) because it conflicts with settled Washington law on personal jurisdiction and the CPA, unduly restrains Washington courts under the federal constitution, and implicates substantial public interests.

[16] Even so, the Court of Appeals' finding that FH's acts were "too remote" to legally cause the providers' injuries ignores their allegations and evidence. Knowledge of the condition injuring a plaintiff is sufficient to establish legal causation. *Wuthric v. King County*, 185 Wn.2d 19, 29 (2016). The providers showed FH knew that auto insurers were using its database to set reimbursement rates and it knew that Progressive was doing so in Washington. *See* CP 2868, 1579-92, 2966-67; *supra* notes 4-5 and accompanying text.

DATED: September 4, 2018

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

FOLWEILER CHIROPRACTIC, PS, a Washington professional services corporation, Appellant, v. FAIR HEALTH, INC., a New York corporation, Respondent.	No. 75864-1-I DIVISION ONE UNPUBLISHED OPINION FILED: June 4, 2018

LEACH, J. — Folweiler Chiropractic PS sued FAIR Health Inc., alleging a violation of Washington's Consumer Protection Act[1] (CPA). Folweiler appeals the trial court's summary judgment dismissal of this claim and denial of its motion to continue. FAIR Health, in turn, appeals the trial court's assertion of specific personal jurisdiction over it and the denial of its request for attorney fees under the long-arm statute.

Because FAIR Health does not have contacts with Washington sufficiently connected to this lawsuit, Washington courts do not have personal jurisdiction over it. If we had personal jurisdiction to decide this case on the merits, we would affirm. Folweiler does not show an issue of fact about two elements of its

[1] Ch. 19.86 RCW.

CPA claim: (1) that FAIR Health committed an unfair or deceptive act or practice and (2) that act or practice caused Folweiler's alleged injury. Also, the long-arm statute entitles FAIR Health to attorney fees incurred in this litigation, including fees on appeal. We affirm the dismissal, but we remand so the trial court can award these fees.

FACTS

FAIR Health is a New York nonprofit corporation. FAIR Health was created as part of a settlement between UnitedHealth Group and the New York State Attorney General after an investigation of Ingenix Inc. This company performed much the same function that FAIR Health now does. The New York Attorney General determined that Ingenix, as a wholly owned subsidiary of UnitedHealth Group Incorporated, had a conflict of interest. FAIR Health was designed to operate independently of any insurer.

Fair Health provides an independent, impartial source of data about the cost of health care procedures. It educates consumers and offers them free tools to make it easier for them to estimate out-of-network expenses, disseminates its data to all health care participants to promote fair billing and reimbursement practices, and makes its data available for policy making and academic research.

FAIR Health developed a national database with the help of academic experts, statisticians, and health care economists. The database contains health care charges for privately insured individuals. The database includes the actual, nondiscounted fees charged by providers before network discounts or other allowances are applied. FAIR Health maintains its database by collecting data from health insurers and plan administrators, including Washington insurers, who license the database for use in paying claims. FAIR Health organizes the data based on "geo-zips," the first three digits of providers' zip codes, and a specific procedure's current procedural terminology (CPT) code.[2]

Folweiler is a Washington professional services corporation that provides chiropractic and massage therapy care in Washington. Folweiler provided care to patients with personal injury protection (PIP) coverage under an automobile insurance policy issued in Washington by Progressive Insurance. The PIP statute requires insurers to pay all reasonable bills submitted.[3] Insurers must investigate if a bill is reasonable before refusing to pay it in full.[4] Mitchell Medical, a California company that does business in California, reviewed

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[2] The American Medical Association assigns a CPT code to every type of medical procedure.

[3] RCW 48.22.085, .005(7).

[4] WAC 284-30-330.

Folweiler's bills for Progressive.[5] Folweiler alleges that Mitchell used the FAIR Health database to automatically reduce its bills to the 90th percentile of the charges for the same procedure in the same geographical area. Progressive then determined that Folweiler's charge of $95 for a certain procedure was unreasonable and instead reimbursed it at the 90th percentile level, which was $91.

Folweiler sued FAIR Health, alleging a CPA violation.[6] The trial court denied FAIR Health's motion to dismiss for lack of personal jurisdiction. The court granted Folweiler's motion for class certification. Both parties moved for partial summary judgment on the issue of liability. The motions were set to be argued together. Folweiler asked the court to delay consideration of FAIR Health's motion so Folweiler could do further discovery but to proceed to hear Folweiler's own motion. The trial court denied the continuance request. It considered both summary judgment motions at the same time. The trial court granted FAIR Health's motion and denied Folweiler's.

Both Folweiler and FAIR Health appeal the trial court's various decisions.

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[5] The record does not establish that Mitchell is a California company, but the parties apparently agree that this is the case.

[6] Folweiler also sued Progressive insurance companies, alleging a violation of the CPA. The parties settled the case. Folweiler Chiropractic, PS v. Progressive Max Ins. Co., No. 15-2-17846-6 SEA (King County Super. Ct., Wash.) (docket nos. 44, 45).

ANALYSIS

I. Jurisdiction

Due process limits a state court's authority to proceed against a defendant.[7] Thus, we first must consider FAIR Health's personal jurisdiction challenge. We conclude that Washington state courts do not have personal jurisdiction over FAIR Health in this matter.

We review the denial of a motion to dismiss for lack of personal jurisdiction de novo.[8] "When a motion to dismiss for lack of personal jurisdiction is resolved without an evidentiary hearing, the plaintiff's burden is only that of a prima facie showing of jurisdiction."[9] Even when the trial court has considered matters outside the pleadings, "'[f]or purposes of determining jurisdiction, this court treats the allegations in the complaint as established.'"[10] For matters outside the pleadings, this court draws reasonable inferences in the light most favorable to the nonmoving party.[11]

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[7] Noll v. Am. Biltrite Inc., 188 Wn.2d 402, 411, 395 P.3d 1021 (2017) (quoting Goodyear Dunlop Tires Operations, SA v. Brown, 564 U.S. 915, 923, 131 S. Ct. 2846, 180 L. Ed. 2d 796 (2011)).

[8] State v. LG Elecs., Inc., 186 Wn.2d 169, 176, 375 P.3d 1035 (2016).

[9] LG Elecs., 186 Wn.2d at 176.

[10] State v. LG Elecs., Inc., 185 Wn. App. 394, 406, 341 P.3d 346 (2015) (alteration in original) (quoting Freestone Capital Partners LP v. MKA Real Estate Opportunity Fund I, LLC, 155 Wn. App. 643, 654, 230 P.3d 625 (2010)), aff'd, 186 Wn.2d 169, 375 P.3d 1035 (2016).

[11] State v. AU Optronics Corp., 180 Wn. App. 903, 912, 328 P.3d 919 (2014).

"Under Washington's long arm jurisdiction statute, RCW 4.28.185, personal jurisdiction exists in Washington over nonresident defendants and foreign corporations as long as it complies with federal due process."[12] Due process allows Washington courts to exercise jurisdiction over a nonresident defendant so long as: (1) purposeful minimum contacts exist between the defendant and the forum state, (2) the plaintiff's injuries arise out of or relate to those minimum contacts, and (3) the exercise of jurisdiction is consistent with notions of fair play and substantial justice.[13] If the plaintiff satisfies the first two prongs, the burden shifts to the defendant to set forth a compelling case that the exercise of jurisdiction would not be reasonable.[14]

Depending on the facts and the claims, Washington courts may have either general or specific personal jurisdiction over a defendant corporation.[15] A state court has general jurisdiction to decide claims against a defendant corporation when that corporation's contacts with the state are so significant that it is essentially at home in the forum state.[16] A corporate defendant is "at home" in the place of the corporation's incorporation and its principal place of

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[12] Noll, 188 Wn.2d at 411.
[13] LG Elecs., 186 Wn.2d at 176-77.
[14] AU Optronics, 180 Wn. App. at 914-15.
[15] FutureSelect Portfolio Mgmt., Inc. v. Tremont Grp. Holdings, Inc., 175 Wn. App. 840, 886, 309 P.3d 555 (2013), aff'd, 180 Wn.2d 954, 331 P.3d 29 (2014).
[16] Goodyear, 564 U.S. at 919.

business.[17] Also, in an exceptional case, a corporation's operations in a state may be so substantial and of such a nature to make it at home there.[18] Folweiler does not claim that Washington courts have general jurisdiction over FAIR Health. So we consider whether Washington courts have specific jurisdiction over FAIR Health in this case.

The court may exercise specific jurisdiction over a nonresident based on the nonresident's more limited but claim-specific contacts with the state.[19] Specific jurisdiction requires a connection between the forum and the controversy.[20] In addition, "the relationship must arise out of contacts that the 'defendant himself' creates with the forum State."[21]

The Supreme Court of the United States most recently explained the requirements of specific personal jurisdiction in Bristol-Myers Squibb Co. v. Superior Court of California.[22] The Court noted that specific jurisdiction requires an "'affiliation between the forum and the underlying controversy, principally, [an]

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[17] BNSF Ry. v. Tyrrell, __ U.S. __, 137 S. Ct. 1549, 1558, 198 L. Ed. 2d 36 (2017).

[18] Tyrrell, 137 S. Ct. at 1558.

[19] FutureSelect, 175 Wn. App. at 886.

[20] Bristol-Myers Squibb Co. v. Superior Court of Cal., __ U.S. __, 137 S. Ct. 1773, 1781, 198 L. Ed. 2d 395 (2017).

[21] Walden v. Fiore, 571 U.S. 277, 134 S. Ct. 1115, 1122, 188 L. Ed. 2d 12 (2014) (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985)).

[22] __ U.S. __, 137 S. Ct. 1773, 1779-81, 18 L. Ed. 2d 395 (2017).

activity or an occurrence that takes place in the forum State.'"[23] The court expressly rejected use of a "sliding scale approach" to decide specific jurisdiction issues.[24] This means that a corporation's continuous activity within a state cannot make up for the lack of an adequate link between that activity and the claims made in the case.[25]

The trial court found that FAIR Health's actions were sufficient to subject it to specific jurisdiction:

> I am persuaded that the defendant's collection, compilation and use of data that is Zip Code specific constitutes a sufficiently purposeful involvement in the state of Washington such that being held to answer to claims concerning related conduct in the courts of this state does not offend traditional notions of fair play and substantial justice.

Relying on Bristol-Myers Squibb, we disagree.

FAIR Health has contacts in Washington. But they are not sufficiently connected to the claims made in this lawsuit to make the exercise of specific personal jurisdiction appropriate. As the trial court observed, FAIR Health's product is organized geographically and it collects data from Washington to be used in Washington. But FAIR Health had no direct contact with Progressive or

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[23] Bristol-Myers Squibb, 137 S. Ct. at 1780 (alteration in original) (quoting Goodyear, 564 U.S. at 919).

[24] Bristol-Myers Squibb, 137 S. Ct. at 1778, 1781 (quoting Bristol-Myers Squibb Co. v. Superior Court of Cal., 1 Cal. 5th 783, 806, 377 P.3d 874, 206 Cal. Rptr. 3d 636 (2016)).

[25] Bristol-Myers Squibb, 137 S. Ct. at 1781.

the health care providers included in the class of plaintiffs. FAIR Health collects data in Washington from health insurers and third-party administrators. FAIR Health does not collect data from auto insurers, like Progressive, or health care providers, like the class members. FAIR Health has customers in Washington, but the class's claims did not arise out of those contacts. The class bases its claims on a contract that FAIR Health had with Mitchell, a company located in California. Mitchell had a contract with Progressive that had a contract with Folweiler's patient. Under these facts, FAIR Health's contacts with Washington are not sufficiently connected to the claims made in this lawsuit to make the exercise of personal jurisdiction proper.

Folweiler claims that Washington courts have personal jurisdiction under a stream of commerce theory. In State v. LG Electronics, Inc.,[26] the Washington Supreme Court explained how the stream of commerce theory can be used to establish the purposeful minimum contacts required by the first prong of a due process analysis: "where a foreign manufacturer seeks to serve the forum state's market, the act of placing goods into the stream of commerce with the intent that they will be purchased by consumers in the forum state can indicate purposeful availment." Folweiler argues, under LG Electronics, that FAIR Health

[26] 186 Wn.2d 169, 177, 375 P.3d 1035 (2016) (citing J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 888-89, 131 S. Ct. 2780, 180 L. Ed. 2d 765 (2011) (Breyer, J., concurring).

is subject to personal jurisdiction in Washington because it placed its product in the stream of commerce and knew it would be used in the forum.[27] But, in LG Electronics, the Washington Supreme Court expressly rejected the argument that "mere foreseeability that a product may end up in a forum state" allows specific jurisdiction.[28] "Instead, the defendant's conduct and connection with the State must be such that it should reasonably anticipate being haled into court there."[29]

Folweiler does not show that the class's claims made in this lawsuit are sufficiently connected to FAIR Health's contacts with Washington to make the exercise of personal jurisdiction proper.

II. Consumer Protection Act Claims

Even if Washington courts had personal jurisdiction over FAIR Health, we would affirm dismissal because Folweiler fails to show a material issue of fact that would entitle it to a trial.

Both Folweiler and FAIR Health moved for summary judgment on the CPA claim. A party moving for summary judgment has the initial burden to show no genuine issue of fact exists.[30] The burden then shifts to the nonmoving party to "set forth specific facts to rebut the moving party's contentions and show that a

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[27] See LG Elecs., 186 Wn.2d at 177.
[28] LG Elecs., 186 Wn.2d at 177.
[29] LG Elecs., 186 Wn.2d at 178.
[30] Young v. Key Pharm., Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989).

genuine issue as to a material fact exists."[31] Summary judgment is proper if, viewing the facts and reasonable inferences in the light most favorable to the nonmoving party, no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law.[32] A genuine issue of material fact exists if reasonable minds could differ about the facts controlling the outcome of the litigation.[33] We review summary judgment orders de novo, engaging in the same inquiry as the trial court.[34]

The CPA prohibits "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce."[35] To prevail on a CPA claim, the plaintiff must show (1) an unfair or deceptive act or practice, (2) occurring in trade or commerce, (3) a public interest impact, (4) injury to the plaintiff's business or property, and (5) a causal link between the unfair or deceptive act and the injury.[36] The parties dispute the first and fifth elements

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[31] Allard v. Bd. of Regents of Univ. of Wash., 25 Wn. App. 243, 247, 606 P.2d 280 (1980).

[32] CR 56(c); Michak v. Transnation Title Ins. Co., 148 Wn.2d 788, 794-95, 64 P.3d 22 (2003).

[33] Hulbert v. Port of Everett, 159 Wn. App. 389, 398, 245 P.3d 779 (2011).

[34] Michak, 148 Wn.2d at 794. Although Folweiler acknowledges the standard of review is de novo, it nevertheless spends much of its argument critiquing the trial court's analysis. These arguments do not matter to our analysis.

[35] RCW 19.86.020.

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

here. Because Folweiler does not create a factual issue about either element, the trial court properly granted summary judgment to FAIR Health. This means that the trial court correctly denied Folweiler's summary judgment motion.[37]

Admissibility of Evidence

Preliminarily, FAIR Health challenges admissibility of certain evidence and contends that the trial court improperly relied on inadmissible evidence. Courts may consider only admissible evidence when ruling on a motion for summary judgment.[38] "The trial court has wide discretion in ruling on the admissibility of expert testimony."[39]

First, FAIR Health contends that the trial court should not have considered the declarations of Brendan Burke and Paul Torelli because Folweiler did not disclose these witnesses until after it filed its motion for summary judgment. FAIR Health provides no evidence to support this claim, so we disregard it.[40]

Second, FAIR Health contends that Folweiler improperly supported its motion with deposition transcripts from other cases. FAIR Health claims that the depositions are inadmissible under CR 32 and ER 802 but offers no legal

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[37] Because we decide that the trial court properly dismissed the suit, we do not reach FAIR Health's challenge to class certification.

[38] King County Fire Prot. Dist. No. 16 v. Hous. Auth., 123 Wn.2d 819, 826, 872 P.2d 516 (1994).

[39] Moore v. Hagge, 158 Wn. App. 137, 155, 241 P.3d 787 (2010).

[40] RAP 10.3(a)(6); Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

argument in its appellate briefing. Further, it does not identify the depositions it objects to. Thus, we also disregard this argument.[41]

Third, FAIR Health contends that the Burke declaration is conclusory, speculative, and lacks adequate foundation. "'It is well established that conclusory or speculative expert opinions lacking an adequate foundation will not be admitted.'"[42] FAIR Health asserts that Burke has no stated experience with health care charges or FAIR Health data products and thus lacks foundation for his opinions. But Burke attests that he holds a PhD in mathematics and specializes in the application of economics, statistics, and econometrics. The court properly exercised its discretion in deciding to consider the Burke declaration.

FAIR Health does not show that the trial court improperly relied on inadmissible evidence.

Unfair or Deceptive Act or Practice

Next, we consider whether a question of fact exists about the unfair or deceptive act or practice element of a CPA claim. Whether conduct is an unfair

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[41] Farmer v. Davis, 161 Wn. App. 420, 432, 250 P.3d 138 (2011) (stating that if appellate brief lacks citations to legal authority and references to the record, the court will not consider the argument).

[42] Moore, 158 Wn. App. at 155 (quoting Safeco Ins. Co. v. McGrath, 63 Wn. App. 170, 177, 817 P.2d 861 (1991)).

or deceptive act or practice prohibited by the CPA is a question of law.[43] The CPA does not define "unfair" or "deceptive," so the Supreme Court "has allowed the definitions to evolve through a 'gradual process of judicial inclusion and exclusion.'"[44] To decide whether a practice is unfair or deceptive, Washington courts can be guided by federal court decisions applying the Federal Trade Commission Act (FTCA).[45] Under the FTCA, a practice is unfair if it ""causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits.""[46] "Deception exists 'if there is a representation, omission or practice that is likely to mislead' a reasonable consumer."[47] "A plaintiff need not show the act in question was intended to deceive, only that it had the capacity to deceive a substantial portion of the public.[48]

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[43] Panag v. Farmers Ins. Co. of Wash., 166 Wn.2d 27, 47, 204 P.3d 885 (2009).

[44] Klem v. Wash. Mut. Bank, 176 Wn.2d 771, 785, 295 P.3d 1179 (2013) (internal quotation marks omitted) (quoting Saunders v. Lloyd's of London, 113 Wn.2d 330, 344, 779 P.2d 249 (1989)).

[45] 15 U.S.C. §§ 41-58; Panag, 166 Wn.2d at 47; Testo v. Russ Dunmire Oldsmobile, Inc., 16 Wn. App. 39, 50, 554 P.2d 349 (1976).

[46] Rush v. Blackburn, 190 Wn. App. 945, 963, 361 P.3d 217 (2015) (quoting Klem, 176 Wn.2d at 787 (quoting 15 U.S.C. § 45(n))).

[47] Panag, 166 Wn.2d at 50 (quoting Sw. Sunsites, Inc. v. Fed. Trade Comm'n, 785 F.2d 1431, 1435 (9th Cir. 1986)).

[48] Panag, 166 Wn.2d at 47.

Folweiler contends that FAIR Health engaged in unfair practices by licensing its database to companies that it knew would use it to violate the CPA. Essentially, Folweiler claims that because the database is not suitable for the purpose for which it claims that Mitchell and Progressive used it (i.e., determining usual, customary, and reasonable rates for Washington providers), FAIR Health acted unfairly by licensing the data to Mitchell. Folweiler makes a number of arguments to show that the database is not suited for the purpose Mitchell and Progressive used it.[49] But FAIR Health's user guide also contains a disclaimer, explaining the limitations on the use of the database:

> The data provided in the FAIR Health product modules[ ] should be used only for informational purposes consistent with the terms of client's license to use such data. FAIR Health is not determining, developing or establishing an appropriate fee or reimbursement levels for client and its business. Rather, the data represents charge benchmarks for various geographic areas based on the claims data contributed to FAIR Health. The data, including each of the FAIR Health product modules, is not a fee schedule and should not be used as a substitute for client's own judgment in setting reimbursement rates. Indeed, it is the client's responsibility to ascertain the suitability of the data for the client's purposes. FAIR Health disclaims any endorsement, approval, or recommendation of

[49] Folweiler asserts that FAIR Health uses the same flawed system as Ingenix, specifically claiming the data was flawed in the following ways: (1) the geo-zip data does not correspond to a reasonable medical market because each geo-zip encompasses an area with a variety of communities with access to a range of resources, (2) the data does not include data from all health care providers in the geo-zip or one charge for every amount charged for the same treatment or procedure, (3) FAIR Health does not collect data from auto insurers, and (4) the data does not include information about a provider's credentials, certifications, or years of experience.

> data in the modules. Any reliance upon, interpretation of and/or use of the data by client to establish a fee schedule or set a rate is in client's sole discretion.

The parameters that FAIR Health set for the use of its product show that it did not act unfairly when it licensed its product.

Folweiler contends that the user guide should not be used as evidence of FAIR Health's intent. Folweiler correctly notes that intent is not required to show an unfair or deceptive practice.[50] But the user guide is still evidence of what the product is, what it is not, and how it should be used. In light of the user guide, Folweiler's argument that FAIR Health's product is flawed fails.

Folweiler compares this case to Federal Trade Commission v. Neovi, Inc.,[51] a Ninth Circuit decision interpreting federal trade statutes. We distinguish Neovi. Neovi discusses causation but is useful in deciding whether the act in question is unfair or deceptive. There, the defendant Qchex operated a website that allowed users to create and deliver unverified checks drawn on unauthorized accounts.[52] The court found causation where the defendant "created and controlled a system that facilitated fraud and that the company was on notice as to the high fraud rate."[53] The court emphasized that Qchex was not liable under a theory of "aiding and abetting" but had itself "caused harm through its own

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[50] Panag, 166 Wn.2d at 47.
[51] 604 F.3d 1150 (9th Cir. 2010).
[52] Neovi, 604 F.3d at 1154-55.
[53] Neovi, 604 F.3d at 1155.

deeds."[54] The court explained that Qchex "engaged in behavior that was, itself, injurious to consumers" by "creating and delivering unverified checks."[55] Unlike Neovi, this case does not involve an unfair act by FAIR Health itself.

CPA liability does not extend to a party that compiles data and clearly explains the limitations of that data simply because a licensee ignores those limitations and later uses it improperly. FAIR Health's conduct was not unfair or deceptive under the CPA.

Proximate Cause

Next, Folweiler challenges the trial court's conclusion about proximate cause. Proximate cause generally has two elements: "but for" or factual causation and legal causation.[56] Whether the defendant's acts were a "but for" cause of injury is typically a question of fact for the jury.[57] But when the facts are undisputed and the inferences from them are not subject to any reasonable difference of opinion, the question of "but for" cause becomes a question of law.[58] Legal causation is a question of law for the court.[59]

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[54] Neovi, 604 F.3d at 1157.
[55] Neovi, 604 F.3d at 1157.
[56] Michaels v. CH2M Hill, Inc., 171 Wn.2d 587, 610-11, 257 P.3d 532 (2011).
[57] Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc., 162 Wn.2d 59, 84, 170 P.3d 10 (2007).
[58] Tae Kim v. Budget Rent A Car Sys., Inc., 143 Wn.2d 190, 203, 15 P.3d 1283 (2001); Ward v. Zeugner, 64 Wn.2d 570, 574-75, 392 P.2d 811 (1964).
[59] Tae Kim, 143 Wn.2d at 204.

In a footnote, FAIR Health claims that Folweiler cannot establish "but for" causation. It asserts that Progressive could have relied on other databases to reduce Folweiler's reimbursement. If FAIR Health is correct, it has identified a question of fact to be determined by the jury. We cannot conclude as a matter of law that FAIR Health was not the "but for" cause of the alleged injury.

But Folweiler has not shown legal causation. Folweiler claims that the CPA does not require a plaintiff to show legal causation. We disagree. Folweiler relies on our Supreme Court's comment in its discussion of the causation element in a CPA claim in Indoor Billboard/Washington, Inc. v. Integra Telecom of Washington, Inc.,[60] where the court stated that the causation element of the CPA requires a plaintiff to establish that "but for the defendant's unfair or deceptive practice, the plaintiff would not have suffered an injury." Folweiler asserts that this defines the causation test for the CPA and does not require legal causation. But Indoor Billboard does not stand for the proposition that the CPA requires only "but for" causation without the usual other legal causation prong. Indoor Billboard considered a contention that to prove causation under the CPA, the plaintiff had to show only that it paid invoices with allegedly improper surcharges.[61] The court decided that this was not enough because it did not

[60] 162 Wn.2d 59, 84, 170 P.3d 10 (2007).
[61] Indoor Billboard, 162 Wn.2d at 78.

satisfy the "but for" cause standard.[62] But the court did not address legal causation.[63] The CPA also requires legal causation.

To decide if legal causation exists, a court considers whether "'as a matter of policy, the connection between the ultimate result and the act of the defendant is too remote or insubstantial to impose liability.'"[64] The determination depends upon "'mixed considerations of logic, common sense, justice, policy, and precedent.'"[65] FAIR Health contends that the relationship was too remote because it provided only data, which did not cause the alleged injury. Assuming there was an injury, Mitchell's and Progressive's alleged misuse of the data caused it. We agree that the alleged injury here is too remote to support liability under the CPA. FAIR Health's user guide states that the data should not be used in the way that Mitchell and Progressive allegedly used it. Folweiler cannot establish FAIR Health's legal responsibility with evidence that Progressive and Mitchell chose to use the data in a way contrary to FAIR Health's instructions. Thus, Folweiler cannot establish legal causation.

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[62] Indoor Billboard, 162 Wn.2d at 83

[63] See Indoor Billboard, 162 Wn.2d at 78-85.

[64] Michaels, 171 Wn.2d at 611.

[65] Michaels, 171 Wn.2d at 611 (internal quotation marks omitted) (quoting Schooley v. Pinch's Deli Mkt., Inc., 134 Wn.2d 468, 478-79, 951 P.2d 749 (1998)).

III. Request for CR 56(f) Continuance

Folweiler next contends that the trial court improperly denied its CR 56 motion for a continuance. This court reviews a trial court decision on a motion to continue for manifest abuse of discretion.[66] CR 56(f) permits a court to order a continuance to allow a party opposing a motion to conduct discovery. Courts may deny a continuance motion "when '(1) the requesting party does not offer a good reason for the delay in obtaining the desired evidence; (2) the requesting party does not state what evidence would be established through the additional discovery; or (3) the desired evidence will not raise a genuine issue of material fact.'"[67] Folweiler sought the continuance after it had already moved for summary judgment on liability. Yet, it argues that the trial court "refus[ed] to give Folweiler a fair opportunity to prove its CPA claims." The fact that Folweiler had previously moved for summary judgment on the exact issues on which it claims it needed more discovery undermines its argument. Under these circumstances, the trial court did not abuse its discretion when it denied Folweiler's continuance motion.

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[66] Coggle v. Snow, 56 Wn. App. 499, 504, 784 P.2d 554 (1990).

[67] Pitzer v. Union Bank of Cal., 141 Wn.2d 539, 556, 9 P.3d 805 (2000) (internal quotation marks omitted) (quoting Tellevik v. 31641 W. Rutherford St., 120 Wn.2d 68, 90, 838 P.2d 111, 845 P.2d 1325 (1992)).

IV. Attorney Fees

FAIR Health appeals the trial court's denial of its request for attorney fees and costs under Washington's long-arm statute. When a defendant is personally served outside the state and prevails in the action, RCW 4.28.185(5) permits the court to award as attorney fees, reasonable costs of defending the action. One purpose of this provision is to compensate defendants for the added expense caused by plaintiff's assertion of long-arm jurisdiction.[68] "Such an award is discretionary and is limited to the amount necessary to compensate a foreign defendant for the added costs of litigating in Washington."[69]

Here, the trial court denied FAIR Health's request for fees and explained, "Given that this was a Washington CPA claim, that jurisdiction was found to be proper in Washington and that fees and costs may very well have been higher in [New York], the court declines to make any RCW 4.28.185 award." We agree that the court abused its discretion because no evidence indicates that it would have been more expensive for FAIR Health to litigate in New York. In fact, FAIR Health introduced evidence that it spent more litigating in Seattle because its Seattle-based counsel charged higher hourly rates than its New York-based

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[68] Scott Fetzer Co. v. Weeks, 114 Wn.2d 109, 122, 786 P.2d 265 (1990).

[69] Payne v. Saberhagen Holdings, Inc., 147 Wn. App. 17, 36, 190 P.3d 102 (2008).

counsel. Thus, FAIR Health is entitled to attorney fees incurred in this litigation and also on appeal.[70]

CONCLUSION

We affirm the dismissal of Folweiler's claims. We remand so the trial court can reconsider its attorney fee decision and award reasonable fees to FAIR Health.

Leach, J.

WE CONCUR:

Dwyer, J.

Becker, J.

[70] RAP 18.1(a).

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this date I electronically filed the attached document with the Clerk of the Court and caused service on the following counsel of record, in the manner indicated:

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