

NO. 74736-3-I

King County Cause No. 15-2-08509-3 SEA

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION I

GEICO INDEMNITY COMPANY,

Appellant,

v.

UNIVERSITY OF WASHINGTON,

Respondent.

FILED
July 18, 2016
Court of Appeals
Division I
State of Washington

APPELLANT'S BRIEF

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I. INTRODUCTION

The Trial Court improperly allowed the Respondent, University of Washington (“the University”), to amend its Complaint two weeks before trial to add a claim for violation of the Consumer Protection Act. Allowing the addition of the Consumer Protection Act violation claim was contrary to the substantive and procedural laws of Washington.

Appellant, GEICO Indemnity Co (“GEICO”), requests this Court find as a matter of law that the claim brought by the University for violation of the Consumer Protection Act be dismissed with prejudice and without recovery.

II. GEICO’S ASSIGNMENTS OF ERROR

- A.** The Trial Court abused its discretion by granting the University’s Motion for Leave to Amend Complaint to add a claim for violation of the Consumer Protection Act.
- B.** The Trial Court erred as a matter of law because the University of Washington, as a third-party, could not bring a claim against GEICO as an insurer under the Consumer Protection Act.
- C.** The trial court committed error by denying GEICO’s Motions for Judgment as a Matter of Law because the University failed to

prove the elements for a violation of the Consumer Protection Act as required by Washington law.

- D.** The Trial Court abused its discretion by denying GEICO's Motion to Continue Trial to Conduct Discovery once the Trial Court improperly allowed the addition of the Consumer Protection Act claim.

III. RESTATEMENT OF CASE

This is a case involving a dispute about the apportionment of fault between a police officer employed by the University and a motorist insured by GEICO.

Shortly after the subject motor vehicle collision occurred, GEICO and the University preliminarily entered into an agreement to split liability for claims resulting from the incident at an apportionment of 50% each. This preliminary decision regarding apportionment was reached before law enforcement had even completed their investigation into the cause of the accident. The decision to enter into a preliminary agreement was to facilitate the early resolution of the claims against GEICO's insured and the University's employee. After this arrangement was put into writing via email, the respective parties continued to investigate the loss and evaluate their positions.

Two months later, GEICO informed the University that it was disclaiming liability, based on information it had received since agreeing to split liability 50/50. GEICO's subsequent investigation proved that the University police officer involved in the collision bore sole responsibility for the occurrence of the collision.

The University asserted that the agreement to split liability evenly constituted a binding contract regardless of the actual evidence that was subsequently discovered in the case. GEICO argued that the initial 50/50 split was merely a temporary agreement while the parties continued to investigate the case.

The inability to reach an agreement regarding the apportionment of fault prevented the parties from settling the claims arising from the car accident. As such, those claimants filed civil actions for damages alleging negligence against both the GEICO insured and the University employee. The University then filed a lawsuit against GEICO alleging breach of contract.

The Trial Court made numerous reversible errors, including, but not limited to, abusing its discretion by: 1) Granting the University's Motion for Leave to Amend Complaint to add a claim for violation of the Consumer Protection Act two weeks before trial; 2) Allowing the Violation of

Consumer Protection Act claim to proceed contrary to substantive law; 3) Denying GEICO's Motion for Directed Verdict regarding the claim for violation of the Consumer Protection Act; 4) Denying GEICO's Motion for Judgment Notwithstanding of Verdict regarding the claim for violation of the Consumer Protection Act based upon a failure to meet the elements of the claim; 5) Denying GEICO's Motion for Continuance of Trial Date to Conduct Discovery; 6) Awarding the University Attorneys' Fees contrary Washington statutory and case law.

Accordingly, GEICO respectfully requests that this Court reverse the decision of the trial court and provide the following relief:

1. That an Order be entered dismissing the University's claims for violation of the Consumer Protection Act with prejudice. If the CPA claim is dismissed with prejudice and without recovery, GEICO waives its request for any additional relief. If the CPA claim is not dismissed, then;
2. That an Order be entered remanding the University's claims for a new trial;
3. That an Order be entered granting GEICO's Motion for Remittitur substantially reducing the University's claimed attorneys' fees and costs;

4. That an Order be entered granting GEICO attorney fees and expenses under RAP 18.1.

A. Facts of the Car Accident

This lawsuit arose from the damages resulting from a multi-party vehicle collision that took place on March 5, 2011. CP 3065. The vehicle collision occurred in the early morning hours when GEICO insured, Kyle Murphy, entered the intersection of NE 45th Street and University Way NE in Seattle on a green light; at the same time University of Washington Police Officer, Ruslan Sattarov, responding to a call, entered the intersection on a red light. VRP 11/4/2015, p. 36, l. 21.

Following the collision of the two vehicles, Officer Sattarov's vehicle crashed into the storefront of American Apparel causing property damage, while Mr. Murphy's vehicle veered onto the sidewalk located at that intersection. VRP 11/5/2015, p. 4, l. 16. Both Ofc. Sattarov and Mr. Murphy had passengers; Tyler Lennier was the passenger of Mr. Murphy and the passenger of Ofc. Sattarov was another UWPD officer, Stefan Pentcholv. VRP 11/5/2015, p. 11, l. 6. In addition, pedestrians James Howard and Megatron Lawrence were struck by Ofc. Sattarov's vehicle prior to it coming to a stop, causing bodily injuries. VRP 11/4/2015, p. 98, l. 7 – p. 112, l. 19.

B. Adjustment of Claims

On April 12, 2011, approximately one month after the accident, GEICO claims adjuster, Andrea Kravitz, sent correspondence to all parties involved stating that, based on the information available to date, GEICO and the University had agreed to apportion liability 60%/40%, respectively. VRP 11/9/2015, p. 8, l. 11 – p. 13, l. 21. In the correspondence delivered to the University, it stated that the percentage of negligence attributed to GEICO would be 40% while the percentage of negligence attributed to the University would be 60%. *Id.* In the correspondence delivered to all other parties involved, the number of the percentages assigned were inverted, apportioning 60% of fault on GEICO's insured and 40% on the University. *Id.*

On April 28, 2011, Ms. Kravitz and the University's risk management claims specialist, Wendy Winslow-Nason, made an agreement over the telephone, which was subsequently memorialized in an email, to apportion liability for claims resulting from the loss at an equal 50%-50% split. VRP 11/5/2015, p. 5, l. 8. Following this exchange, GEICO and the University continued their respective investigations of the cause of the collision and engaged with the related parties to settle the underlying claims.

On or about June 30, 2011, GEICO claims adjuster Zachary Kozma, sent a fax to Ms. Winslow-Nason disclaiming all liability based on the facts of the investigation into the cause of the collision. VRP 11/10/2015, p. 202, 1. 3-5. GEICO had determined that there were conflicting reports regarding whether the lights and sirens of Ofc. Sattarov's vehicle were in operation at the time of the collision and that Mr. Murphy entered the intersection on a green light while Ofc. Sattarov ran a red. VRP 11/10/2015, p. 117, 11. 7-23. In addition, Ofc. Sattarov's vehicle entered the intersection with enough force to push Mr. Murphy's vehicle approximately fifty feet sideways, indicating a high rate of speed. During this period of time GEICO still had not received the report authored by the Seattle Police Department.

In fact, the Seattle Police Department's Case Investigation Report was completed on or about June 28, 2011, and received in its entirety by the University's Risk Management Department on or about July 15, 2011. VRP 11/9/2015, p. 89, 11. 11-20. This full report was concealed from GEICO until it was actually produced pursuant to a Freedom of Information Act request on October 21, 2015. VRP 11/9/2015, p. 89, 11. 6-10. Throughout the course of discovery, GEICO brought numerous motions to compel the University to release all documentation in its possession

regarding the investigation of the accident with the intention of bringing the conclusions of this report to light. CP 2235-2251; CP 3502-3512. After the full case investigation report was produced it became apparent to GEICO why the University was so reluctant to disclose its subject matter: the report concluded that the actions Ofc. Sattarov were the proximate cause of the collision and attributed liability to the University. CP 6160.

On July 20, 2011, Ms. Winslow-Nason responded to Mr. Kozma's correspondence via email, enclosed with witness statement summaries from the Seattle Police Department's Case Investigation Report, and inquiring if GEICO would submit to the 50%-50% apportionment of liability. VRP 11/9/2015, pp. 199, l. 6- p. 201, l. 8. However, Ms. Winslow-Nason only provided Mr. Kozma with an incomplete, heavily redacted copy that was not reflective of the full report. VRP 11/9/2015, p. 90, ll. 6-19. This redacted report omitted key information about the speed of Ofc. Sattarov's vehicle, the procedures performed by the officers and analysis of the black box information. VRP 11/10/2015, p. 122, ll. 5-25.

It was the University that acted unfairly and with deception when it attempted to conceal that its employee was actually 100% at fault for the accident. It was the University that acted unfairly and with deception when it attempted to keep the alleged 50/50 agreement when it knew its

employee was 100% at fault and the GEICO insured had no fault.

C. Procedural History

The University filed its initial Complaint on April 7, 2015, bringing six separate cause of actions that essentially claimed a breach of contract. CP 1-13. Those claims were 1) breach of contract, 2) equitable indemnity, 3) contribution, 4) unjust enrichment, 5) equitable estoppel, and 6) a claim under the ABC Rule. *Id.* The University alleged that the April 28, 2011 agreement to apportion liability 50%-50% with GEICO constituted a contract for which GEICO was in breach such that it was entitled to equitable relief. *Id.* The initial Complaint made no claims for violation of the CPA or any claims that would entitle the University to recover attorney fees or treble damages.

On October 14, 2015, the trial court granted the University's Motion for Leave to Amend Complaint. CP 3011-3012. The Amended Complaint was filed on October 20, 2015, less than 15 days before the trial date. CP 3064-3179.

Although all pretrial rulings were entered by the Honorable Timothy Bradshaw, trial commenced on November 4, 2015, before the Honorable Julie Spector. Following deliberations on November 18, 2015, the Jury returned a verdict finding that 1) the University and GEICO

entered into a contract; 2) GEICO breached the contract; 3) the damages caused by GEICO's breach amounted to \$9,750.00; 4) GEICO violated the Consumer Protection Act; 5) the damages caused by GEICO's violation of the Consumer Protection Act amounted to \$300,000.00. CP 5706-5707.

In post-trial proceedings, the court denied GEICO's Motion for New Trial or Remittitur regarding the Consumer Protection Act claim. CP 6731-6732. Finally, the trial court disregarded GEICO's Opposition to the University's Cost Bill in its Findings of Fact and Conclusions of Law and Final Judgment in unlawfully awarding the University \$495,033.75 in attorneys' fees. CP 6971-6980; CP 6946-6970.

IV. ARGUMENT

A. It was Error to Grant the University's Motion for Leave to Amend Complaint to add a Claim for Violation of the Consumer Protection Act

1. Standard of Review

Orders on motions to amend or supplement a complaint prior to trial under Civil Rule 15 are properly reviewed under the abuse of discretion standard. *In re Disciplinary Proceedings Against Bonet*, 144 Wn.2d 502, 509-10, 29 P.3d 1242 (2001); *Herron v. Tribune Pub. Co., Inc.*, 108 Wn.2d 162, 165, 736 P.2d 249 (1987).

2. Ruling was Prejudicial to GEICO due to Undue Delay &

Unfair Surprise

Motions to amend pleadings are governed by Civil Rule 15(a). CR 15. A trial court may deny a motion to amend because of undue delay where such delay imposes undue hardship or prejudice on the opposing party. *Wallace v. Lewis County*, 134 Wn. App. 1, 137 P.3d 101 (2006). The touchstone for the denial of a motion to amend is the prejudice such an amendment would cause to the nonmoving party. *Wilson v. Horsley*, 137 Wn.2d 500, 505, 974 P.2d 316, 319 (1999). Factors which may be considered in determining whether permitting amendment would cause prejudice include undue delay and unfair surprise. *Id.* at 506.

It was a manifest abuse of discretion for the trial court to grant the motion to amend when, 1) the motion was filed after the discovery cutoff; 2) The Court refused to reopen discovery; 3) the amendment substantially expanded the damages available to the University; and 4) was contrary to existing law. Here, GEICO was prejudiced similar to the respondent in *In re Estate of Lowe*, 191 Wn. App. 216, 361 P.3d 789 (2015)

In the *Estate of Lowe* case, the parties, litigating the administration of an estate, had engaged in discovery for a prolonged period of time when the plaintiff-appellant brought a motion to amend its complaint less than one month before trial. *In re Estate of Lowe*, 191 Wn. App. 216, 361 P.3d

789 (2015). The parties disagreed about the merit of the plaintiffs' claims. *Id.* However, the Court saw no need to address the merits of the new causes of action due to the prejudice created by undue delay and unfair surprise of the proposed amendments. The Court held that when parties engage in discovery for a prolonged period and a motion to amend and supplement is brought less than one month before trial, a trial court properly exercises its discretion when it denies leave to amend and supplement with new theories that could have been raised months before. *Id.* at 227-228.

GEICO was prejudiced by the undue delay of the University in moving to amend its complaint at such a late juncture, similar to the defendant in *Estate of Lowe*. GEICO and the University had engaged in discovery for the better part of a year. CP 3502-3512. The facts of the case were well known to the University. As such, the University had months before trial during which it could have timely amended its complaint such that there would be no prejudice to GEICO. Rather, as a litigation tactic, the University waited until weeks before trial, well after the discovery cutoff, to move to amend the complaint.

GEICO was supremely prejudiced when the trial court refused a continuance to conduct discovery in regard to the newly added claims or bring dispositive motions addressing them. GEICO had no idea of the

factual or legal basis for the CPA claim less than two weeks before trial. Thus, GEICO was prevented from conducting written discovery and depositions to understand that new claim it faced.

Furthermore, the initial claims made by the University were all based upon equitable grounds arising from a breach of contract. CP 1-13. None of the initial claims allowed for the recovery of attorney fees. *Id.* None of the initial claims allowed for the trebling of damages. *Id.* However, adding the CPA claim completely changed the damages now available to the University. CP 3064-3179. The CPA claim allowed for the recovery of attorney fees and allowed for the trebling of damages. *Id.* These new claims completely prejudiced GEICO, coming only two weeks before trial.

Similar to the ruling in the *Estate of Lowe*, allowing the addition of the CPA claim constituted an undue delay and an unfair surprise that resulted in prejudice under the factors properly considered in *Wilson*.

3. CPA Claim was Improper as a Matter of Law

The University was prohibited from bringing a CPA claim because the University was not an insured of GEICO. It has been the law of Washington for over thirty years that only an insured may bring claims for bad faith against an insurance company. An injured third party has no

right of action against an insurance company for bad faith. *Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 393, 715 P.2d 1133 (1986); *Planet Insurance v. Wong*, 74 Wn. App. 905 (1994).

Similarly, Washington courts have also long held that a third party may not maintain a CPA claim against an insurance company. *Rice v. Life Ins. Co. Of N. America*, 25 Wn. App. 479, 609 P.2d 1387 (1980); *Green v. Holm*, 28 Wn. App. 135, 622 P.2d 869 (1981). In *Green*, the plaintiff in a car accident sued the tortfeasor and the tortfeasor's insurance company, Federated American Insurance Company ("Federated"). The plaintiff claimed that Federated did not attempt to settle the case in good faith and forced her to retain counsel and file suit. *Green*, 28 Wn. App. at 136-137. The Court of Appeals concluded that only an insured may maintain a CPA claim against its own insurance company. Most importantly, the Court of Appeals concluded:

Here, Federated is Holm's insurer, not the appellants'. They cannot assert a claim under the act because it does not apply to a relationship that is adversarial in nature. *Marsh v. General Adjustment Bureau, Inc.*, 22 Wn. App. 933, 592 P.2d 676 (1979).

Green, 28 Wn. App. at 137.

Recently the Washington Supreme Court affirmed that only an insured may bring a CPA claim against an insurer. *Panag v. Farmer Insur.*

Co. of Wash., 166 Wn.2d 27, 50, 204 P.3d 885 (2009). While the *Panag* ruling may be argued to have expanded standing to bring a CPA claim, the case reaffirmed that only an insured may bring a CPA claim against an insurance company.

As discussed in *Green*, the insurance code imposes a statutory duty of good faith on “the insurer, the insured, their providers, and their representatives.” RCW 48.01.030. Because the plaintiff was not the “insured,” the *Green* court concluded the plaintiff lacked standing to allege a per se CPA violation based upon violation of the insurance code. Only an insured may bring a CPA claim for an insurer’s breach of its statutory duty of good faith. *Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 385, 715 P.2d 1133 (1986); *Litho Color, Inc. v. Pac. Employers Ins. Co.*, 98 Wn. App. 286, 991 P.2d 638 (1999)). However, contractual privity ordinarily is not required to bring a CPA claim. *Holiday Resort*, 134 Wn. App. 210.

Panag, 166 Wn.2d at footnote 6.

Washington law for over thirty years has prohibited the very CPA claim that was asserted by the University against GEICO. The University was not an insured of GEICO and the University was directly adverse to GEICO regarding the accident. As such, the CPA claim should never have seen the light of day and the amendment should have been denied. Accordingly, the trial court abused its discretion and committed an error of law by granting the belated amendment. This Court should dismiss the CPA claim with prejudice and without recovery.

B. GEICO's Motions for Judgment as a Matter of Law Should Have Been Granted

1. Standard of Review

Orders on motions for judgment as a matter of law both before and after submission to the jury under CR 50(a)—motions for directed verdict—and CR 50(b)—motions for judgment notwithstanding of verdict—are properly reviewed under the de novo standard. *Anaya Gomez v. Sauverwein*, 180 Wn.2d 610, 616, 331 P.3d 19 (2014); *Washburn v. City of Federal Way*, 178 Wn.2d 732, 752-53, 310 P.3d 1275 (2013); *Ramey v. Knorr*, 130 Wn. App. 672, 676, 124 P.3d 314 (2005). In conducting de novo review of orders on motions for judgment as a matter of law, the Court applies the same standard as the trial court. *Schmidt v. Coogan*, 162 Wn.2d 488, 491, 173 P.3d 273 (2007); *Guijosa v. Wal-Mart Stores, Inc.*, 144 Wn.2d 907, 915, 32 P.3d 250 (2001).

Under either subsection of the Civil Rule 50, (a) or (b), just as is the standard for motions for summary judgment, all reasonable inferences are drawn in favor of the non-moving party and the movant admits the truth of the opposing party's evidence. *Faust v. Albertson*, 167 Wn.2d 531, 537-38, 222 P.3d 1208 (2009); *Mut. of Enumclaw Ins. Co. v. Gregg Roofing, Inc.*, 178 Wn. App 702, 725, 315 P.3d 1143 (2013), *review denied*,

180 Wn.2d 1011 (2014). A judgment as a matter of law is proper only when there is no substantial evidence or reasonable inference to sustain a verdict for the non-moving party. *Id.*

2. The University’s CPA Claim was Properly Dismissed on GEICO’s Halftime Motion for Judgment as a Matter of Law under CR 59(a)

At the close of the University’s case-in-chief, GEICO brought a Motion for Judgment as a Matter of Law to dismiss the violation of the CPA claim. CP 5486-5498. The trial court incorrectly missed the opportunity to correct its prior erroneous rulings. The CPA claim should have been dismissed on directed verdict.

The University presented no evidence that GEICO engaged in an unfair or deceptive act or practice as defined in the CPA. The University also failed to demonstrate that any act or omission on behalf of GEICO affected the public interest such that there was a real and substantial potential for repetition. Furthermore, the University failed to present evidence that it suffered an injury that was the proximate cause of any alleged CPA violation. For the foregoing reasons, the ruling of the trial court should be reversed.

i. The University Presented No evidence that GEICO Engaged in an Unfair or Deceptive Act or Practice under the CPA

RCW 19.86.090 provides for civil actions for damages for any person alleging injury in their business or property through a violation of the CPA. *Ambach v. French*, 167 Wn.2d 167, 171, 216, P.3d 405 (2009); *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 W.2d 778, 780, 719 P.2d 531 (1986). A claimant under the CPA must establish five distinct elements in order to substantiate a prima facie case (1) an unfair or deceptive act or practice (2) that has occurred in trade or commerce, (3) affected the public interest such that it (4) proximately caused (5) damage to the plaintiff's business or property. *Id.* All five of these elements must be established before the burden shifts to a defendant to put forth competent admissible evidence which rebuts the claim of a plaintiff. *Id.* Prior to trial, GEICO stipulated that the University could meet the second prong of the CPA that any act or omission of GEICO occurred in the stream of trade or commerce.

The University's late addition of the CPA claim shifted the focus of this litigation away from the actual contract dispute, redirecting the attention of the trial court to more generalized arguments that insurance provides policyholders "security and peace of mind" and that for non-specified reasons GEICO did not provide that service. CP 2580-2581.

This conjecture cannot adequately support a claim brought under the CPA. WPI 310.02. Of paramount importance here, is the fact that the instant case does not involve a policyholder and this issue is compounded due to GEICO not having the benefit of any discovery regarding the University's claim under the CPA. GEICO did not have requisite time to retain and prepare witnesses to rebut the University's theory of liability under the CPA and was further prejudiced by the order denying further discovery because it was entirely uninformed of the University's basis for the CPA claim.

Initially, it was an abuse of discretion for the trial court to even permit the late amendment adding the CPA claim. In its opening statement, the University alleged that GEICO's conduct in the *Ross* case was the kind of conduct it was asserting formed the rational basis for its claim under the CPA, but the University presented absolutely no evidence in the trial that followed to support that argument. VRP 11/5/2015, p. 14, ll. 11-14. GEICO properly preserved this issue for appeal, when its objection for argument outside the scope was sustained by the trial court. VRP 11/5/2015, p. 15, l. 2.

It remains GEICO's position that its business decisions, standing alone, are insufficient for establishing an unfair or deceptive act or practice under the CPA. Washington Pattern Instruction 310.02, entitled

Reasonableness Defense to Consumer Protection Act Claim states, in part, “[t]he Consumer Protection Act does not prohibit acts or practices that are reasonable in relation to the development and preservation of business or that are not injurious to the public interest. WPI 310.02. Here, GEICO’s dispute of an agreement, even if determined to be an enforceable contract, was not sufficient to establish a violation of the CPA, as a matter of law. The comments to WPI 310.08, defining unfair or deceptive act or practice, delineate that an act or practice is unfair if the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition. WPI 310.08. Accordingly, the University has failed to present the requisite evidence of any unfair or deceptive act necessary to put forth a prima facie claim under the CPA.

Other than GEICO disputing that a liability agreement memorialized in a one-line email qualifies as an enforceable contract, the University is unable to demonstrate any conduct on its behalf arising from its handling of the claims resulting from the March 5, 2011, vehicle collision that could be subject to a claim under the CPA. At trial, the University did not present any evidence that any act or omission by GEICO was “unfair or deceptive.” The University did not present any evidence that

any adjuster, or other agent acting within the scope of authority, engaged in conduct that could objectively be considered “unfair or deceptive.”

The University’s position that Ms. Kravitz intentionally misrepresented GEICO’s apportionment of liability to the University in its letter dated April 12, 2011, by accidentally transposing the percentage numbers of 40% and 60% is entirely unpersuasive. VRP 11/17/2015, p. 660, ll. 17-21. Two days later, on April 14, 2011, prior to any telephone conversation between the parties, the University received a payment recovery notice from GEICO with the intended apportionment assigned to the University of 40% that was originally communicated to all other parties involved. VRP 11/17/2015, p. 668, l. 19 – p. 669, l. 2. Furthermore, on cross examination, when asked if she had known GEICO was accepting 60% liability, Ms. Winslow-Nason testified that she “would have taken the better deal” rather than settling on 50% and characterized her testimony as being stated “facetiously.” VRP 11/10/2015, p. 280, ll. 2-11. Based on this, reasonable minds could not conclude that the University’s allegations of intentional misrepresentation were sufficient evidence to support its claim under the CPA as a matter of law. Accordingly, the CPA claim should have been dismissed on GEICO’s motion and never been sent to the Jury as the finder of fact.

The only issue properly adjudicated in the case at bar is whether the agreement between Ms. Winslow-Nason and Ms. Kravitz constituted a legally binding contract and, if so, whether it was intended to apply to all judgments. The CPA simply does not contemplate relief for business disputes over the enforceability of agreements. Further, the University has not provided any evidence that GEICO's decision to amend its liability determination violated any statute, regulation or other state law. In essence, the only evidence that was offered to the jury is that: 1) the University took the position that the agreement between the parties was a contract and GEICO took an opposing point of view; and 2) the University interpreted the agreement to apply to judgments while GEICO did not.

ii. The University Presented No Evidence that GEICO Committed Any Act or Omission that Caused Damage to the University's Business or Property under the CPA

Likewise, the University failed to present any evidence that an unfair or deceptive act or practice attributable to GEICO caused it to suffer an injury to its business or property. Again, the mere act of disclaiming a contract cannot, in and of itself, be grounds for the finding that doing so was unfair or deceptive. But perhaps more importantly, the University did not produce any evidence identifying how the alleged illicit conduct resulted in an ascertainable injury to its business or property; its assertion of this

element is entirely unsupported by evidence in the record.

Additionally, the University cannot allege that GEICO's conduct throughout the course of litigation proceedings constituted a basis for a claim made under the CPA, as that proposed argument is also unsupported by evidence in the record. In that sense, this case is somewhat analogous to *Blake v. Federal Way Cycle Center*. There, the plaintiff asserted that various acts and practices committed by the defendant during the purchase and sale of a motorcycle met the elements required for a prima facie claim under the CPA. *Blake v. Federal Way Cycle Center*, 40 Wn. App. 302, 306-07, 698 P.2d 578 (1985). As part of its cause of action, the plaintiff also argued that certain conduct of the defendant during litigation following the filing of suit formed the basis for a CPA claim. *Id.* The Court rejected the assertions put forth by the plaintiff contending that post-litigation activity could be offered as evidence of a violation of the CPA, reasoning that once the lawsuit was filed, the matter was under the aegis of the courts; as such it was a private dispute. *Id.* at 312.

The University has argued since the inception of this case that this cause of action comes down to whether the parties entered into a contract and, if so, whether it was intended to apply to judgments. It was never about whether GEICO's decision to alter its liability determination, based

on new information, was unfair or deceptive. The University put forth no evidence at trial regarding how the liability decision caused damage to its business or property, a required element of the CPA. The sole instance in which the University attempted to elicit testimony regarding damage to its business or property, during the examination of Ms. Winslow-Nason was objected to and sustained by the trial court.

Q: Has the work and your time—have you had to put off doing other tasks to focus on this?

A: Yea. When the 50/50 apportionment agreement was derailed, I had to spend a lot of time of this case, and it took away from my other caseload.

Q: Can you expand on that a little bit for the jury. I mean, how has this decision to withdraw the deal impacted your day-to-day business life?

Mr. Donahue: Your Honor, I'm going to object.

The Court: It's sustained.

Mr. Morrone: I'll just ask this question.

Q: Has it affected your day-to-day business life?

Mr. Donahue: Your Honor, I'm going to object.

The Court: Sustained.

VRP 11/10/2015, p. 274, l. 14 – p. 275, l. 3.

The claim of damages allegedly arose because GEICO broke the

alleged 50/50 agreement. The breaking of the 50/50 agreement was not the alleged unfair or deceptive action. Therefore, because the University failed to demonstrate that an act or practice attributable to GEICO caused damage to its business or property it was improper for the trial court to deny GEICO's Motion for Judgment as a Matter of Law under CR 50(a) at the close of the University's case-in-chief.

3. The University's CPA Claim Should Have Been Dismissed on GEICO's Motion for Judgment as a Matter of Law at the Close of Evidence under CR 59(b)

It was an error of law for the trial court to deny the motion for judgment as a matter of law at the close of the University's case under CR 59(a), because the University did not present sufficient evidence for its claim under the CPA to survive a halftime motion brought by GEICO. Similarly, during the presentation of GEICO's case-in-chief the University did not attempt to put forth evidence or elicit testimony on cross examination in support of its CPA claim. At no point following the close of the University's case did it demonstrate that GEICO committed any deceptive act or practice as defined under the CPA. Furthermore, the University did not demonstrate an injury that was caused by GEICO to its business or property under the CPA. Accordingly, it was appropriate for the trial court to dismiss the University's cause of action brought under the

CPA pursuant to CR 59(b) at the close of the evidentiary stage of trial because the University did not fulfill the requirements of its evidentiary burden as a matter of law.

i. The University Did Not Demonstrate any Evidence of an Unfair or Deceptive Act of Practice under the CPA

In its prior motion brought under CR 50, GEICO asserted that the University had failed to present evidence of 1) an unfair or deceptive act or practice that was committed by GEICO; and 2) that any act or practice attributable to GEICO caused an injury to the University's business or property such that it had been damaged under the CPA. CP 5486-5498. The University raised claims handling regulations, alleging that GEICO's conduct was in violation of WAC 284-30 *et seq*, in particular. CP 5687-5690.

GEICO brought to the trial court's attention that WAC 284-30-300, governing standards for unfair claim settlement practices, are subject to the provisions of RCW 48.30.010. VRP 11/16/2015, p. 507, l. 16 – p. 509, l. 4. Under RCW 48.30.010 the only legal procedure for instituting a cause of action for unfair claims settling practices is through the State of Washington Office of the Insurance Commissioner. Under *Tank v. State Farm* and its

progeny, Washington courts have held that insured, first party claimants may also bring such a cause of action. At no time during trial proceedings did the University provide the Court with any authority to support the argument that a plaintiff, other than a first-party insured, may establish an act or practice as being unfair or deceptive by demonstrating an insurance company violated a provision set forth in WAC 284-30-330.

Under *Panag*, no third-party claims against an insurer for bad faith are permissible as a cause of action. *Panag v. Farmer Insur. Co. of Wash.*, 166 Wn.2d 27, 50, 204 P.3d 885 (2009). The insurance code imposes a statutory duty of good faith on the insurer, the insured, their providers and their representatives. RCW 48.01.030. Here, because the University was not an insured of GEICO, it lacked standing to allege a per se violation of the CPA, the basis of which is a violation of the Washington Administrative Code regulating insurance. Only an insured may bring a CPA claim for an insurer's breach of its statutory duty of good faith. *Panag*, 166 Wn.2d at 43 citing *Green v. Holm*, 28 Wn. App. 135, 622 P.2d 869 (1981).

Here, the University presented no evidence in support of its claim under the CPA with this line of argument because it was not an insured of GEICO and was precluded from bringing suit under the CPA as a matter of

law. Accordingly, the University's attempt to raise an inference that GEICO was liable for damages under the CPA due to claims handling procedures alleged to be in violation of the WAC was unsuccessful. Therefore, it was an abuse of discretion for the trial court to deny GEICO's motion for judgment as a matter of law under CR 59(b).

ii. The University Did Not Demonstrate an Injury that was Caused by GEICO to its Business or Property under the CPA

Washington requires a private CPA plaintiff to establish that a deceptive act or practice caused an injury. *Hangman Ridge*, 105 Wn.2d at 794. The injury requirement is met upon proof that the plaintiff's property interest or money is diminished because of the unlawful conduct. *Mason v. Mortgage Am., Inc.*, 114 Wn.2d 842, 854, 792 P.2d 142 (1990). Further, a 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 Washington, Inc.*, 162 Wn.2d 59, 170 P.3d 10 (2007).

The University's position that Ms. Kravitz's typographical mistake of transposing the 60%/40% liability apportionment in its April 12, 2011, letter constituted an unfair or deceptive act is untenable. VRP 11/17/2015, p. 660, ll. 17-21. The characterization of this act as an

intentional misrepresentation on behalf of GEICO that resulted in an injury to the University's business or property is unsupported by evidence in the record. To begin with, Ms. Kravitz testified that she made an honest mistake. VRP 11/9/2015, p. 13, ll. 1-16. Secondly, this admission by Ms. Kravitz is supported by GEICO's payment recovery notice letter to the University, two days later, on April, 14, 2011. The letter stated the apportionment of liability as 40% to the University and 60% to GEICO insured Mr. Murphy consistent with correspondence sent to all other parties. VRP 11/17/2015, p. 668, ll. 19-23.

The University did not rely upon the inaccurate information initially communicated by Ms. Kravitz to its detriment because GEICO set the record straight within a period of two days. The apparent lack of evidence or reasonable inference that the University suffered an injury is a sufficient basis upon which this Court may enter judgment in GEICO's favor as a matter of law as to the CPA claim.

The stated deceptive act by Ms. Kravitz did not present sufficient evidence that the University had been injured by an unfair or deceptive act or practice attributable to GEICO. The following testimony given at trial by Ms. Winslow-Nason does not describe an injury for which relief is properly granted under the CPA:

Q: Has the work and your time—have you had to put off doing other tasks to focus on this?

A: Yea. When the 50/50 apportionment agreement was derailed, I had to spend a lot of time of this case, and it took away from my other caseload.

VRP 11/10/2015, p. 274, ll. 14-18.

Ms. Winslow-Nelson’s testimony does not mention any damage related to the two-day mistake made by Ms. Kravitz. As such, the very claimed deceptive act caused no damage to the University. Rather, the testimony goes to alleged additional work incurred by Ms. Winslow-Nason. There is no authority supporting the proposition that spending unspecified additional time on work following an alleged act or practice establishes an injury under the CPA. *Sign-o-Lite Signs, Inc. v. DeLaurenti Florists, Inc.*, 64 Wn. App. 553, 825 P.2d 714 (1992).

The injury requirement of the CPA is met upon proof that the University’s property or business is diminished because of the unlawful conduct, even if the expenses caused by the statutory violation are minimal. *Mason*, 114 Wn.2d at 854. “Injury” is distinct from “damages” in that monetary damages need not be proved; unquantifiable damages may suffice. *Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d 735, 733 P.2d 208 (1987). In this instance, the University certainly did not prove

monetary damages. At no point during trial did the University attempt to extrapolate a damage model casually tied to the acts or practices of GEICO. However, more importantly, the University did not espouse a theory of liability as to unquantifiable damages that was in any way supported by evidence in the record. This is most evident during closing arguments when counsel for the University states the following:

So, the last question is: What are the damages, if any, caused by GEICO's violation of the Consumer Protection Act? This is the one that I'm not going to write anything. You guys get to decide. At what point did it stop becoming a mistake and start becoming unfair? At what point was it deceptive to allow Ms. Winslow-Nason to continue to work on a file which she testified to she had to spend time working this file as a result of being misled? This is where you have to use common sense.

VRP 11/17/2015, p. 664, l. 10-20.

Not only did the University fail to elicit testimony or admit exhibits demonstrating damages, quantifiable or not, caused by GEICO during the presentation of evidence at trial, but it did not even attempt to argue what the appropriate amount of damages should be to the Jury as to the CPA claim. The fact that the amount of damages need not be proved with precision does not allow a claimant to present no evidence regarding the amount. *Mut. of Enumclaw Ins. Co.*, 178 Wn. App at 715. There must be "substantial evidence" as distinguished from a "mere scintilla" of

evidence, to support the verdict – i.e., evidence of a character “which would convince an unprejudiced, thinking mind of the truth of the fact to which the evidence is directed.” A verdict cannot be founded on mere theory or speculation. *Hojem v. Kelly*, 93 Wn.2d 143, 145, 606 P.2d 275 (1980) citing *Arnold v. Sanstol*, 43 Wn.2d 94, 98, 260 P.3d 327 (1953). Here, there is absolutely no evidence in the record to support the proposition that an unfair or deceptive act or practice attributable to GEICO caused an injury that resulted in damages to the business or property of the University. Thus, the trial court erred in denying GEICO’s Motion for Judgment as a Matter of Law under CR 50(b).

C. A New Trial Should Have Been Granted

Although, GEICO’s motions brought under CR 59 (a) and (b), respectively, should have been granted, the argument and evidence provided in GEICO’s Motion for a New Trial was even more dispositive that the CPA claim was properly revisited. Within the Declaration in Support of GEICO’s Motion for a New Trial was the unredacted Case Investigation Report of the Seattle Police Department, delineating the cause of the March 5, 2011 collision as it was provided to Ms. Winslow-Nason on July 15, 2011, concluding that the University was responsible for the cause of the accident. CP 6127-6160.

1. Standard of Review

Orders on motions for new trial under CR 59 are properly reviewed under the abuse of discretion, unless the decision is based on an error of law. *Teter v. Deck*, 174 Wn.2d 207, 215, 222, 274 P.3d 336 (2012); *Ramey v. Knorr*, 130 Wn. App. 672, 686, 124 P.3d 314 (2005), *review denied*, 157 Wn.2d 1024 (2006). If the stated reasoning for the trial court's decision on a motion for a new trial involves a question of law, the proper standard of review is de novo. *Smith v. Orthopedics Int'l Ltd., P.S.*, 170 Wn.2d 659, 664, 244 P.3d 939 (2010); *Ramey*, 130 Wn. App. at 686. A trial court's denial of a new trial is reviewed more critically than a grant of new trial because "a new trial places the parties where they were before, but a decision denying a new trial concludes their rights." *M.R.B. v. Puyallup Sch. Dist.*, 169 Wn. App. 837, 848, 282 P.3d 1124 (2012), *review denied*, 176 Wn.2d 1002 (2013). The Court will not disturb a jury's determination of damages unless it is outside of the range of substantial evidence in the record, shocks the conscience of the Court, or was the unmistakable result of passion or prejudice. *Bingaman v. Grays Harbor Cmty. Hosp.*, 103 Wn.2d 831, 835, 699 P.2d 1230 (1985).

2. The Trial Court Committed an Error of Law that Resulted in Prejudice to GEICO by Permitting the CPA Claim to be Added Immediately Prior to Trial

Allowing the University to amend its complaint to add an additional cause of action under the CPA less than two weeks prior to the commencement of trial was an error of law that necessitates granting GEICO a new trial. The prejudice caused by allowing the late amendment was compounded significantly by the trial court denying GEICO's Motion to Continue Trial for a period of 120 days to conduct discovery. CP 2394; 3011-3012. These rulings precluded GEICO from discovering the University's theory of liability and damage model for its claim under the CPA, effectively preventing GEICO from presenting a defense at trial. It is GEICO's position that the verdict rendered by the Jury is a direct reflection of this prejudice.

Civil Rule 59(a) enumerates the following as justification for the grant of a new trial:

- (1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion, by which such party was prevented from having a fair trial.
- (5) Damages so excessive or inadequate as unmistakably to indicate that the verdict must have been the result of passion or prejudice;
- (7) That there is no evidence or reasonable inference from the evidence to justify the verdict or the decision, or that it is contrary to law;

- (8) Error in law occurring at the trial and objected to at the time by the party making the application; or
- (9) That substantial justice has not been done.

Authority for grant of a new trial is also codified in RCW 4.76.030:

If the trial court shall, upon a motion for new trial, find the damages awarded by a jury to be so excessive or inadequate as unmistakably to indicate that the amount thereof must have been the result of passion or prejudice, the trial court may order a new trial or may enter an order providing for a new trial unless the party adversely affected shall consent to a reduction or increase of such verdict...

As stated above, under *Wilson*, the standard for the denial of a motion to amend is the prejudice such an amendment would cause to the non-moving party. 137 Wn.2d 500, 505. Granting the University's Motion for Leave to Amend Complaint adding the CPA claim at such a late juncture, after the discovery cutoff and two weeks before trial, prejudiced GEICO and constituted an error of law that supports the granting of a new trial.

Without adequate time to conduct discovery and develop a defense theory to the University's claim under the CPA, GEICO was left guessing which specific acts or practices and supporting evidence the University would rely on to prove the elements required under the CPA. It was only

on November 16, 2015, after both parties had rested at trial, when the University filed its response to GEICO's Motion for Judgment as a Matter of Law, that it became informed of the University's position that the transposition of the initially agreed upon liability apportionment of 60%/40% in the letters sent to the underlying claimants would serve as the basis for the alleged violation of the CPA. VRP 11/16/2015, p. 514, l. 21 – p. 515, l. 1. The untimely addition of the CPA claim and subsequent denial of requested time for additional discovery prevented GEICO from developing a requisite defense at trial and it was the prejudice resulting from these decisions of the trial court which culminated in an inequitable verdict. Accordingly, the trial court ruling permitting the addition of the CPA claim was an error of law which precluded GEICO from having a fair trial. Thus, this Court should remand for a new trial unless the court vacates the verdict of the Jury.

D. The CPA Damages Awarded were the Result of Passion and Prejudice

The fact that the amount of damages need not be proven with precision does not allow a claimant to present no evidence regarding the amount. *Mut. of Enumclaw Ins. Co.*, 178 Wn. App. at 715. In this case, the University offered no evidence of damages for the injury it claimed to

have suffered under the CPA; the sum awarded by the jury cannot be supported by the evidence in the record and, therefore, must have been the result of passion or prejudice—there is no alternative rationale. A jury verdict must not stand if it is outside the range of substantial evidence in the record, or shocks the conscious of the court, or appears to have been arrived at as the result of passion and prejudice. *Bunch v. Dep’t of Youth Services*, 155 Wn.2d 165, 179 116 P.3d 381 (2005). Here, all of these elements are present. The requirement of substantial evidence necessitates that the evidence be such that it would convince “an unprejudiced, thinking mind.” *Id.* at 179. Because the University presented literally zero evidence of damages it is reasonable to conclude that “an unprejudiced, thinking mind” could not have awarded \$300,000.00 in damages on the CPA claim. The “shocks the conscience” test asks if the award is “flagrantly outrageous and extravagant.” *Id.*

The Washington Supreme Court has summarized the rules regarding damages below:

The damages, therefore, must be so excessive as to strike mankind, at first blush, as being, beyond all measure, unreasonable and outrageous, and such as manifestly show the jury to have been actuated by passion, partiality, prejudice, or corruption. In short, the damages must be flagrantly outrageous and extravagant, or the court cannot undertake to draw the line; for they have no standard by

which to ascertain the excess.

Kramer v. Portland-Seattle Auto Freight, Inc., 43 Wn.2d 386, 395, 261 P.2d 692 (1953).

Since no evidence of damages was presented by the University, an award of \$300,000.00 fits squarely within this framework of excessive damages. Here, the “shocks the conscience” test is most certainly met. Therefore, GEICO would request that this Court reduce the amount of damages awarded to \$0.00. In the alternative, GEICO is entitled to a new trial on the basis of CR 59(a)(5) and (7), in addition to RCW 4.76.030.

**E. The Trial Court Abused its Discretion in Denying
GEICO’s Motion for Remittitur**

Orders denying a motion for remittitur of a jury’s award of damages are properly reviewed under the abuse of discretion standard and the Court is to consider whether the award of damages is outside the range of substantial evidence in the record, shocks the conscience of the Court or appears to have been arrived at as the result of passion or prejudice. *Bunch v. King Cnty. Dep’t of Youth Servs.*, 155 Wn.2d 165, 176, 116 P.3d 381 (2005); *Mut. of Enumclaw Ins. Co. v. Gregg Roofing, Inc.*, 178 Wn. App 702, 725, 315 P.3d 1143 (2013), *review denied*, 180 Wn.2d 1011 (2014).

Remittitur is wholly within the power of the trial court when, within

the guidelines of the doctrine, the court makes the legal conclusion that the jury's damage finding is too high. *Sofie v. Fibreboard Corp.*, 112 Wn 636, 654, 771 P.2d 711 (1989). A trial court's use of remittitur is, in effect, the result of a legal conclusion that the jury's finding of damages is unsupported by the evidence. *Id.* A trial court can only reduce a jury's determination when it is wholly unsupported by the evidence, obviously motivated by passion or prejudice or shocking to the court's conscience. *Id.* at 654-655. Here, all of the requisite elements are met. The award rendered by the Jury was the direct result of prejudice caused by the trial court's prior errant discovery and evidentiary rulings. Furthermore, it is GEICO's position that the University's statements during closing arguments contributed an award of damages that was the product of punitive passion:

Whatever your verdict is, whatever it is, GEICO will listen. They have sent people to trial. You've heard one name, Fiona Hunt. You're smart enough to have figured out who she was, and you're smart enough to know she's hear today...

If GEICO is willing to send people to trial every day, it's certainly going to listen to what the result of this jury is at the end of the case. So, if you think commitments don't matter within the insurance industry, that they can make promises and break them when it's convenient, induce reliance and then walk away when it's something they no longer something they want to honor...if you think that's

acceptable, then find for GEICO.

VRP 11/17/2015, p. 624, l. 10 – p. 625, l. 1.

This line of argument was timely objected by GEICO and sustained by the trial court. VRP 11/17/2015, p. 624, ll. 15-16. In addition, it is GEICO's position that the University's consistent focus throughout trial on attempting to elicit testimony in direct reference to the limits of GEICO's policy with its insured, Mr. Murphy, of \$300,000.00 was directly correlated with the award returned by the Jury.¹ This measure of damages was in no way in conformance with the evidence offered by the University in support of its claim under the CPA. Therefore, the trial court abused its discretion by denying GEICO's Motion for Remittitur.

F. The Attorneys' Fees Awarded on the CPA Claim were Not Based upon the Law

A trial court's determination of the amount of an attorney fee award is properly reviewed under the abuse of discretion standard. *Sanders v. State*, 169 Wn.2d 827, 866-67, 240 P.3d 120 (2010); *Magana v. Hyundai Motor Am.*, 167 Wn.2d 570, 593, 220 P.3d 191 (2009). The lodestar method must be utilized by the court in its calculations and must be based

¹ See, VRP 11/9/2015, p. 52, l. 24 – p. 53, l. 1; VRP 11/9/2015, p. 53, ll. 7-13; VRP 11/9/2015 p. 75, ll. 16-17; VRP 11/10/2015, p. 244, l. 8-10;

upon articulable grounds based upon proper findings of fact and conclusions of law. *Morgan v. Kingen*, 166 Wn.2d 526, 539, 210 P.3d 995 (2009); *Mahler v. Szucs*, Wn.2d 398, 434-35, 957 P.2d 632, 966 P.2d 305 (1998); *Manna Funding, LLC v. Kittitas County*, 173 Wn. App. 879, 901-02, 295 P.3d 1197, *review denied*, 178 Wn.2d 1007 (2013).

The party seeking an award for attorney fees bears the burden of proving that such fees are reasonable. *Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 151, 859 P.2d 1210 (1993).

The trial court abused its discretion in awarding all of the University's Attorneys' Fees. CP 6971-6980. The University brought its petition for an award of fees on the CPA claim pursuant to RCW 19.86.090 and RCW 4.84.250 and the trial court granted attorneys' fees in the staggering amount requested of \$495,033.75. *Id.* First, there was no legal authority for an award of reasonable attorney fees under RCW 4.84.250. Second, the University never should have recovered the vast majority of the attorney fees for work related to non-CPA claims and a multiplier was not supported.

1. RCW 4.84.250 is not applicable

The University did not qualify for the recovery of reasonable attorney fees pursuant to RCW 4.84.250. The University never 1) plead

for a recovery under RCW 4.84.250; 2) never complied with the notice requirements; and 3) never pled that the case was worth less than \$10,000.00. See, RCW 4.84.250 and *Hanson v. Estell*, 100 Wn. App. 281, 290, 997 P.2d 426 (2000); *Lay v. Hass*, 112 Wn. App. 818, 824, 51 P.3d 130, 133 (2002). Under *Beckmann v. Spokane Transit Authority*, any offer made pursuant to 4.84.250 must cite that statute. 107 Wn.2d 785, 787, 733 P.2d 960, 960-61 (1987). More recent decisions have held that a plaintiff must inform a defendant an offer is made under the statute for RCW 4.84.250 to apply. *Woodruff v. Spence*, 76 Wn. App. 207, 883 P.2d 936 (1994). Notice is required so the parties may settle a claim before they take on the risk of incurring liability for the opposing party's attorney fees. *In re 1992 Honda Accord*, 117 Wn. App. 510, 524, 71 P.3d 226 (2003).

Here, the University did not plead the statute, or provide any statutory authority in any settlement offers received by GEICO. Nor did the University plead a specific amount of damages in its complaint. Notice is required so litigants can settle claims before incurring the risk of paying the prevailing party's attorney fees. *Id.* When the University made its settlement offer, it included other financial terms to the figure of \$9,750 making the statute inapplicable even if the University had provided notice. CP 6822-6823. The record demonstrates that the University never pled

that the instant case was worth less than \$10,000.00. The University's post-trial effort to invoke RCW 4.84.250 as an alternative means of recovering fees must be refused by this Court because it failed to meet any of the requirements necessary to invoke RCW 4.84.250. As such, pursuant to the above case law, the University was not entitled to recover reasonable attorney fees pursuant to RCW 4.84.250.

2. Applying a Multiplier was an Abuse of Discretion

Additionally, the University should not have been granted a multiplier of 1.5 in its petition for this case. Using a multiplier to make an adjustment to the lodestar calculation is reserved for rare occasions because the lodestar method is presumed to compensate a practitioner. *Miller v. Kenny*, 180 Wn. App. at 825. In calculating a lodestar fee award, a court first multiplies a reasonable hourly rate by the number of hours reasonably expended. *Chuong Van Pham v. Seattle City Light*, 159 Wn.2d 527, 538, 151 P.3d 976, 987 (2007). A reasonable rate reflects the market value of the attorney's services. *Collins v. Clark Cnty Fire Dist. No. 5*, 155 Wn. App. 48, 98-99, 231 P.3d 1211, 1238 (2010). Multipliers are typically reserved for contingency fee cases because the lodestar calculation method may not account for the high risk nature of a case. *Id.* Here, to establish a reasonable hourly rate the University cited the National Law Journal, a

publication with no bearing on the reasonableness of billing rates in its own locality. CP 6774. Further, there were no risk factors present justifying a multiplier because the counsel for the University's fee recovery was not dependent on the outcome of the litigation.

3. The Court Abused Discretion when it Awarded Unrelated Attorney Fees

The most recent controlling case that applies to the review of the University's award of fees is *Berryman v. Metcalf*, 177 Wn. App. 644, 658, 312 P.3d 745 (2013). Four principles from the holding in *Berryman* are as follows: 1) the trial court should actively and independently confront the question of what constituted a reasonable fee; 2) An award of reasonable fees must be limited to hours reasonably expended; 3) the hours an attorney recorded for his work must be discounted for hours spent on unsuccessful claims, duplicated effort, or otherwise unproductive time; 4) a trial court commits reversible error by granting a party's request for an award of attorney fees without addressing an opposing party's specific objections that the request includes fees for blocks of billed time that are alleged to be duplicative or unnecessary. 177 Wn. App. 644 at 658-662.

Washington courts have held that a fee award should only represent the reasonable amount of time and effort expended which should have been

expended for the actions of that party which constituted a CPA violation. *Nordstrom v. Tampourlos*, 107 Wn. App. at 744. Applied to the instant case, an appropriate fee would relate only to time reasonably required to show unlawful practices that the University alleged to be unfair or deceptive. The considerable time and resources the University attributed to litigating the contractual and estoppel claims should therefore have no bearing on the jury's award of damages on the CPA claim and accordingly nothing to do with a corresponding award of attorney fees.

If an attorneys' fee recovery is authorized for only some of the claims, the attorneys' fee award must properly reflect a segregation of the time spent on issues for which attorney fees are authorized from time spent on other issues. *Kastanis v. Educ. Emp. Credit Union*, 122 Wn.2d 483, 501-502, 859 P.2d 26 (1993). A trial court's order must include, on the record, a segregation of the time allowed for separate legal theories. *Travis v. Wash. Horse Breeders Ass'n*, 111 Wn2d 396, 411, 759 P.2d 418 (1988). The burden of segregating fees must be met by the party requesting the fees. *Kastanis*, 122 Wn.2d at 501. Here, the University did not meet that burden and therefore a substantial reduction in the amount of attorney fees awarded is warranted. The University is precluded from recovering attorney fees for work pursuing its contract and equitable claims

and is only authorized for work performed in furtherance of its CPA claim. The trial courts finding that, “Ultimately the contract and CPA theories were supported by nearly-identical evidence and testimony” is contrary to law. CP 6974.

The CPA claim was not brought until less than 3 weeks prior to trial. CP 3011-3012. Of course, since the CPA claim was added via amendment after the discovery cutoff, neither party had the capacity to expend time and resources conducting discovery. CP 3011. Irrespective of this, the University was awarded fees for 479 hours billed prior to filing its Amended Complaint on October 20, 2015, as well as 256.5 additional hours billed between October 21st and the start of trial and 332.5 hours for the 5.5 day trial. CP 6900-6901. Counsel for the University also billed over 105 hours attributable to post-trial motions after the probability of fee recovery related to this litigation increased substantially. *Id.* It is GEICO’s position that this accounting was excessive and unreasonable, but even more indefensible was that in preparing its petition, the University did not segregate fees for work specific to its CPA claim.

4. No Attorney Fee Provision in Alleged Contract

The University was not entitled to recover attorney fees as a result of litigating the contractual claims. In Washington, attorney fees may be

awarded when authorized by private agreement. *Deep Water Brewing, LLC v. Fairway Res. Ltd.*, 152 Wn. App. 229, 277, 215 P.3d 990 (2009). Whether a specific contract provision authorizes an award of fees is a question of law that an appellate court reviews de novo. *Id.* A contractual attorney fees clause will not support an award of attorney fees for a claim not based on the contract. *Id.* at 279. In a multiclaim case, the court may limit a party's award of attorney fees to only those fees attributable to the claims on which the party prevailed if the claims are separable.

There is no contract provision granting attorney fees in this case. The email alleged to be a contract between GEICO and the University contained no clause regarding attorney fees stating it is entirety, "This confirms that we have agreed to apportion liability 50/50 in regard to this loss." 11/9/2015, p. 25, ll. 8-15. Thus, the Court should find under de novo review that this language does not support an award of attorney fees under the contractual claim. Accordingly, the because the contract between the parties did not provide for attorney fees and the CPA claim and its associated award of fees were incorrectly decided as a matter of law it is GEICO's position that the University's total award of attorney fees for this case is \$0.00.

In summary, the trial court abused its discretion by awarding the

University \$495,033.75 in attorney fees and costs for its CPA claim when the University all but unquestionably devoted nearly all of its effort in discovery and trial attempting to prove that there was a contract between the parties in this case and that said contract bound GEICO to all future judgments or settlements. The University pled that, “the only issue in this stand-alone action is whether the two parties—through their employees—entered into a binding agreement to equally apportion liability and, if so, what the resultant damages would be for GEICO’s decision to breach the contract.” CP 1358-1359. The University’s claim to recover all of its fees was contrary to its own pleading.

Therefore, this Court should revise the amount of attorneys’ fees awarded to the University to \$0.00 if the CPA claim is properly dismissed. In the alternative, if the Court affirms the entry of judgment as to the CPA claim, attorneys’ fees should be revised to \$32,342.46, or the issue of the proper amount of the fee award should be remanded to the Trial Court.²

Finally, GEICO asks this Court to award GEICO recovery of reasonable attorneys’ fees and expenses for review of this matter under RAP 18.1. Should this Court rule that GEICO is the prevailing party, under

² GEICO will provide a complete accounting of this calculated total along with supporting documentation at the request of the Court.

4.84.250 it is entitled to a reasonable amount of attorneys' fees because as the defendant at the trial court level GEICO never pleaded it was entitled to any damages and bore the cost of defending itself in this action.

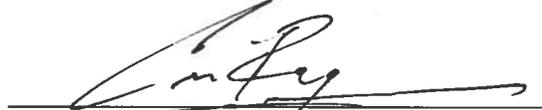
V. CONCLUSION

GEICO respectfully requests that this Court reverse the rulings of the trial court and dismiss the CPA claim with prejudice and without recovery. If the CPA is not dismissed, the Court should remand this case for a new trial based on the above stated reasons.

DATED this 18TH day of July, 2016.

Respectfully Submitted,

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NO. 74736-3-I

King County Cause No. 15-2-08509-3 SEA

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION I

GEICO INDEMNITY COMPANY,

Appellant,

v.

UNIVERSITY OF WASHINGTON,

Respondent.

PROOF OF SERVICE - APPELLANT'S BRIEF

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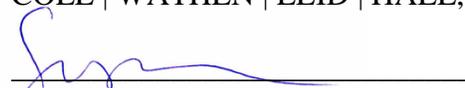
I, Sarah Gunderson, the undersigned, certify and declare under penalty of perjury under the laws of the State of Washington that the following statements are true and correct.

I certify that on July 18, 2016, I submitted the Appellant's Brief to the Court of Appeals Division One via e-filing; and a copy of the same was e-mailed and sent out for service by U.S. Postal Service to be served on the following:

Howard Goodfriend howard@washingtonappeals.com Jenna Sanders jenna@washingtonappeals.com Tara Friesen taraf@washingtonappeals.com SMITH GOODFRIEND, PS 1619 8 th Avenue North Seattle, WA 98109	<input checked="" type="checkbox"/> Via US Mail <input checked="" type="checkbox"/> Via email
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RESPECTFULLY SUBMITTED this 18th day of July, 2016.

COLE | WATHEN | LEID | HALL, P.C.



Sarah Gunderson
Legal Assistant