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DIVISION II

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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

ESTATE OF JOANN H. COWART (DECEASED) BY KERRY
BRINK, ESQ., as Co-Personal Representative and Special
Administrator, and JAMES E. COWART, JR.,

Appellants,

v.

GREAT-WEST LIFE & ANNUITY INSURANCE, et al.,

Respondents.

BRIEF OF RESPONDENTS

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I. INTRODUCTION

The issue in this case is whether respondents¹ (collectively “Great-West”) can be held liable to plaintiffs, James and Joann Cowart,² for failing to pre-approve a total abdominal hysterectomy (“TAH”) for Mrs. Cowart. Great-West provided claims processing services for the Cowarts’ employer-funded medical plan.

Mrs. Cowart sought the TAH, together with a bladder suspension procedure, to treat her symptoms of heavy menstrual bleeding and stress incontinence. Great-West approved the bladder suspension but declined to pre-authorize the TAH because Mrs. Cowart had not previously tried other less invasive treatments.

In August 1998, two months after Great-West declined to pre-approve the TAH, Mrs. Cowart was diagnosed with ovarian cancer. The Cowarts now assert that, if Great-West had pre-authorized the TAH in June, her cancer would have been discovered at that time. The Cowarts seek to hold Great-West liable for bad faith, negligence,

¹ Respondents include Great-West Life & Annuity Insurance Company, One Health Plan of Washington, Inc., One Health Plan of Colorado, Inc., and Drs. Stephen Gorshow, Thomas Paulson, and Roy Gottesfeld.

² Mrs. Cowart died during the pendency of this lawsuit, and the Estate of Joanne Cowart by Kerry Brink, Esq., has been substituted as a plaintiff on her behalf.

medical malpractice, and violation of Washington's Consumer Protection Act ("CPA").

The claims asserted by the Cowarts can only be characterized as novel. They are not seeking to recover benefits under an insurance policy. Instead, the Cowarts seek \$20 million in damages arising from Mrs. Cowart's subsequent diagnosis of cancer, even though Mrs. Cowart's own physician admits the TAH that Great-West declined to pre-approve was not intended to diagnose, prevent, or treat cancer, and he expressly did not recommend it for that purpose. It is merely a fortuity that a TAH performed in June 1998 would (likely) have revealed Mrs. Cowart's ovarian cancer, thus allowing treatment to be commenced two months earlier than it was.

Regardless of the merits of the Cowarts' tort claims, those claims are barred by the applicable statutes of limitations. The Cowarts did not file this lawsuit until August 2001, more than three years after their tort claims accrued. The Cowarts were aware of all of the elements of these claims no later than June 1998, when Great-West declined to pre-certify the TAH and the Cowarts then determined that Mrs. Cowart's health was jeopardized as a result. The fact that Mrs. Cowart subsequently suffered additional damages does not delay the

commencement of the statute of limitations, and the trial court correctly dismissed the Cowarts' tort claims on summary judgment.

The trial court also properly dismissed the Cowarts' CPA claim on summary judgment. The Cowarts did not suffer injury to their business or property as required for a CPA claim. The trial court's decisions granting summary judgment in favor of Great-West and denying the Cowarts' motion for reconsideration should be affirmed.

II. ASSIGNMENTS OF ERROR

The Cowarts assign error to the Order Granting Defendants' Motion for Summary Judgment filed June 23, 2006, and the Order Denying Plaintiffs' Motion for Reconsideration filed July 14, 2006.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The statute of limitations for bad faith and negligence claims is three years. The Cowarts' bad faith and negligence claims accrued no later than June 22, 1998, when they became aware of all of the elements of these causes of action. The Cowarts did not file suit until August 27, 2001, more than three years later. Are the Cowarts' bad faith and negligence claims time-barred as a matter of law?

2. A claim for medical malpractice must be filed within three years from the date of the act or omission complained of or one

year from the date of discovery that the defendant's act or omission caused the plaintiff's injury. The Cowarts' medical malpractice claim accrued June 22, 1998, the date of the allegedly wrongful denial of the request for pre-certification of Mrs. Cowart's TAH and the date they discovered the denial caused harm. The Cowarts did not file suit until August 27, 2001, more than three years later. Is the Cowarts' medical malpractice claim time-barred as a matter of law?

3. In order to prevail on a CPA claim, the plaintiff must show an injury to business or property; the CPA does not apply to personal injury damages. The Cowarts seek damages for medical care, pain and suffering, and emotional distress. Have the Cowarts failed to establish an essential element of their CPA claim, thus warranting dismissal of that claim as a matter of law?

IV. STATEMENT OF THE CASE

A. Factual Background

On June 15, 1998, Mrs. Cowart went to her gynecologist, Dr. Gary Nickel, complaining of urinary incontinence and episodes of heavy menstrual bleeding. (CP 455) Mrs. Cowart had previously seen Dr. Nickel in March 1997 for a routine gynecological examination. (CP 172-73) Dr. Nickel did not document any complaints of urinary

incontinence during the 1997 exam nor did he diagnose Mrs. Cowart with any medical condition. (CP 175)

During Mrs. Cowart's 1998 visit, Dr. Nickel diagnosed Mrs. Cowart with stress urinary incontinence ("SUI")³ and menorrhagia.⁴ (CP 455) Dr. Nickel also incorrectly diagnosed Mrs. Cowart as suffering from uterine fibroids. (CP 178, 455, 2025) He recommended that Mrs. Cowart undergo a bladder suspension procedure and TAH to resolve these issues. (CP 178) Dr. Nickel advised Mrs. Cowart that he would perform the TAH and that Dr. Robert Modarelli, a urologist, would perform the bladder suspension procedure. (CP 70-71, 2017)

On June 17, Dr. Nickel's office contacted Great-West and requested pre-certification for payment for Mrs. Cowart's TAH and bladder suspension procedure. (CP 85, 154) Great-West provided medical claims processing services for a medical benefits plan offered by Amerus Life Insurance Company ("Amerus") to its insurance agents and their eligible dependents. (CP 94) Mr. Cowart was an independent insurance agent for Amerus and was insured under the Amerus medical

³ "SUI is an 'inability to prevent escape of urine during stress, such as laughing, coughing, sneezing, lifting, or sudden movement.'" (CP 85)

⁴ "Menorrhagia is excessive bleeding at the time of the menstrual period." (CP 85)

benefits plan. (CP 4, 6) Amerus funded the medical benefits plan and was responsible for payment of any benefits due. (CP 94)

Dr. Nickel's office informed Great-West that Dr. Nickel had scheduled Mrs. Cowart's TAH and bladder suspension for June 22 and that the procedures were intended to treat Mrs. Cowart's SUI, menorrhagia, and uterine fibroids. (CP 85, 154) According to Dr. Nickel, the procedures were elective in nature and did not need to be performed on June 22; this date was selected to accommodate Mrs. Cowart's summer plans. (CP 157, 180, 203-04)

Great-West referred Dr. Nickel's request to Dr. Thomas Paulson, a family practice physician licensed in Washington. (CP 85) Dr. Paulson was an independent contractor for One Health Plan of Washington, an organization that performed utilization reviews for Great-West.⁵ (CP 720-24)

On June 18, Dr. Paulson contacted both Dr. Nickel and Dr. Modarelli in order to determine whether the TAH was "medically necessary" as required for coverage under the Amerus plan. (CP 85-

⁵ The Amerus plan provided for utilization reviews to determine whether a particular treatment was "medically necessary" as required for coverage under the plan. (CP 105)

86) In order to fall within the definition of “medically necessary,” treatment must be:

- Ordered by a Doctor; and
- Required for the treatment or management of a medical symptom or condition; and
- The most efficient and economical service that can safely be provided to such person; and
- Provided in accordance with approved and generally accepted medical or surgical practices .

...

(CP 146)

Dr. Paulson first spoke with Dr. Nickel’s nurse and asked about Dr. Nickel’s diagnosis and treatment plan. (CP 186) The nurse confirmed that Dr. Nickel had not (1) conducted any assessment of Mrs. Cowart’s blood mass (i.e., checking hemoglobin or hematocrit levels), (2) tried any conservative therapies, such as hormones or birth control pills, or (3) performed any diagnostic procedures, such as a hysteroscopy or a D&C.⁶ (*Id.*)

Dr. Paulson then spoke directly with Dr. Nickel. (CP 187) Dr. Nickel informed Dr. Paulson that Mrs. Cowart’s real problem was the

⁶ A hysteroscopy is a visual instrumental inspection of the uterus. Stedman’s Medical Dictionary 869 (27th ed. 2000). A D&C, or dilation and curettage, is “dilation of the cervix and curettement of the endometrium.” *Id.* at 503.

SUI, not menorrhagia or uterine fibroids. (*Id.*) Dr. Paulson asked whether there was an alternative approach (other than a TAH) to treat the SUI. (CP 188) Dr. Nickel responded that he did not know and that Dr. Paulson should ask Dr. Modarelli.⁷ (*Id.*) Dr. Nickel opined that the TAH should be performed because Mrs. Cowart's enlarged uterus could put pressure on the bladder suspension, making it less effective over time. (*Id.*) When Dr. Paulson asked whether Mrs. Cowart's uterus was changing in size, Dr. Nickel responded, "Oh no, we're not doing it because of a worry of cancer or anything like that." (*Id.*)

Dr. Paulson then spoke with Dr. Modarelli and asked whether the size of Mrs. Cowart's uterus necessitated a TAH. (CP 191) Dr. Modarelli explained that size did not matter much to him; he was more concerned with the amount of relaxation, or prolapse, of the uterus. (*Id.*) Because Dr. Modarelli had not seen Mrs. Cowart, he did not know whether she had any prolapse. (CP 86, 191) Dr. Modarelli confirmed that the bladder suspension procedure could be done without the TAH. (CP 192)

⁷ During his deposition, Dr. Nickel testified that there were, in fact, less invasive procedures, such as physical therapy, strengthening exercises, and a bladder suspension without a TAH. (CP 2015)

After evaluating all of the information provided by Dr. Nickel's nurse, Dr. Nickel, and Dr. Modarelli, Dr. Paulson concluded the TAH did not meet the criteria for "medically necessary" treatment as defined in the Amerus plan. (CP 87) In particular, the primary reason articulated by Dr. Nickel for performing the TAH was the size of Mrs. Cowart's uterus, and Dr. Modarelli, the physician who would be performing the bladder suspension, did not believe size was a significant factor. (*Id.*)

Dr. Paulson called Dr. Nickel to advise him that he was recommending denial of pre-certification for the TAH. (*Id.*) Great-West did, however, pre-certify the bladder suspension procedure. (CP 85) In a letter dated June 18, 1998, Great-West informed Mrs. Cowart that, while it would not pre-certify the TAH, the final decision about whether to proceed with the operation was up to her and her physician. (CP 150)

On Friday, June 19, Mr. Cowart contacted Great-West and asked them to reconsider their decision. (CP 157) He informed Great-West that his wife wanted to have the procedure done as soon as possible because their daughter was expecting a baby at the end of July. (*Id.*) In addition, Dr. Nickel was not going to be available later in the

summer. (*Id.*) Mr. Cowart requested that a review of the denial be done immediately, as the surgery was scheduled to take place the following Monday. (*Id.*)

After receiving Mr. Cowart's telephone call, Great-West asked Dr. Ray Gottesfeld, an OB-GYN licensed in Colorado and Pennsylvania, and an independent contractor for One Health Plan of Colorado, to review the request for pre-certification of the TAH. (CP 82, 712-15) Dr. Gottesfeld called Dr. Nickel on June 22 to discuss the case. (CP 82) Dr. Gottesfeld reviewed the information provided to Great-West regarding Mrs. Cowart's symptoms and compared that information to the "medical necessity" criteria. (*Id.*) Dr. Nickel stated that he had offered hormonal therapy to Mrs. Cowart but that she declined. (*Id.*) Dr. Gottesfeld then pointed out that patient preference, rather than "medical necessity," seemed to be motivating the request for the TAH. (*Id.*) Dr. Gottesfeld concluded the TAH did not satisfy the criteria for "medically necessary" treatment and informed Dr. Nickel of his determination. (*Id.*)

Great-West also contacted Mr. Cowart by telephone on June 22 to inform him of the coverage decision and sent Mrs. Cowart a letter on that date explaining the TAH could not be pre-certified because more

treatment was needed before surgery. (CP 151, 164, 222) The letter reiterated that the final decision about whether to proceed with the TAH was up to Mrs. Cowart and her doctor. (CP 151)

At the time he recommended the TAH, Dr. Nickel believed Mrs. Cowart had a “clear need” for the procedure. (CP 1220) In addition, Mr. Cowart believed, at the time Great-West first refused to pre-certify the TAH, that his wife’s health had been jeopardized by the denial. (CP 215-17)

Dr. Nickel and Dr. Modarelli advised Mrs. Cowart that the bladder suspension procedure could, however, be performed without the TAH. (CP 201) She went ahead with that procedure on June 22. (CP 992) A few days later, Mr. Cowart contacted Amerus and asked them to overturn Great-West’s decision regarding the TAH.⁸ (CP 222-23) Shortly thereafter, Amerus informed Mr. Cowart that they would not do so. (CP 223)

⁸ Amerus, as the Plan Administrator, has complete discretion to determine whether a claim should be paid or denied. (CP 94, 142) The Cowarts assert, “The plan provides that, with respect to insureds’ [sic] benefits, ‘Great-West has full discretion and authority to determine the benefits and amounts payable and to construe and interpret all terms and provision [sic] of [the policy] booklet.’” Brief of Appellants at 3. In fact, the plan provides that Great-West has such discretion with respect to *insured* benefits. (CP 94) Medical benefits, such as those at issue here, are not insured benefits, but are self-funded by Amerus. (*Id.*)

In July 1998, Mrs. Cowart was hospitalized with severe abdominal pain. (CP 205-06, 977) Dr. Nickel believed the pain was due to torn sutures from the bladder suspension procedure, and he sent Mrs. Cowart home. (CP 206) Despite the fact that Mrs. Cowart was experiencing significant pain, Dr. Nickel's plan was to "let it ride" for the summer. (*Id.*)

In August 1998, Mrs. Cowart complained of abdominal bloating and cramping. (CP 223) She returned to Dr. Modarelli to see if there was a problem with the bladder suspension. (*Id.*) A pelvic ultrasound and needle biopsy performed August 25 revealed a pelvic cyst, a large amount of fluid in Mrs. Cowart's pelvis, and malignant cells consistent with ovarian cancer. (CP 979)

Dr. Nickel learned of the test results on August 26 and went to Mrs. Cowart's home to inform her of the diagnosis. (CP 211-12, 2125) Dr. Nickel scheduled a TAH and oophorectomy (removal of the ovaries) for August 28. (CP 980) Dr. Nickel contacted Great-West on August 27, requesting pre-certification for a TAH, exploratory laparoscopy, and possible removal of lymph nodes and other structures for treatment of malignant adenocarcinoma. (CP 165) Great-West

approved Dr. Nickel's request that same day, and Mrs. Cowart underwent surgery August 28. (CP 165, 987-89)

The surgery confirmed that Mrs. Cowart was suffering from ovarian cancer. (CP 987) Thereafter, she underwent chemotherapy treatment, and her cancer went into remission. (CP 223) The cancer returned in May 2000, and Mrs. Cowart underwent additional chemotherapy. (*Id.*) She died in 2004. (CP 2315)

B. Procedural Background

The Cowarts filed suit against Great-West, One Health Plan of Washington and Colorado, Dr. Paulson, Dr. Gottesfeld, Dr. Stephen Gorshow,⁹ and Amerus,¹⁰ asserting claims for breach of contract, bad faith, violation of the CPA, intentional infliction of emotional distress, negligent infliction of emotional distress, breach of medical standards and practices, declaratory judgment, and injunctive relief. (CP 3-14) The Cowarts are seeking \$20 million in damages allegedly caused by

⁹ Dr. Gorshow was Great-West's medical director; he did not personally review or rule on the request for pre-certification of Mrs. Cowart's TAH in June 1998. (CP 89)

¹⁰ The Cowarts settled their claims against Amerus, and Amerus is not a party to this appeal.

Great-West's denial of the request for pre-certification of Mrs. Cowart's TAH in June 1998. (CP 3-14, 1712)

Great-West removed the case to federal court, asserting the Cowarts' claims were governed by ERISA. (CP 19) In a ruling entered December 20, 2002, the court remanded the case to state court, after concluding ERISA did not apply. (CP 53)

Great-West subsequently filed a motion for summary judgment seeking dismissal of the Cowarts' tort claims on statute of limitations grounds and dismissal of their breach of contract and CPA claims on the merits.¹¹ (CP 57-80) The trial court granted Great-West's motion and dismissed the Cowarts' complaint with prejudice. (CP 1739-41) The Cowarts then filed a motion for reconsideration, which the court also denied. (CP 2343-95, 2634-36) The Cowarts now seek review of the trial court orders granting Great-West's motion for summary judgment and denying the Cowarts' motion for reconsideration. (CP 2858-65)

¹¹ Great-West also noted that the Cowarts' tort claims should be dismissed on the merits.

V. ARGUMENT

On appeal, the Cowarts challenge the dismissal of their claims for bad faith, negligence, medical malpractice, and violation of the CPA. They have abandoned their claims for breach of contract, negligent and intentional infliction of emotional distress, declaratory judgment, and injunctive relief. As explained below, the Cowarts' tort claims are barred by the applicable statutes of limitations, and their CPA claim is barred because they have not suffered any injury to their business or property. Accordingly, the trial court's dismissal of the Cowarts' complaint should be affirmed.

As the Cowarts acknowledged in their opening brief, the merits of their tort claims are not at issue because the trial court ruled those claims were time-barred.¹² It should be noted, however, that the Cowarts are seeking an unprecedented extension of tort liability to a third-party administrator of a health insurance plan for consequential damages only tangentially related to the denial of coverage.¹³ The Cowarts' arguments must be rejected for a number of reasons.

¹² Brief of Appellants at 14 n.11.

¹³ In their briefing before the trial court, the Cowarts recognized, "The issue of whether a plan administrator, such as Great-West, owes a duty of good

First, Great-West is not an insurer and cannot be held liable to the same standard as an insurer. Second, even if Great-West could be deemed an “insurer,” its determination that a TAH was not “medically necessary” as required for coverage cannot be characterized as frivolous or unfounded.¹⁴ Great-West cannot now be held responsible for the fact that a TAH performed in June 1998 might fortuitously have revealed Mrs. Cowart’s ovarian cancer. Finally, Drs. Paulson, Gottesfeld, and Gorshow cannot be held liable for medical malpractice. RCW 7.70.030 does not even apply to Drs. Gottesfeld and Gorshow because Dr. Gottesfeld has never been licensed in Washington and Dr. Gorshow was not licensed in Washington when Great-West denied Mrs. Cowart’s pre-certification request.¹⁵ (CP 82, 89) And, Dr. Paulson cannot be held liable for medical malpractice based upon his

faith to the insured appears to be a question of first impression in Washington.” (CP 1276)

¹⁴ See, e.g., *Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 484, 78 P.3d 1274 (2003) (to prove bad faith, insured must show insurer’s denial of coverage was unreasonable, frivolous, or unfounded).

¹⁵ See RCW 7.70.020(1). Dr. Gorshow obtained his Washington medical license in 2001. (CP 89)

determination, on behalf of Great-West, that Mrs. Cowart's TAH was not "medically necessary."¹⁶

A. The trial court correctly concluded that the Cowarts' tort claims are barred by the applicable statutes of limitations.

A statute of limitations serves two purposes:

First is the policy of repose, i.e., it is intended to instill a measure of certainty and finality into one's affairs by eliminating the fears and burdens of threatened litigation. Second, it is intended to protect one against stale claims because they are more likely to be spurious and consist of untrustworthy evidence than are fresh claims. One is also less likely to have witnesses and relevant evidence available to defend against stale claims.¹⁷

As a general rule, a cause of action accrues, and the statute of limitations begins to run, when a party has the right to seek relief in the courts.¹⁸ Thus, a cause of action ordinarily accrues at the time the act or omission occurs.¹⁹ In certain types of cases, however, the injured

¹⁶ See *Judy v. Hanford Envtl. Health Found.*, 106 Wn. App. 26, 39, 22 P.3d 810 (2001) (physician retained by employer to determine whether plaintiff had physical capacity to do her job could not be held liable for medical malpractice).

¹⁷ *Kittinger v. Boeing Co.*, 21 Wn. App. 484, 486-87, 585 P.2d 812 (1978); see also *Burns v. McClinton*, 135 Wn. App. 285, 293, 143 P.3d 630 (2006) ("When plaintiffs sleep on their rights, evidence may be lost and memories may fade.").

¹⁸ *O'Neil v. Estate of Murtha*, 89 Wn. App. 67, 69-70, 947 P.2d 1252 (1997).

¹⁹ *In re Estates of Hibbard*, 118 Wn.2d 737, 744, 826 P.2d 690 (1992); *Gevaart v. Metco Constr., Inc.*, 111 Wn.2d 499, 501, 760 P.2d 348 (1988).

party does not, or cannot, know that he or she has been injured. In these cases, the Washington courts have applied a “discovery” rule, which provides that a cause of action accrues when the plaintiff knew or should have known all the essential elements of the cause of action.²⁰

The discovery rule is an exception to the general rule regarding the statute of limitations and, as such, must be narrowly construed.²¹ Such exceptions “cannot be enlarged from considerations of apparent hardship or inconvenience.”²²

The Washington courts have applied the discovery rule in two types of cases: (1) fraudulent concealment and (2) where the nature of the plaintiff’s injury makes it difficult to learn of the factual elements giving rise to the cause of action within the applicable limitations period.²³

The Cowarts’ tort claims do not fall into either of these categories, and the discovery rule therefore does not apply. In

²⁰ *Hibbard*, 118 Wn.2d at 744-45.

²¹ *Hibbard*, 118 Wn.2d at 745; *Murtha*, 89 Wn. App. at 73.

²² *Murtha*, 89 Wn. App. at 73.

²³ *Id.* at 72.

particular, there are no allegations of fraudulent concealment,²⁴ and the nature of Mrs. Cowart's injury did not make it difficult for the Cowarts to discover the elements of their claims within the statutory limitations period. Although Mrs. Cowart may have sustained additional damage at a later date, the Cowarts apprehended immediately that they were harmed by Great-West's decision. In any event, as explained below, the Cowarts' tort claims are barred by the applicable statutes of limitations, regardless of whether the discovery rule is applied, and the trial court properly granted summary judgment in favor of Great-West on this issue.

1. The Cowarts' bad faith and negligence claims are barred by the statute of limitations.

The Cowarts' bad faith and negligence claims are predicated upon Great West's decision not to pre-certify a TAH for Mrs. Cowart

²⁴ The Cowarts note that they "had been consistently informed" that the Amerus health plan was governed by ERISA, and therefore they could not pursue any claims against Great-West. Brief of Appellants at 8 n.7. Although a federal district court concluded ERISA does not apply, the Cowarts do not claim Great-West fraudulently concealed any information regarding the applicability of ERISA, and there is no evidence in the record to support such a claim.

in June 1998. The statute of limitations for these claims is three years.²⁵

In order to establish a claim of bad faith against an insurer, the plaintiff must establish (1) bad faith by the insurer, (2) causing harm to the insured.²⁶ The essential elements of a negligence claim include (1) duty, (2) breach, (3) causation, and (4) damages.²⁷ Thus, the statutes of limitations began to run on these claims either when each element was present or, at the latest, when the Cowarts discovered the existence of each element of their bad faith and negligence claims.

Claims against an insurer for bad faith/negligence in refusing to pay benefits accrue on the date the insurer wrongfully denies coverage.²⁸ For example, in *Murray v. San Jacinto Agency*,²⁹ the plaintiff sought coverage for treatment of chronic pancreatitis under a

²⁵ RCW 4.16.080(2); *O'Neill v. Farmers Ins. Co. of Wash.*, 124 Wn. App. 516, 529-30, 125 P.3d 134 (2004) (bad faith) *Washington v. Boeing Co.*, 105 Wn. App. 1, 18, 19 P.3d 1041 (2000) (negligence).

²⁶ *Safeco Ins. Co. of Am. v. Butler*, 118 Wn.2d 383, 389, 823 P.2d 499 (1992).

²⁷ *Lynn v. Labor Ready, Inc.*, 136 Wn. App. 295, 306, 151 P.3d 201 (2007).

²⁸ See, e.g., *Safeco Ins. Co. of Am. v. Sims*, 435 So. 2d 1219 (Ala. 1983); *Love v. Fire Ins. Exch.*, 221 Cal. App. 3d 1136 (1990); *Murray v. San Jacinto Agency, Inc.*, 800 S.W.2d 826 (Tex. 1990).

²⁹ 800 S.W.2d 826 (Tex. 1990).

group medical insurance program. The plaintiff was covered under the program as a dependent of her husband. The insurer denied coverage because the plaintiff's husband had requested that the plaintiff be dropped from coverage after she filed for divorce.³⁰

As a result of the denial of coverage, the plaintiff was unable to obtain treatment for her medical condition. The insurer later rescinded its denial and reinstated coverage retroactively.³¹

Thereafter, the plaintiff filed suit, alleging negligent denial of coverage. She subsequently amended her complaint to add a claim for bad faith. The trial court dismissed the plaintiff's complaint on statute of limitations grounds.³²

On appeal, the issue before the court was whether the plaintiff's bad faith claim was timely filed. The court held that the plaintiff's bad faith claim accrued, and the statute of limitations began to run, on the date the insurer denied coverage.³³ The court noted that the fact that damage may continue to occur after the denial of coverage does not

³⁰ *Id.* at 827.

³¹ *Id.*

³² *Id.*

³³ *Id.* at 828.

prevent the statute of limitations from beginning to run.³⁴ Instead, the limitations period begins when a wrongful act occurs causing some damage to the plaintiff.³⁵

Similarly, in *Love v. Fire Insurance Exchange*,³⁶ the plaintiffs discovered cracks in the foundation of their home as well as cracks in the ground adjacent to the home. They hired a geotechnical engineering firm to conduct an inspection and learned that the damage was caused by earth movement and the negligence of the home's builders.³⁷

Thereafter, the plaintiffs submitted a claim for the damage to their homeowners insurer. The insurer denied coverage on the ground that the damages resulted from an "act of God." Several years later, the plaintiffs learned that other homes in their area had suffered similar damage and that other insurers had compensated their insureds for the

³⁴ *Id.*

³⁵ *Id.*

³⁶ 221 Cal. App. 3d 1136 (1990).

³⁷ *Id.* at 1141.

damage. Accordingly, the plaintiffs resubmitted their claim. The insurer investigated the claim but again denied coverage.³⁸

The plaintiffs subsequently filed suit against the insurer alleging, among other things, that the insurer had acted in bad faith. The trial court entered summary judgment in favor of the insurer, concluding the plaintiffs' claims were barred by the applicable statutes of limitations.³⁹

The court of appeals upheld the dismissal of the plaintiffs' claims, ruling that all of their causes of action accrued when the insurer initially denied coverage.⁴⁰ The court explained that the statute of limitations begins to run when a party knows or should know the *facts* essential to his claim.⁴¹

Similarly, in this case, the Cowarts' bad faith and negligence claims against Great-West accrued no later than June 22, 1998, when Great-West denied the Cowarts' appeal for pre-certification of the TAH. All of the elements of the Cowarts' bad faith and negligence

³⁸ *Id.* at 1141-42.

³⁹ *Id.* at 1142.

⁴⁰ *Id.* at 1143.

⁴¹ *Id.*

claims existed on that date, and the Cowarts were aware of their existence. In particular, the Cowarts knew that Great-West (allegedly) acted negligently and/or in bad faith by denying coverage for the TAH. Mr. Cowart testified that he disagreed with the denial and that his father, a physician, told him the TAH was medically necessary. (CP 2304, 2306) In addition, Dr. Nickel testified that a combination of a bladder suspension procedure and TAH “was the only proper medical treatment.” (CP 1218)

They also apprehended that Mrs. Cowart had suffered damage as a result of the denial. She did not get the medical procedure that she wanted (and, according to Dr. Nickel, needed) to have. In fact, Mr. Cowart specifically testified that he believed, at the time of Great-West’s denial of coverage, his wife’s health had been jeopardized.⁴² (CP 215-17)

⁴² Mr. Cowart was deposed on May 12, 2006. (CP 214) On May 26, Great-West filed its motion for summary judgment citing Mr. Cowart’s acknowledgement of the harm to his wife. (CP 57) On June 12, Mr. Cowart submitted a correction sheet to his deposition “clarifying” his deposition testimony. (CP 1264) The correction sheet added language purporting to show that Mr. Cowart did not realize until later that his wife was harmed by the denial of the pre-certification request for her TAH. (*Id.*) The Cowarts cannot create a question of fact by changing Mr. Cowart’s deposition testimony in response to an argument asserted by Great-West in its summary judgment motion. *See Young v. Group Health Coop. of Puget Sound*, 85 Wn.2d 332, 338, 534 P.2d 1349 (1975) (addition to deposition testimony by deponent could not be considered where deponent failed to state why

The statute of limitations on the Cowarts' bad faith and negligence claims therefore began to run no later than June 22, 1998. They did not file suit until August 27, 2001, more than three years later. Because the statute of limitations for both the bad faith and negligence claims is three years, the trial court correctly recognized that those claims are time-barred.

The Cowarts claim they were not aware of the damage caused by Great-West's allegedly wrongful conduct until September 2000, when they claim to have learned, allegedly for the first time, of Mrs. Cowart's shortened life expectancy.⁴³ Thus, because they filed suit within three years from the date they allegedly discovered an essential element of their bad faith and negligence claims—i.e., damages—the Cowarts assert those claims were timely filed.

testimony had been changed); *Marthaller v. King County Hosp. Dist. No. 2*, 94 Wn. App. 911, 918, 973 P.2d 1098 (1999) (when a party has given clear answers to unambiguous deposition questions, he may not thereafter create a question of fact with an affidavit that merely contradicts that testimony, without explanation).

⁴³ Brief of Appellants at 25-26. The Cowarts assert they learned of Mrs. Cowart's reduced life expectancy when they went to M.D. Anderson Cancer Center in Houston where the doctors told Mrs. Cowart to "go home and live life" because she did not have much of it left.. *Id.* The records from M.D. Anderson do not reflect such a grim prognosis. An MRI conducted there showed "No evidence of metastatic disease or tumor recurrence." (CP 1004) The physicians at M.D. Anderson recommended that Mrs. Cowart undergo treatment with either tamoxifen or immune therapy. (CP 1006)

In support of their argument that the statute of limitations did not begin to run on June 22, 1998, the Cowarts cite three Washington cases, each of which is readily distinguishable. In *Ohler v. Tacoma General Hospital*,⁴⁴ the plaintiff was placed in an incubator after her premature birth and given oxygen to assist with her breathing. As a result she became blind. The plaintiff was aware, from an early age, that her blindness was due to the administration of oxygen. She did not know, however, that the oxygen had been improperly administered; she believed it had been necessary for her treatment and that blindness was a complication of her prematurity.⁴⁵

After the plaintiff grew up, she learned that her blindness might have been preventable and that the hospital acted wrongfully in giving her too much oxygen. Shortly thereafter, she filed a medical malpractice action against the hospital.⁴⁶

The trial court granted summary judgment in favor of the hospital, holding that the plaintiff's claim was barred by the statute of limitations. The supreme court reversed, concluding a factual issue

⁴⁴ *Ohler v. Tacoma Gen. Hosp.*, 92 Wn.2d 507, 598 P.2d 1358 (1979).

⁴⁵ *Ohler*, 92 Wn.2d at 509.

⁴⁶ *Id.*

existed regarding when the plaintiff knew or should have known that the hospital breached a duty of care owed to her.⁴⁷

In *North Coast Air Services v. Grumman Corp.*,⁴⁸ the plaintiffs sought damages arising out of the crash of an airplane manufactured by the defendant. An inquest following the crash concluded it was the result of pilot error. Several years later, the pilot's father discovered the crash might have been caused by a defect in the plane's elevator control assembly. Thereafter, the plaintiffs filed a products liability lawsuit in federal court.⁴⁹

The defendant moved to dismiss the lawsuit on statute of limitations grounds. After the court initially denied the motion, the defendant moved for reconsideration. The court then certified the statute of limitations question to the Washington Supreme Court.⁵⁰

The court concluded the plaintiffs' cause of action did not accrue until they discovered, or in the exercise of due diligence should

⁴⁷ *Id.* at 510.

⁴⁸ *N. Coast Air Servs., Ltd. v. Grumman Corp.*, 111 Wn.2d 315, 759 P.2d 405 (1988).

⁴⁹ *N. Coast*, 111 Wn.2d at 317-18.

⁵⁰ *Id.* at 318.

have discovered, “a factual causal relationship of the product to the harm.”⁵¹

In *Lo v. Honda Motor Co.*,⁵² the plaintiffs filed a medical malpractice suit after their son was diagnosed at birth with spastic quadriplegia and cerebral palsy. When the boy’s mother inquired about the cause of his afflictions, the doctors told her that there was no explanation.⁵³

Several years later, the plaintiffs learned that their son’s injuries might have been caused by medical malpractice. Shortly thereafter, the plaintiffs filed suit against their son’s doctors and the hospital where he was born.⁵⁴ The defendants moved for summary judgment, asserting the plaintiffs’ claims were barred by the statute of limitations. The trial court denied the defendants’ summary judgment motions, and the court of appeals accepted discretionary review of this ruling.⁵⁵

⁵¹ *Id.* at 319.

⁵² *Lo v. Honda Motor Co.*, 73 Wn. App. 448, 869 P.2d 1114 (1994).

⁵³ *Lo*, 73 Wn. App. at 451.

⁵⁴ *Id.* at 453.

⁵⁵ *Id.* at 454.

The court ruled that the plaintiffs' claims were timely because the statute of limitations did not begin to run until the plaintiffs discovered that their son's injury was caused by medical malpractice.⁵⁶ Citing *North Coast*, the court concluded the fact of injury and knowledge of its immediate cause did not constitute notice that the injury was caused by a medical error or omission.⁵⁷

Thus, in *Ohler*, *North Coast*, and *Lo*, a question of fact existed as to whether the plaintiffs timely filed suit after they discovered **all** of the essential elements of their causes of action. In *Ohler*, the plaintiff did not initially discover the defendant's alleged breach; in *North Coast* and *Lo*, the plaintiffs did not initially discover the wrongful conduct or the cause of their harm. Here, as explained above, the Cowarts were aware of **all** of the elements of their bad faith and negligence claims, including damage, no later than June 22, 1998. The fact that Mrs. Cowart may have recognized additional damages after this date does not preclude the commencement of the statute of limitations period.⁵⁸

⁵⁶ *Id.* at 460.

⁵⁷ *Id.*

⁵⁸ The Cowarts state they "had no knowledge of the fact of damage until they learned of Ms. Cowart's shortened life expectancy" in September 2000. Brief of Appellants at 22 n.14. In fact, the Cowarts were aware of some damage on

The Washington courts have repeatedly recognized that the statute of limitations begins to run when the plaintiff discovers the existence of *any appreciable damage*, even if the full extent of the injury is unknown.⁵⁹

For example, in *Steele v. Organon, Inc.*,⁶⁰ the plaintiff filed a medical malpractice action against a physician who had prescribed medication to treat the plaintiff's migraines. Shortly after taking the medication, the plaintiff suffered an accidental overdose and was hospitalized with symptoms of loss of sensation in her arms and legs. Several months later, the plaintiff complained of tingling in her hands and feet and was diagnosed with Raynaud's Syndrome.⁶¹

The plaintiff then sought advice from an attorney, who asked the doctors who treated the plaintiff for the overdose whether that could explain her subsequent symptoms. The doctors opined that a causal

June 22, 1998, and of additional damage no later than August 28, 1998, when Mrs. Cowart's diagnosis of ovarian cancer was confirmed.

⁵⁹ See, e.g., *Green v. A.P.C.*, 136 Wn.2d 87, 96, 960 P.2d 912 (1998); *Gazija v. Nicholas Jerns Co.*, 86 Wn.2d 215, 219, 543 P.2d 338 (1975); *Hamilton v. Arriola Bros. Custom Farming*, 85 Wn. App. 207, 212, 931 P.2d 925 (1997); *Zaleck v. Everett Clinic*, 60 Wn. App. 107, 112, 802 P.2d 826 (1991); *Streifel v. Hansch*, 40 Wn. App. 233, 237, 698 P.2d 570 (1985).

⁶⁰ 43 Wn. App. 230, 716 P.2d 920 (1986).

⁶¹ *Steele*, 43 Wn. App. at 231.

connection was unlikely, and the plaintiff elected not to pursue the matter further.⁶²

Several years later, the plaintiff suffered a heart attack and a stroke. A doctor she consulted after leaving the hospital advised her the heart attack and stroke were related to her overdose, more than eight years earlier. One year later, the plaintiff filed suit.⁶³

The defendant doctors moved for summary judgment on the ground that the plaintiff's claims were barred by the statute of limitations. The plaintiff argued the damage element of her cause of action was not present until she suffered the heart attack and stroke, and that her suit was therefore timely.⁶⁴

The court rejected the plaintiff's argument, explaining that, although she might have considered the *amount* of damage small following her overdose, it was undisputed she was aware of some injury at that time.⁶⁵ The court explained:

Where an injury, although slight, is sustained in consequence of the wrongful act of another, and the law

⁶² *Id.* at 232.

⁶³ *Id.* at 232-33.

⁶⁴ *Id.* at 233.

⁶⁵ *Id.* at 235.

affords a remedy therefor, the statute of limitations attaches at once. It is not material that all the damages resulting from the act shall have been sustained at that time, and the running of the statute is not postponed by the fact that the actual or substantial damages do not occur until a later date.⁶⁶

The court added, “Generally, if the plaintiff is aware of some injury, the statute of limitation begins to run even if he does not know the full extent of his injuries.”⁶⁷

Similarly, in this case, the Cowarts expressed their belief that Mrs. Cowart had suffered harm no later than June 22, 1998. That is, she was unable to have a medical procedure she wanted to have and that her physician believed was necessary to treat her medical condition. Dr. Nickel testified that he believed the denial of pre-certification was so far below the applicable standard of care as to be frivolous and unfounded. (CP 1220) Mr. Cowart testified that he believed his wife’s health was jeopardized as a result of Great-West’s denial of the pre-certification request for the TAH and that he believed this at the time of the denial. (CP 215-17) The fact that Mrs. Cowart may have sustained additional harm at a later date does not prevent the

⁶⁶ *Id.* at 234 (quoting *Lindquist v. Mullen*, 45 Wn.2d 675, 677, 277 P.2d 724 (1954)).

⁶⁷ *Id.* at 234.

statute of limitations from beginning to run when the Cowarts determined Great-West had acted wrongfully toward them, causing them harm. Because the limitations period on the Cowarts' bad faith and negligence claims expired June 22, 2001, and they did not file suit until August 27, 2001, their claims are time-barred as a matter of law.

2. The Cowarts' medical malpractice claim is barred by the statute of limitations.

The Cowarts' medical malpractice claim is governed by RCW 4.16.350, which provides that an action for medical malpractice "shall be commenced within three years of the act or omission alleged to have caused the injury or condition, or one year of the time the patient or his representative discovered or reasonably should have discovered that the injury or condition was caused by said act or omission, whichever period expires later" ⁶⁸ In this case, it is undisputed that the "act or omission" at issue is Great-West's denial of pre-certification in June 1998. It also is undisputed that the Cowarts did not file suit within three years of Great-West's decision. Thus, the Cowarts had to file suit within one year of the time they discovered or reasonably should have

⁶⁸ In their motion for reconsideration, the Cowarts asserted, for the first time, that RCW 4.16.350 did not apply because their injuries did not arise as a result of "health care." (CP 2380-82) Apparently, the Cowarts have now abandoned this position. *See* Brief of Appellants at 16.

discovered that their damages were caused by Great-West's denial of pre-certification.

As explained above, the Cowarts discovered the harm resulting from Great-West's denial of the request for pre-certification of the TAH no later than June 22, 1998. The fact that Mrs. Cowart may have sustained additional harm later does not change this fact.

Moreover, the Cowarts discovered the precise harm complained of—Mrs. Cowart's alleged reduction in chance of survival from ovarian cancer—no later than August 28, 1998, when her cancer diagnosis was confirmed. At that time, the Cowarts learned that Mrs. Cowart had a shortened life expectancy. Mr. Cowart testified that, on August 28, his father, who is a physician, told him that Mrs. Cowart had only a 25% chance of survival. (CP 1711-12) Thus, the Cowarts had until August 28, 1999, to assert a claim for medical malpractice. Because they did not file suit until August 27, 2001, their medical malpractice claim is barred by the statute of limitations set forth in RCW 4.16.350.

3. The suit limitation provision in the Cowarts' insurance plan does not apply.

The Cowarts argue that their tort claims are timely because they filed suit within the time period specified in the Amerus health

insurance plan.⁶⁹ This argument is based upon a fundamental misconception—that a contractual limitations period applies to tort claims.

The Cowarts assert their tort claims “are claims seeking the recovery of benefits under the policy”⁷⁰ This is not true. The Cowarts are not seeking to recover the cost of a TAH; in fact, Amerus subsequently paid for that procedure. Rather, they are seeking extra-contractual damages allegedly resulting from the initial refusal to pre-certify the TAH in June 1998.

This distinction is illustrated in *Simms v. Allstate Ins. Co.*⁷¹ In *Simms*, the plaintiff filed suit against his insurer asserting claims for breach of contract and violation of the CPA. The court concluded the breach of contract claim was barred by a provision in the insurance policy requiring suits against the insurer to be brought within one year from the inception of the loss.⁷² The court ruled, however, that the

⁶⁹ Brief of Appellants at 27-29. The plan requires an insured to submit a proof of claim within 15 months from the date of a claim, and suit must be filed three years after that. (CP 140-41)

⁷⁰ Brief of Appellants at 29.

⁷¹ *Simms v. Allstate Ins. Co.*, 27 Wn. App. 872, 621 P.2d 155 (1981).

⁷² *Simms*, 27 Wn. App. at 873-77.

plaintiff's CPA claims were governed by the four-year statute of limitations set forth in RCW 19.86.120 and those claims therefore were not barred.⁷³ The court explained that the one-year limitation period applied only to claims compensable under the contract.⁷⁴

In this case, the Cowarts' tort claims are not compensable under the contract. They are analogous to the CPA claims at issue in *Simms*—i.e., they would not exist but for the contract between Amerus and the Cowarts but they are not direct claims for breach of that contract.⁷⁵ Accordingly, the contractual limitations period set forth in the Amerus health plan does not apply to extend the limitations period for the Cowarts' tort claims.

⁷³ *Id.* at 878.

⁷⁴ *Id.*; see also *O'Neill*, 124 Wn. App. at 531 (statute of limitations for plaintiff's bad faith and CPA claims not governed by limitations period set forth in insurance contract).

⁷⁵ The Cowarts initially asserted a claim for breach of contract against all defendants. This claim would be governed by the limitations period set forth in the insurance plan. The Cowarts have abandoned this claim on appeal, however.

B. The trial court correctly dismissed the Cowarts' CPA claim on summary judgment.

The Cowarts first note that their CPA claim is not barred by the statute of limitations.⁷⁶ This is true, and Great-West has never argued otherwise. (*See* CP 58) Instead, the trial court properly dismissed the Cowarts' CPA claim on the merits.

As a preliminary matter, the Cowarts cannot assert a CPA claim against Great-West because there is no contractual relationship between the parties.⁷⁷ And even if the Cowarts' CPA claim is considered on the merits, it is still subject to dismissal as a matter of law. In order to prevail on a CPA claim, a plaintiff must establish *each* of the following elements: (1) an unfair or deceptive act or practice, (2) in trade or commerce, (3) that impacts the public interest, (4) causing injury to the plaintiff in his business or property, and (5) a causal link between the unfair or deceptive act and the plaintiff's injury.⁷⁸

⁷⁶ Brief of Appellants at 29-30.

⁷⁷ *See Int'l Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co.*, 122 Wn. App. 736, 87 P.3d 774 (2004).

⁷⁸ *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 784-85, 719 P.2d 531 (1986).

Here, the Cowarts cannot show they suffered injury to their business or property, and the trial court therefore properly dismissed their CPA claim as a matter of law.⁷⁹ (See 6/23/06 VRP at 50)

On appeal, the Cowarts do not even mention the injury element of their CPA claim despite the fact that this was the basis for the trial court's dismissal of the CPA claim. In fact, the Washington courts have specifically recognized that the CPA does not apply to personal injuries.⁸⁰

For example, in *Stevens v. Hyde Athletic Industries*,⁸¹ the plaintiff sued the seller and manufacturer of softball shoes seeking to recover for injuries she sustained while wearing the shoes during a

⁷⁹ Nor have the Cowarts shown that Great-West engaged in any unfair or deceptive acts. The fact that Dr. Nickel, Mrs. Cowart's physician, disagreed with Drs. Paulson and Gottesfeld regarding the need for a TAH in June 1988 does not establish that Great-West acted without reasonable justification. See *Koch v. Mut. of Enumclaw Ins. Co.*, 108 Wn. App. 500, 509, 31 P.3d 698 (2001) (disagreement between physicians about medical conclusions does not support an inference of dishonesty or bad faith).

⁸⁰ See, e.g., *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 318, 858 P.2d 1054 (1993); *Stevens v. Hyde Athletic Inds., Inc.*, 54 Wn. App. 366, 773 P.2d 871 (1989).

⁸¹ 54 Wn. App. 366, 773 P.2d 871 (1989).

game. The court dismissed the plaintiff's CPA claim, holding that the Act does not apply to personal injuries.⁸² The court explained:

Had the Legislature intended to include actions for personal injury within the coverage of the CPA, it would have used a less restrictive phrase than "business or property." [The plaintiff's] attempts to come within this analysis by classifying her personal injury damages into a pseudo-property structure, i.e., special damages such as hospital, physician, and rehabilitative expenses, constitute property and economic interests. This argument is unconvincing.⁸³

In this case, the Cowarts seek both economic and non-economic damages. Their economic damages include expenses for medical care, hospitalization, treatment, and loss of income—precisely the type of damages rejected by the *Stevens* court. (CP 34) Their non-economic damages include "physical pain and suffering, mental anguish, emotional distress, loss of care, companionship and society, damage to the marital community, permanent disability and impairment, past, present, and future mental and emotional trauma, distress, and anxiety, reduction in the capacity to enjoy life, and Joann Cowart's reduced life

⁸² *Stevens*, 54 Wn. App. at 370.

⁸³ *Id.*

expectancy.”⁸⁴ (CP 34-35) These damages cannot be characterized as an injury to the Cowarts’ “business or property.”⁸⁵ Because none of the damages alleged by the Cowarts fall within the scope of the CPA, their CPA claim must be dismissed as a matter of law.

C. The Cowarts are not entitled to recover their attorney fees on appeal.

The CPA authorizes an award of attorney fees to a person who brings and *prevails* on a claim under the Act.⁸⁶ In this case, as explained above, the trial court properly dismissed the Cowarts’ CPA claim on summary judgment, and they are therefore not entitled to prevail on appeal. Moreover, even if the Cowarts did prevail on appeal, they would not be entitled to an award of attorney fees. The Cowarts are not requesting that the Court enter judgment in their favor on the CPA claim; they are merely asking the Court to reverse the summary judgment in favor of Great-West. Because the Cowarts cannot now

⁸⁴ In response to Great-West’s summary judgment motion, Mr. Cowart submitted a declaration listing various expenses incurred “as a result of my wife’s diagnosis of ovarian cancer.” (CP 1261) Aside from the fact that the Cowarts are not claiming Great-West is responsible for causing Mrs. Cowart’s cancer, the expenses described by Mr. Cowart are all based upon personal injury and thus are not recoverable under the CPA.

⁸⁵ See, e.g., *Keyes v. Bollinger*, 31 Wn. App. 286, 296, 640 P.2d 1077 (1982) (emotional distress damages not recoverable under the CPA).

⁸⁶ RCW 19.86.090.

prevail on their CPA claim, they are not entitled to recover their attorney fees on appeal.

VI. GREAT WEST'S CROSS-APPEAL

A. Assignment of Error

Great-West assigns error to the trial court's apparent consideration of the Declaration of Charles M. Miller in Support of Plaintiff's Opposition to Defendants' Motion for Summary Judgment, filed June 13, 2006. The Court does not need to reach this issue, however, unless the case is remanded for further proceedings in the trial court.

B. Issue Pertaining to Assignment of Error

An expert witness may not offer opinions of law regarding the issues before the court. The declaration submitted by Charles Miller contains numerous conclusions regarding Great-West's alleged liability to the Cowarts. Did the trial court err in declining to strike Mr. Miller's declaration?

C. Factual Background

The Cowarts submitted the declaration of Charles Miller, an insurance "expert" from California, in support of their assertion that Great-West acted improperly in denying the June 1998 request for pre-

certification of Mrs. Cowart's TAH. (*See* CP 1311-1414) Great-West objected to the Miller declaration on numerous grounds, including the fact that it contained impermissible conclusions of law. (CP 1691-93, 1716-18) The trial court stated, during oral argument, that Great-West's motion to strike was moot because of its decision granting Great-West's motion for summary judgment. (6/23/06 VRP at 50) However, the summary judgment order lists Mr. Miller's declaration as one of the documents considered by the court. (CP 1740) Accordingly, in order to ensure that Mr. Miller's improper testimony cannot be considered in the event the case is remanded to the trial court, Great-West asks that the Court rule on the admissibility of Mr. Miller's conclusions of law.

D. Argument

The trial court's decision regarding the admissibility of Mr. Miller's declaration is subject to de novo review.⁸⁷ ER 702 authorizes expert testimony to "assist the trier of fact to understand the evidence or to determine a *fact* in issue" (Emphasis added.) As the

⁸⁷ *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998) (de novo standard of review applies to all trial court rulings made in conjunction with a summary judgment motion).

Washington courts have repeatedly recognized, the rule does not allow an expert to offer opinions of law in the guise of expert testimony.⁸⁸

For example, in *Stenger v. State*,⁸⁹ a public school instructional aide sued the state for injuries she received while working with a developmentally disabled child who was a ward of the state. In support of her assertion that the state failed to fulfill its obligations as the child's custodial parent, the plaintiff submitted the declaration of an attorney practicing disability law. The declaration set forth the attorney's qualifications and listed the documents he had considered. He then addressed several disability-related questions, including the obligations arising under applicable state and federal law.⁹⁰

The court rejected the attorney's declaration, noting that he was merely expressing his opinion as to whether the state fulfilled its obligation to develop an appropriate educational program for the disabled student.⁹¹ The court explained, "Expert opinion that consists

⁸⁸ *Bell v. State*, 147 Wn.2d 166, 179, 52 P.3d 503 (2002); *Terrell C. v. State*, 120 Wn. App. 20, 30, 84 P.3d 899 (2004); *Stenger v. State*, 104 Wn. App. 393, 408-09, 16 P.3d 655 (2001); *Charlton v. Day Island Marina, Inc.*, 46 Wn. App. 784, 787-88, 732 P.2d 1008 (1987).

⁸⁹ 104 Wn. App. 393, 16 P.3d 655 (2001).

⁹⁰ *Stenger*, 104 Wn. App. at 408.

⁹¹ *Id.*

solely of legal conclusions is not admissible under the Rules of Evidence and it cannot, by its very nature, create an issue of material fact when it only contains legal conclusions.”⁹²

In *Charlton v. Day Island Marina*,⁹³ the plaintiffs filed suit against a marina seeking damages for the deaths of two people killed by carbon monoxide fumes as a result of the accumulation of exhaust fumes in a boathouse. The plaintiffs submitted affidavits of expert witnesses who opined that the defendant negligently designed and constructed the boathouse.⁹⁴ This court refused to consider the affidavits, noting, “[E]xperts are not to state opinions of law or mixed fact and law, such as whether X was negligent.”⁹⁵

In this case, the Miller declaration is replete with impermissible legal conclusions, including:

- Great-West was a party to the insurance contract between Amerus and the Cowarts and was “in the business of insurance in Washington.” (CP 1318)
- Great-West wrongfully denied the Cowarts’ claim. (CP 1321)

⁹² *Id.* at 408-09.

⁹³ 46 Wn. App. 784, 732 P.2d 1008 (1987).

⁹⁴ *Charlton*, 46 Wn. App. at 787-88.

⁹⁵ *Id.* at 788.

- Great-West conducted an unreasonable and incomplete investigation of the Cowarts' claim. (CP 1322)
- Great-West violated various claims-handling regulations. (CP 1323-26)

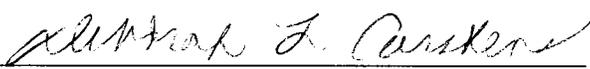
These opinions are inadmissible, and if the case is remanded, they should not be considered by the trial court.

VII. CONCLUSION

For the reasons set forth above, Great-West respectfully requests that the trial court's decisions granting Great-West's motion for summary judgment and denying the Cowarts' motion for reconsideration be AFFIRMED. In the event the case is remanded, Great-West asks the Court to rule that the Declaration of Charles M. Miller should be stricken to the extent it contains impermissible legal conclusions.

DATED this 6th day of April, 2007.

BULLIVANT HOUSER BAILEY PC

By 
Jerret E. Sale, WSBA #14101
Deborah L. Carstens, WSBA #17494
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Attorneys for Respondents

CERTIFICATE OF SERVICE

The undersigned certifies that on this 6th day of April, 2007, I

caused to be served this document to:

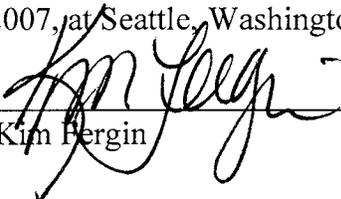
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I declare under penalty of perjury under the laws of the state of

Washington this 6th day of April, 2007, at Seattle, Washington.



Kim Fergin

07 APR -9 AM 9:34
STATE OF WASHINGTON
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