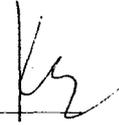


NO. 36480-8-II



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COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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ERENE REED,

Respondent,

v.

FARMERS INSURANCE COMPANY OF WASHINGTON,

Appellant.

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**RESPONSE BRIEF OF RESPONDENT ERENE REED**

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**A. INTRODUCTION**

On May 25, 2007, a hearing was held on Farmers Insurance Company of Washington (“Farmers”) and Greg Lebien’s Motion for Summary Judgment. The trial court dismissed with prejudice the claim of Intentional Infliction of Emotional Distress against Greg Lebien (Field Coordinator for Farmers) and granted his motion to remove his name from the caption. The trial court denied Farmers’ motion for summary judgment with respect to the Consumer Protection Act (CPA) claim.

Thereafter, Farmers moved for discretionary review of the trial court’s decision. Commissioner Skerlec granted Farmers’ motion for discretionary review.

**B. NO ASSIGNMENT OF ERROR**

The trial court did not err when it denied Farmers’ Motion for Summary Judgment on May 25, 2007.

**C. ISSUES PERTAINING TO TRIAL COURT’S DENIAL OF SUMMARY JUDGMENT**

1. The trial court did not err in finding that Farmers had a policy of denying on a class-wide basis of refusing to pay claims based upon diminished value;
2. The trial court did not err in finding that Respondent had standing to bring a CPA claim against Farmers; and,
3. The trial court did not err in finding that Respondent stated a *prima facie* CPA claim against Farmers.

**D. STATEMENT OF THE CASE**

The following recitation of facts is from Reed's Opposition to Farmers' Motion for Summary Judgment. CP 82-97:

Reed's claim arises out of a motor vehicle collision that occurred on December 11, 2004, when Farmers' insured, Karyn Whitacre, rear-ended Reed's 2000 Kia Sportage, thereby causing substantial damage to Reed's vehicle. Reed immediately filed a claim with Farmers, which did not dispute liability.

Reed was referred by Farmers to Titus Will, one of its Circle of Dependability Repair Shops. When Reed picked up her vehicle from Titus Will after its first attempt to repair her vehicle, Reed realized that the vehicle was not properly repaired. "[A]s I drove off there was this rattle and I had to turn around and bring it back. And it turned out that it was – the gate had to be replaced. It wasn't like locking correctly. And so my first thought was, you know, They couldn't hear this noise? I mean, I'm sure they would have test-drove it, you would think after repairing it, but..." CP 102. Several unsuccessful attempts were made by Titus Will to properly repair Reed's vehicle. "[M]y car went in and out of that shop, I don't know, three or four times and still wasn't to my satisfaction. CP 103.

Reed complained to Titus Will on at least two occasions of air noise. Titus Will subsequently referred Reed to a Kia dealership to address the air noise. An employee at the Kia dealership advised Reed that the back door was not properly sealed. "[B]ottom line was it wasn't

sealed right because he put like water in and there was water in between the door where there shouldn't have been water. I know I took it back to Titus Will after that." CP 104-105. Reed reports that after Kia repaired the damaged part to the back of the vehicle, the vehicle to this day still has the air noise. CP 106.

Months after the collision, Reed paid a diminished value expert to conduct a post-repair inspection of her vehicle. The inherent diminished resale value of the vehicle was appraised at a range of \$1,132.00 to \$1,888.00. Reed thereafter presented a demand for payment to Farmers for the diminished resale value of her vehicle, which was subsequently denied in a letter by Greg Lebien, Field Coordinator for Farmers, on the stated grounds that her vehicle had been repaired to "industry standards." CP 107. From Greg Lebien's deposition testimony, "industry standards" is defined as pre-loss condition, which is the condition the vehicle was in before the accident. CP 108. Since there remains outstanding repair issues with respect to Reed's vehicle, her vehicle has not been restored to "industry standards."

In denying Reed's claim for diminished value, Greg Lebien sent a letter to Reed stating:

Farmer's (sic) position has always been there is no diminished value on privately owned vehicles if the repairs are done properly to industry standards. This is evident by the thousands of claims paid by Farmers and other insurance companies to individuals whose vehicles have been totaled. Many of these vehicles have been in prior accidents and repaired. If the repairs are done properly the settlements are based on "fair market value" (not trade

in or diminished value) and are not adjusted for these prior repairs. The following is some Washington case law on the issue:

“Washington Supreme Court in *Certification From United States District of Washington v. Aetna Casualty and Surety Co.* (sic), 113 Wash. 2d 869, 784 P.2d 507 (Wa. 01/04/1990) found “damages for injury to property are measured in terms of the amount necessary to compensate for the injury to the property interest. D. Dobbs 5.1, at 311. Therefore, damages for injury to property are limited under Washington law to the lesser of diminution in value of the property or the cost to restore or replace the property.”

CP 38-39.

Based upon the foregoing letter, Reed brought a claim against Farmers for unfair and deceptive practices under the CPA for its affirmative misrepresentations with respect to her claim. The rule of law interpreted, applied, and cited verbatim by Greg Lebien in the foregoing letter is quoted from the dissenting opinion of Justice C.J. Callow in the *Aetna* case. CP 94.

In allowing the CPA claim to proceed, the trial court expressed the following concerns regarding to Farmers’ nonpayment of diminished value claims:

- “I guess my question is, if the insurance company is denying an entire class of claims, then it really is not about the insured anymore, is it?” RP 15-16.
- “Here, what possible advantage to the client, the insured, is there for denying an entire class of claims summarily?” RP 17.
- “I’m wondering is this dispute about the handling of a claim or is it a dispute whether the - - it is appropriate for them to pay

an entire class of claims? If it is an entire class of claims, does that take us out of Tank?" RP 18.

- "Well, the letter that Mr. Lebien sent said, 'Farmers' position has always been that there is no diminished value on privately owned vehicles if the vehicles are done properly to industry standards.'" RP 19.
- "But that's what this letter says, in so many words, it simply says, 'We don't think there is diminished value, not because we have looked at your individual claim and feel that, you know, in this particular case, your car was worth \$2,300 prior to the wreck. Now that we've fixed it, we still think it is worth \$2,300. You have lost nothing.' This says, 'We don't pay this.'" RP 20.
- "The question is, is it an unfair practice? It's unfair to say, 'I'm not going to pay an entire class of claims. I don't care what the facts are.'" RP 20.
- "With respect to the Consumer Protection Act claim, I'm more troubled. I do think that Farmers' position here is kind of stinky, and I guess it is because it appears to be arbitrary. It is not based on facts. It is arbitrary." RP 32.
- "Here, it isn't just, you have to pay what we think is reasonable or you have to agree with us and so on with respect to the amount, what it really says, there is an entire class of claims

that we can summarily ignore.” RP 34-35.

**E. ARGUMENTS**

**I. Standard of Review**

The standard of review for summary judgment is de novo. The appellate court engages in the same inquiry as the trial court. *City of Sequim v. Malkasian*, 157 Wn.2d 251, 261, 138 P.3d 943 (2006). Summary judgment is appropriate when “there is no genuine issue as to any material fact and...the moving party is entitled to a judgment as a matter of law.” CR 56(c). The court must consider all facts submitted and reasonable inferences from the facts in the light most favorable to the nonmoving party. *Grundy v. Thurston County*, 155 Wn.2d 1, 6, 117 P.3d 1089 (2005).

**II. THE TRIAL COURT DID NOT ERR BY FINDING THAT THE RESPONDENT HAD STANDING TO BRING A CPA ACTION AGAINST THE APPELLANT AND THAT THE RESPONDENT STATED A *PRIMA FACIE* CPA ACTION AGAINST THE APPELLANT**

Washington permits third-party claimants to maintain a **non-per se** Consumer Protection Act claim against a liability insurer. Farmers rely on the Court’s holding in *Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 715 P.2d 1133 (1986) for the rule that third-party claimants are barred from using the good faith provisions of WAC 284-30-330 as a vehicle for a **per se** violation of the CPA.

*Tank* holds that an injured party has no right of action against the tortfeasor’s insurer for breach of its statutory duty to act in good faith.

*Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d at 391-94. Reed does not rely on the good faith provisions of WAC 284-30-330 to maintain a per se violation of the CPA against a liability insurer. Reed seeks to impose a non-per se CPA violation under RCW 19.86 against a liability insurer for its unfair and deceptive practice in handling her claim by stating that her vehicle had been restored to industry standard when it knew that was not the case. In fact, Reed relies upon the holding in *Tank* to support her position:

Our decision in *Transamerica*,<sup>1</sup> in addition to limiting **per se** CPA actions in this context to insureds, suggests in dicta that NON per se actions may be maintainable by third parties. *Transamerica*, at 418. However, in this case neither [plaintiffs] alleged non per se CPA violations or made any showing of the damage-inducement-repetition elements of a non per se theory.

*Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d at 394 (emphasis added).

In *Transamerica*, plaintiff was a vendor of real property and the defendant was a corporation developer/homebuilder that claimed that plaintiffs were negligent in not disclosing coverage of a sewer assessment lien on three parcels of real estate. Defendant asserted that the plaintiff violated the CPA by negligently breaching its duty to perform a reasonable title search. The court held:

A cause of action for a **per se** violation of the CPA may be brought only by the insured.<sup>2</sup> **Therefore, defendant, as a noninsured, must rely on the public interest test for a violation of the CPA.**

*Transamerica*, 103 Wn.2d at 418 (emphasis added).

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<sup>1</sup> *Transamerica Title Ins. Co. v. Johnson*, 103 Wn.2d 409, 418, 693 P.2d 697 (1985).

<sup>2</sup> *Green v. Holm*, 28 Wn. App. 135, 622 P.2d 869 (1981).

Clearly, based upon the foregoing, *Tank* and *Transamerica* do not bar a third-party from maintaining a non-per se CPA action against a liability insurer. In order to recover damages under the CPA, a private party must prove that the defendant's act or practice:

- (1) is unfair or deceptive;
- (2) occurs in the conduct of any trade or commerce;
- (3) affects the public interest; and
- (4) causes
- (5) an injury to the plaintiff in his business or property.

*Hangman Ridge Training Stables, Inc., v. Safeco Title Insurance*, 105 Wn.2d 778, 784-85, 719 P.2d 531 (1986). *See also Mayer v. Sto Indus., Inc.*, 123 Wn. App. 443, 98 P.3d 116 (2004), *affirmed*, 156 Wn.2d 677, 132 P.3d 115 (2006).

Farmers argues that Reed is barred from bringing a CPA action against it because she is not the insured/consumer; rather she is a third-party, therefore she cannot maintain a non-per se CPA claim as a non-insured; however, Washington law with respect to the CPA is contrary to Farmers' position. "[I]t is well settled that a consumer relationship is not a prerequisite for standing" under the CPA. *Panag v. Farmers et al.*, 2007 Wn. App. (56625-3-1) (2007):

*See e.g., Escalante v. Sentry Ins. Co.*, 49 Wn. App. 375, 386-88, 743 P.2d 832 (1987) (estate of passenger in car accident had standing to sue the driver's insurer for bad faith in violation of the Act even though she had no consumer relationship to the company), disapproved on other grounds by *Ellwein v. Hartford Accident & Indem. Co.*, 142 Wn.2d 76, 781, n.10, 15 P.3d 640

(2001). *Escalante* was cited with approval in *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 312, 858 P.2d 1054 (1993).

...In *Fisons*, a physician sued a drug company for unfair and deceptive practices in failing to disclose the dangers of a drug. The drug company argued that the physician lacked standing because he was not the purchaser of the drug. The Supreme Court flatly rejected this argument based on the plain language of the [CPA] statute: "Although the consumer protection statutes of some states require that the injured person be the same person who purchased goods or services, there is no language in the Washington act which requires that a CPA plaintiff be the consumer of goods or services." *Fisons*, 122 Wn.2d at 313.

*Panag, supra.* Further, the court noted:

The [Consumer Protection] Act simply does not require a consumer relationship as a prerequisite for standing. It does not identify the "consuming public" as the entity to be protected. "Any person who is injured in his or her business or property by a violation of RCW 19.86.020...may bring a civil action in the superior court..." In *Hangman Ridge*[,] the Supreme Court described a "successful plaintiff" as "one who establishes all five elements of a private CPA action." *Hangman Ridge*, 105 Wn.2d at 795).

*Panag, supra.*

It was Farmers' intent to deny Reed's claim on any grounds it saw fit, even if it had to make up law in a letter transmitted to all diminished value claimants as the basis for a denial of payment. Farmers denied Reed's claim on the basis that no diminution in resale value exists when a vehicle is repaired to industry standards (pre-loss condition), despite Mr. Lebien having reviewed Reed's diminished value report stating that her vehicle still had outstanding repair issues in the amount of \$465.12.

In his deposition, Lebien admitted that Reed's vehicle had outstanding repairs issues, therefore, it was not restored to "industry standards" (pre-loss condition):

Q: When Ms. Reed had problems that you became aware of, problems with her repairs, and she returned to Titus-Will for rerepair, did you have any concerns about the quality of repairs that were being performed by Titus-Will?

A: I was just concerned about making sure she was taken care of.

Q: And do you know if Titus-Will was able to take care of her?

A: Obviously, we have issues still. I need a break.  
CP 94-95, 108.

Reed does not seek to impose a per se CPA violation under WAC 284-30-330 against Farmers for its affirmative misrepresentation to her that her vehicle had been restored to industry standards, therefore, there was no injury to her property with respect to diminished value. Reed seeks to impose a non-per se CPA violation under *Hangman Ridge*, in which she must meet the five elements of a private CPA action. The trial court properly found that Farmers' denial of diminished value claims on the stated ground that vehicles had been restored to industry standards, when in fact, it made no such independent determination that the vehicles had been restored to industry standard was an unfair practice that excludes

payment to an entire class of claimants. This practice by Farmers is exactly what the CPA seeks to prevent. To hold otherwise would be to gut the CPA.

In a light most favorable to the nonmoving party, whether Farmers' affirmative misrepresentation that a vehicle has been restored to pre-loss condition when it knew that was not the case is an unfair or deceptive act that injured Reed's property is a question of fact that is inappropriate for dismissal by summary judgment. The trial court did not err by denying Farmers' Motion for Summary Judgment.

### **III. THE TRIAL COURT DID NOT ERR BY FINDING THAT THE APPELLANT ENGAGED IN A UNFAIR ACT OF DENYING CLAIMS ON A CLASS-WIDE BASIS**

In Reed's initial complaint, she alleged that Farmers denied her claim for diminished value because it cited to the dissenting opinion in *Boeing v. Aetna Casualty and Surety, Co.*, 113 Wn.2d 869, 784 P.2d 507 (1990). CP 4. Reed alleged that as a direct and proximate cause of Farmers' intentional and/or negligent conduct, she sustained injury to her property. CP 5. Reed also alleged that Farmers' conduct was unfair and deceptive, as well as a non per se CPA violation. CP 5-6. In Reed's first amended complaint, she again alleged all of the foregoing. CP 10-15. Further, at summary judgment, Reed argued that Farmers deceptively and **unfairly** denied her claim for diminished value. CP 86.

As stated above, in order to recover damages under the CPA, a private party must prove that the defendant's act or practice:

- (1) is unfair or deceptive;
- (2) occurs in the conduct of any trade or commerce;
- (3) affects the public interest; and
- (4) causes
- (5) an injury to the plaintiff in his business or property.

*Hangman Ridge Training Stables, Inc., v. Safeco Title Insurance*, 105 Wn.2d 778, 784-85, 719 P.2d 531. *See also Mayer v. Sto Indus., Inc.*, 123 Wn. App. 443, 98 P.3d 116 (2004), *affirmed*, 156 Wash.2d, 677, 132 P.3d 115 (2006).

With respect to the first, fourth, and fifth elements of *Hangman Ridge*, Reed argues that Farmers' act of denying diminished value claims on the stated grounds that no diminution in value exists when vehicles have been restored to pre-loss condition, without a determination whether the vehicles, in fact, have been restored to pre-loss condition is an unfair and deceptive act or practice; the sole basis of which is to avoid payment on legitimate claims. Reed provided documentation from an expert on diminished value that as a result of the collision, she suffered a loss in value to her vehicle. CP 4, 11-12, 84-85. Further, Lebien concedes that Reed's vehicle had outstanding repair issues. CP 94-95, 108. In a light most favorable to the nonmoving party, Farmers' affirmative misrepresentation with respect to the denial of her claim caused injury to her property because she was not made whole, or compensated, for the loss to that property she suffered as a result of the collision. In essence,

she was refrained from the opportunity to repair her vehicle to pre-loss condition because Farmers' failed to pay her for the claim. *See Mayer v. Sto Indus., Inc.*, 123 Wn. App. 443, 98 P.3d 116 (2004), *affirmed*, 156 Wash.2d, 677, 132 P.3d 115 (2006) (Where a defendant induces a plaintiff to act or refrain from acting, the causation requirement is met). *Id.* at 458.

Turning to the second element of *Hangman Ridge*, the business of insurance constitutes trade or commerce. RCW 48.01.030 prohibits insurers from engaging in unfair trade practices. "The business of insurance is one affected by the public interest, requiring that all persons be actuated by good faith, abstain from deception, and practice honesty and equity in all insurance matters."

Perhaps the most difficult element of any non per se CPA violation is the third element, the public interest element of *Hangman Ridge*. In this matter, the trial court properly found that Farmers' conduct of denying on a class-wide basis claims based upon diminished value affected more people than just Reed. Farmers' sent out a stock letter stating that diminished value claims were being denied on the basis that claimants' vehicles had been restored to pre-loss condition without its making any investigation to determine if that was the case. The trial court considered all the pleadings and materials submitted by the parties. The judgment of the trial court should be affirmed under *Tropiano v. Tacoma*, 105 Wn.2d 873, 718 P.2d 801 (1986), which provides in relevant part:

All theories argued by a party to the trial court are properly before the appellate court and, regardless of the basis for the trial court's

decision may be based on any of the theories if supported by the proof.

*Id.* at 876-877. *See Singleton v. Jackson*, 85 Wn. App. 835, 842-843, 935 P.2d 644 (1997) (An appellate court may review any legal theory argued to the trial court if it is supported by the pleadings and the evidence). *See also Hoflin v. Ocean Shores*, 121 Wn.2d 113, 134, 847 P.2d 428 (1993) (An appellate court will affirm a correct judgment even if the trial court based the judgment on the wrong reasons).

#### **IV. APPELLANT IS MISGUIDED WHEN IT CITES ITS INSURED'S POLICY WITH RESPECT TO LEGAL ACTION AGAINST IT**

Farmers argue that the policy issued to Ms. Whitacre contains language which prevents a non-insured, Reed, from naming Farmers as a defendant:

We may not be sued unless there is full compliance with all terms of the policy. We may not be sued under the Liability Coverage until the obligation of a person we insure to pay is finally determined either by judgment against that person at the actual trial or by written agreement of that person, the claimant and us. No one shall have any right to make us a party to a suit to determine the liability of a person we insure.

Farmers argues that Respondent Reed is bound by the terms of a policy it issued to its insured, Ms. Whitacre, which essentially precludes Reed from making Farmers a party in a liability action. This argument is a reversal from Farmers position that Reed lacks standing to bring a claim against Farmers because she is the non-insured under the provisions of a policy. Quite bluntly, Farmers' argument lacks common sense. Reed is not bound by the terms of a policy for which she has given no

consideration. Alternatively, if Reed is bound by the terms of a policy between an insurer and its insured, then Reed has standing to bring an action against the insurer under *Tank v. State Farm Fire & Cas.*, 105 Wn. 2d 381, 715 P.2d 1133 (1988) for a per se violation of the CPA.

**F. CONCLUSION**

For the reasons set forth above, Reed respectfully requests that the Court affirm the trial court's denial of Farmers' Motion for Summary Judgment.

DATED this 17<sup>th</sup> day of December, 2007.

Respectfully submitted,

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NO. 36480-8-II



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COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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ERENE REED,

Respondent,

v.

FARMERS INSURANCE COMPANY OF WASHINGTON,

Appellant.

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**CERTIFICATE OF SERVICE**

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Alana K. Bullis, WSBA No. 30554  
Of Attorneys for Respondent

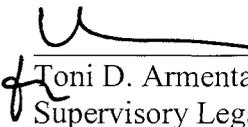
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I hereby certify that on December 17, 2007, I served Response Brief of Respondent Erene Reed and this declaration of service upon the following counsel of record as indicated:

Tyna Ek  
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I declare under penalty of perjury under the laws of the State of Washington that the above is true and correct.

Executed at Tacoma, Washington this 17<sup>th</sup> day of December, 2007.

  
\_\_\_\_\_  
Toni D. Armenta  
Supervisory Legal Assistant to  
Alana K. Bullis