

FILED
COURT OF APPEALS
DIVISION II

09 OCT -7 PM 1:50

STATE OF WASHINGTON
BY *W*
DEPUTY

No. 39511-8-II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

Terry S. Hartman, Appellant

v.

Nationwide Mutual Insurance Company; Nationwide Life
Insurance Company; Assurity Security Group, Inc.; Assurity Life
Insurance Company, Respondents

BRIEF OF APPELLANT

Todd R. Renda, WSBA# 20779
Attorney for Appellant

Todd R. Renda, Attorney at Law
6314 19th St., Ste 20
Tacoma WA 98466
253-566-6701

ORIGINAL

TABLE OF CONTENTS

I. Introduction

II. Assignments of Error

Assignments of Error

1	.....	1
2	.....	1

III. Issues Pertaining to Assignments of Error 1

IV. Statement of the Case 2

V. Argument 8

A. Standard of Review 8

B. The Trial Court Erred in Granting Assurity’s Motion for Summary Judgment 9

1.	Purposes of the Consumer Protection Act...	9
2.	Hangman Ridge Test	9
a.	Unfair or deceptive act or practice.....	10
b.	Occurring in trade or commerce.....	19
c.	Public interest	20
d.	Injury to business or property	22
e.	Causation	23
3.	Actual Damages	26
4.	Attorney Fees	27

VI. Conclusion 28

VII. Declaration of Service 30

TABLE OF AUTHORITIES

Table of Cases

<i>Ambach v. French</i> , 2009 WL 3031416 9/24/09....	22
<i>Anderson v. State Farm Mutual Insurance Company</i> , 101 Wn.App. 323, 2 P.3d 1029 (2000), <i>rev. denied</i> 142 Wn.2d 1017 (2001)	11
<i>Griffin v. Allstate</i> , 108 Wn.App 133, 29 P.3d 777 (2001), <i>rev. denied</i> , 146 Wn.2d 1005, 45 P.3d 551 (2002)	22
<i>Haberman v. Wash. Pub. Power Supply Sys.</i> , 109 Wn.2d 107, 169, 744 P.2d 1032 (1987)	9
<i>Hangman Ridge Training Stables v. Safeco Title Ins. Co.</i> , 105 Wn.3d 778, 719 P.2d 531 (1986)	1, 9, 10, 11, 19, 20, 21, 22, 23
<i>Indoor Billboard/Washington, Inc., v. Integra Telecom of Washington, Inc.</i> , 162, Wn.2d 59, 170 P.3d 10, 15 (2007)	8, 10, 23
<i>Johnston v. Beneficial Management Corp. Of Amer.</i> , 85 Wn.2d 637, 538 P.2d 510 (1975)	11
<i>Leingang v. Pierce County Medical Bureau</i> , 131 Wn.2d 133, 930 P.2d 288 (1997)	10
<i>Mason v. Mortgage America, Inc.</i> , 114 Wn.2d 842, 792 P.2d 142 (1990)	22

BRIEF OF APPELLANT

PAGE ii

<i>Matheny v. Unumprovident Corporation</i> , 594 F.Supp.2d 1212, (E.D.Wash 2009)	17, 27
<i>McRae v. Bolstad</i> , 32 Wn.App. 173, 646 P.2d 771 (1982), <i>aff'd</i> 101 Wn.2d 161 (1984)...	27
<i>Michael v. Mosquera-Lacy</i> , 165 Wn.2d 595, (2009)	19
<i>Panag v. Farmers Insurance Company of Washington</i> , 166 Wn.2d 27, 204 P.3d 885, 889 (2009)	10, 23
<i>Peterson v. Big Bend Insurance Agency, Inc.</i> , 150 Wn.App. 504, 202 P.3d 372, 379 (2009)	14, 15, 21
<i>Shah v. Allstate Insurance Company</i> , 130 Wn.App 74, 121 P.3d 1204 (2005), <i>rev. denied</i> 157 Wn.2d 1006	11, 14, 15, 21
<i>Sign-O-Lite Signs, Inc., v. DeLaurentis Florists Inc.</i> , 64 Wn.App. 553, 825 P.2d 714 (1992)	27, 28
<i>St. Paul Fire & Marine Insurance Company, v. Updegrave</i> , 33 Wn. App. 653, 656 P.2d 1130 (1983)	26
<i>Stephens v. Omni Insurance Co.</i> , 138 Wn.App 151, 166 (2007), <i>aff'd Panag v. Farmers Insurance Company of Washington</i> , 166 Wn.2d 27, 204 P.3d 885	11

Strother v. Capitol Bankers Life Insurance Company,
 68 Wn.App. 224, 842 P.2d 504 (1992),
reversed on other grounds, 124 Wn.2d 873 (1994).. 12, 21, 22

Vallandigham v. Clover Park Sch. Dist.
No. 400, 154 Wn.2d 16,
 109 P.3d 805 (2005) 8

Van Noy v. State Farm Mutual Insurance Company,
 98 Wn.App. 487, 16 P.3d 574 (1999),
aff'd 142 Wn.2d 784 (2001) 12

Washington State Physicians Ins. Exchange
v. Fisons Corp., 122 Wn.2d 299,
 858 P.2d 1054 (1993) 28

Statutes

RCW 19.86.020	.....	9
RCW 19.86.090	.....	26, 28
RCW 48.30.030	.....	21
RCW 48.30.090	.....	13, 18, 19, 21
RCW 48.30.180.	.....	16, 18, 19, 21

Regulations and Rules

CR. 56(c)	.....	8
WAC 284-30-330(1)	.....	17, 18, 19
WAC 284-30-350(1)	.....	18, 19

Other Authorities

WPI 15.01 24

I. INTRODUCTION

Appellant, Terry S. Hartman (Hartman), alleges that Respondent, Assurity Life Insurance Company (Assurity), violated the Consumer Protection Act (CPA) by misrepresenting the monthly benefit of his Long Term Disability policy after he requested that Assurity cancel his policy. Hartman further claims that the misrepresentation induced him to change his mind and retain the policy and that he sustained damages when he later became disabled and received less than the represented amount in monthly disability benefits. The trial court erred in granting summary judgment to Assurity.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in granting Assurity's motion for summary judgment.
2. The trial court erred in denying Hartman's cross-motion for summary judgment.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether Hartman established the five elements of a Consumer Protection Act claim as set out in *Hangman Ridge Training Stables v. Safeco Title Ins. Co.*, 105 Wn.3d

778,780, 719 P.2d 531 (1986)? Assignment of Error 1 and

2.

2. Whether material issues of fact exist to prevent a grant of summary judgment to Assurity? Assignment of Error 1.

IV. STATEMENT OF THE CASE

On June 27, 2000, a Guaranteed Renewable Disability Policy became effective between Hartman and Nationwide Life Insurance Company. CP 127, ll.19-22. Assurity later reinsured and administered Hartman's disability policy. *Id.* The policy calls for monthly benefits of \$3,800.00 plus an integrated social benefits rider of \$1,200.00 per month. CP 127, ll. 23-25.

On September 20, 2004, Assurity received correspondence from Hartman written on the face of its quarterly premium invoice. The correspondence stated, as follows: "Close this account immediately I was never aware that my wife took out this policy for me. I cannot afford this policy & do not want it!" CP 114.

On September 27, 2004, Linda Nettland, an employee of Assurity, and acting within the scope of her authority, (CP136-137), wrote a letter addressed to Hartman which stated in part:

Our office received your termination request on the above listed policy. We have temporarily suspended your account. In order for us to complete your request, we ask you to sign and return the enclosed form to our office. Meanwhile, we are concerned by your termination request since your policy continues to be a valuable asset to you and your family. We encourage you to review the following information before making your final decision.

Your policy was issued on June 27, 2000. Currently, the total monthly benefit is \$10,000.00 with a elimination period of 90 days days [sic] for accident and 90 days days [sic] for sickness. This policy has a benefit period of 5 years for accident and 5 years for sickness.

Please be advised, if this policy is terminated, it cannot be reinstated. If replaced, any replacement policy would be written at your current attained age. In addition to the possibility of a higher premium, the contestable period would start all over. If you feel that you need more or less coverage, consider the advantage of supplementing or reducing what you currently have. CP116.

Hartman responded to the September 27, 2004, letter by writing on the back of the original the following words: "I see it would be a mistake to cancell [sic] this policy. Please ReBill [sic] again as I have misplaced Balance Due. Enclosed a check for \$300.00". CP119. On October 6, 2004, an employee from the accounting department sent a letter to Hartman stating that Assurity had received his remittance of \$300.00 on October 5, 2004 and asking that the balance of \$157.37 be paid. CP 122.

On October 15, 2004, Hartman remitted the balance due. CP 124.

On November 25, 2004, Hartman sustained a disabling injury and subsequently applied for benefits under the policy. CP 56, ll. 8-12. On March 21, 2005, Assurity began making monthly benefits to Hartman in the amount of \$5,000.00. CP128, ll. 4-7.

Linda Nettland testified in her deposition that in 2004-2005 she worked in Assurity's conservation unit. CP87 (Nettland Dep. p. ll. 6-9. "Conservation" is a term used by Assurity which means that "when we receive a cancellation request from a customer, we would attempt to communicate with the policyholder to ensure that they had all the necessary information to make an informed decision about cancellation." CP 87 (Nettland dep. p. ll, ll.14-23).

Ms. Nettland testified that the monthly benefit amount of \$10,000.00 in the September 27, 2004, conservation letter was miscalculated. The correct monthly benefit should have been \$5,000.00. CP 92, 93 (Nettland dep. p. 32, ll. 1-25; p. 33, ll. 1-11). Ms. Nettland explained that her miscalculation occurred as follows:

...I believe I added together the amount of the base policy plus what I thought were two additional riders, when, in fact, there was actually only one rider to the base policy. CP 90 (Nettland dep. p. 32, ll. 6-13).

Ms. Nettland stated that in order to determine the monthly benefit she had to engage in a calculation. It was not possible to just look up the monthly benefit either on the policy schedule or on the computer. CP 89 (Nettland dep. p. 21, ll. 3-9). She further stated that although the policy always had a \$5,000.00 monthly benefit since its inception, she used the word “currently” in the sentence in the September 27, 2004, conservation letter in the sentence which reads, “Currently, the total monthly benefit is \$10,000.00...” because it was part of a standard form letter that was used for many purposes. CP 91 (Nettland dep p. 35, ll. 4-25). Finally, Ms. Nettland testified that her miscalculation was not intentional. CP 92 (Nettland dep. p. 43, ll. 12-16).

Vickie Goodman, an Assurity employee and supervisor of Linda Nettland, testified by way of deposition that the purpose of providing information to policyholders in the conservation letter is so that the customer can use the information to understand what benefits they have should they cancel. CP 98 (Goodman dep. p. 25, ll. 1-21).

Ms. Goodman testified that the word “currently” as used in the second sentence of the second paragraph of the conservation letter is part of a form and is included in every conservation letter. CP 99-100 (Goodman dep. p. 36, ll. 18-25, p. 37, ll. 1-14). Ms. Goodman also stated that policyholders would on occasion call her after receiving conservation letters. Some of the commonly asked questions were as follows:

Many times they didn't know what they had, whether— how much they had, what elimination period, you know, the time for the elimination period or the benefit period. CP 97 (Goodman dep. p. 18, ll. 1-15).

Hartman testified in deposition that he took out the disability policy in 2000 at his wife's suggestion and although he didn't believe in disability insurance he “just went along with it” CP103-104 (Hartman dep. p. 10, ll. 23-25; p. 11, ll. 1-13). He testified that he did not understand when he took out the policy that the monthly benefit was \$5,000.00. CP 105 (Hartman dep. p. 13, ll. 5-25). He did not read the policy before he signed for it. CP 106 (Hartman dep. p. 14, ll. 17-25). Usually his wife handled all the paperwork as he did not want to be involved. CP 107 (Hartman dep. p. 15, ll. 20-25). His general understanding was that initially the monthly benefit was \$8,000.00. CP 110 (Hartman dep p. 22,

ll. 19-25). Hartman stated that he does not know how to read insurance policies. CP 111 (Hartman dep. p. 22, ll. 19-25).

Hartman testified that he wrote to Assurity to cancel his policy because he was going through a divorce and he had to start paying the bills and he started deciding which bills to pay and which to not. CP 108 (Hartman dep. p. 19, ll. 9-24). The divorce was filed on August 11, 2004. CP 109 (Hartman dep. p. 20, ll. 3-4).

Hartman testified that when he received the September 27, 2004, conservation letter from Assurity, he went through the following thought process:

...and I had to make a choice what if I got injured now I have the business in my hands, I am going through a divorce, now what do I do? So maybe this makes good sense. My house payment would be about \$6,500 a month, my vehicle was a thousand a month, property tax and food would be about \$10,000 minimum for me to survive, so I look at that and I thought the policy was around \$8,000 when we took it out, and I remember it was tax forms, so I know I am making \$30,000 a month now, I was making \$20,000 a month when I took the policy out, so in my mind, it's increasing. So the \$10,000 made sense, it covered my minimum expenses and I decided, okay, I will go with it. CP 110 (Hartman dep. p. 21, ll. 2-18).

Hartman further testified that at the time he changed his mind about cancelling his policy his understanding was that his monthly benefit

was increasing over time. CP110 (Hartman dep. p. 21, ll. 19-25). Finally, Hartman testified that had the September 27, 2009, conservation letter stated that the monthly benefit was \$5,000 he would not have changed his mind and paid the premium. CP 111-112 (Hartman dep. p. 22, ll. 16-25; p. 23, ll. 1-7).

V. ARGUMENT

A. Standard of Review

This Court reviews a trial court's grant of summary judgment *de novo*. *Indoor Billboard/Washington, Inc., v. Integra Telecom of Washington, Inc.*, 162, Wn.2d 59, 70; 170 P.3d 10, 15 (2007). The trial court's granting of summary judgment will be affirmed where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavit, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR. 56(c). The appellate court considers all facts in the light most favorable to the nonmoving party and affirms a grant of summary judgment only if it is determined, based on all of the evidence, reasonable persons could reach but one conclusion. *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005).

The moving party has the burden of proof of showing that there are no genuine issues of material fact. *Id.*

B. The Trial Court Erred in Granting Assurity's Motion for Summary Judgment

1. Purposes of the Consumer Protection Act

The CPA was enacted in 1961, in part, to protect the public from “unfair or deceptive acts or practices in the conduct of any trade or commerce”. RCW 19.86.020. The CPA is to be liberally construed that its beneficial purposes may be served. *Id.* The CPA complements the body of federal law governing unfair, deceptive and fraudulent acts or practices in order to protect the public and foster fair and honest competition. *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 169, 744 P.2d 1032 (1987).

2. Hangman Ridge Test

In 1986, the Washington Supreme Court decided *Hangman Ridge Training Stables, Inc. V. Safeco Title Insurance Company*, 105 Wn.2d 778, 719 P.2d 531 (1986). *Hangman Ridge* established a five-part test to establish a violation of the CPA. The *Hangman Ridge* test is summarized by 1) an unfair or deceptive act or practice, 2) that occurs in trade or

commerce, 3) a public interest, 4) injury to plaintiff in his business or property, and 5) a causal link between the unfair or deceptive act and the injury suffered. *Hangman Ridge* at 105 Wn.2d 784-785. The *Hangman Ridge* test is still applicable. *Panag v. Farmers Insurance Company of Washington*, 166 Wn.2d 27, 36, 204 P.3d 885, 889 (2009). The trial court erred in granting summary judgment to Assurity because Hartman established all the *Hangman Ridge* elements of his CPA action.

a. Unfair or deceptive act or practice

Whether a particular act or practice is “unfair or deceptive” is a question of law for the court to decide. *Leingang v. Pierce County Medical Bureau*, 131 Wn.2d 133, 150, 930 P.2d 288 (1997). To prove that a practice or act is deceptive, neither intent nor actual deception is necessary. The question is whether the conduct has the capacity to deceive a substantial portion of the public. *Hangman Ridge* at 105 Wn. 785-786. “A plaintiff need not show that the act in question was intended to deceive, only that it had the capacity to deceive a substantial portion of the public.” *Panag* at 204 P.3d 894. “The purpose of the capacity-to-deceive test is to deter deceptive conduct before injury occurs.” *Indoor Billboard/Washington*, at 162 Wn.2d 59, 75 (2007).

The CPA does not define the term “deceptive”, “but implicit in that term is ‘the understanding that the actor misrepresented something of material importance.’” *Stephens v. Omni Insurance Co.*, 138 Wn.App 151, 166 (2007), *aff’d Panag v. Farmers Insurance Company of Washington*, 204 P.3d 885. Deceptive acts are those which “unfairly induce a consumer to buy something.” *Johnston v. Beneficial Management Corp. Of Amer.*, 85 Wn.2d 637, 644, 538 P.2d 510 (1975).

The first element of the *Hangman Ridge* test may be established by either of the following:

1) an act or practice which has the capacity to deceive a substantial portion of the public or 2) that the act or practice constitutes per se unfair trade practice. A per se unfair trade practice exists when a statute which has been declared by the Legislature to constitute an unfair or deceptive act in trade or commerce has been violated. *Hangman Ridge* at 105 Wn.2d 785-786.

Violation of the insurance statutes at RCW 48.30 *et seq* constitute a per se violation of the first *Hangman Ridge* prong. *Shah v. Allstate Insurance Company*, 130 Wn.App 74, 86, 121 P.3d 1204 (2005) *rev. denied* 157 Wn.2d 1006; *Anderson v. State Farm Mutual Insurance Company*, 101 Wn.App. 323, 330, 2 P.3d 1029 (2000), *rev. denied* 142 Wn.2d 1017 (2001). Moreover, a single violation of any insurance

regulation at WAC 284-30-330 - 284-30-350 constitute a per se violation of the first *Hangman Ridge* prong. *Van Noy v. State Farm Mutual Insurance Company*, 98 Wn.App. 487, 496, 16 P.3d 574 (1999), *aff'd* 142 Wn.2d 784 (2001); *Strother v. Capitol Bankers Life Insurance Company*, 68 Wn.App. 224, 243-244, 842 P.2d 504 (1992), *reversed on other grounds*, 124 Wn.2d 873 (1994).

In the instant case, plaintiff alleges that defendant has committed an unfair or deceptive act by falsely including the sentence, “Currently, the total monthly benefit is \$10,000.00...” in the September 27, 2004, conservation letter. This sentence is deceptive for two reasons. 1) Despite defendant’s concession that Mr. Hartman’s policy has always had a monthly benefit amount of \$5,000.00, the word “currently” implies that the benefit has been different in times past; 2) the inclusion of the amount of \$10,000.00 as the monthly benefit is deceptive because, as defendant concedes, the actual monthly benefit is \$5,000.00.

The false sentence fulfills both standards of proof outlined by *Hangman Ridge* for this element. First, the sentence has the capacity to deceive a substantial portion of the public. The word “currently” implies that the policy terms have changed over time. Here, however, the policy

terms have not changed over time. Thus Hartman was deceived into thinking that he now had more coverage than he initially had.

Additionally, the misrepresentation of the actual monthly benefit amount has the capacity to deceive a substantial portion of the public. This is particularly true when the false statement comes from an authorized representative of the insurer like Ms. Nettland and the false statement is directly targeted to the particular policyholder in response to a cancellation request and accompanied by an additional statement encouraging the policyholder to rely on the falsity. Additionally, Ms. Goodman testified that she commonly received phone calls from policyholders who were inquiring as to the value of their policies which shows a general lack of knowledge among insureds as to the value of their own policies. Consequently, the misrepresentation had the capacity to deceive a substantial portion of the public.

Secondly, the misrepresentation constitutes a per se violation of the first *Hangman Ridge* element because it violates two insurance statutes and two insurance regulations. RCW 48.30.090 states in pertinent part as follows:

Misrepresentation of policies. No person shall make, issue or circulate...any misrepresentation of the terms of any policy or the benefits or advantages promised thereby...

Plain reading of the statute yields the conclusion that there is no requirement that the misrepresentation of the terms or benefits be knowingly or intentionally made. The statute applies to “any” misrepresentation; there is no statutory exception for good faith mistakes. There is zero tolerance under this statute for misrepresentations of policy terms. Further, the statute does not limit when the misrepresentation must occur. The misrepresentation may occur at any time— at the contract formation stage or either before or after a loss occurs. Indeed, the Court of Appeals has held that violations of RCW 48.30.090 by insurance companies at the contract formation stage and after contract formation violate the first *Hangman Ridge* prong. *Shah* at 130 Wn.App. 74, 85 (2005) *rev.denied* 157 Wn.2d 1006; *Peterson v. Big Bend Insurance Agency, Inc.*, 150 Wn.App. 504, 520, 202 P.3d 372, 379 (2009).

In *Shah*, an insurance agent incorrectly entered the square footage of a home into Allstate’s computer system for determining replacement value of the property. The house was then insured based on the incorrect square footage with notice to the insured as to the replacement value limit.

The policyholder asked the agent why the value was so low, but was told not to worry and that he had replacement value. The house subsequently burned down and was under insured due to the incorrectly entered square footage. *Shah* at 130 Wn.App. 79. The *Shah* court held that the agent's misrepresentation, a misrepresentation based on a good faith miscalculation, violated RCW 48.30.090. *Shah* at 130 Wn.App. 79.

Peterson involved another undervalued homeowner replacement policy. The agent negligently entered improper information into a software system designed to establish the replacement value of homes. This resulted in an under insured home which was subsequently destroyed by fire. The insurance company claimed at trial that the homeowner knew the actual amount of replacement value coverage because the homeowner had been notified of the actual amount and signed an approval of the same at the time the policy was issued and was notified again at a later date prior to the loss. *Peterson* at 202 P.3d 375, 379. Notwithstanding the same, the *Peterson* court held that the insurer violated RCW 48.30.090 even though the incorrect replacement value was clearly spelled out in the policy and signed for by the homeowner. *Peterson* at 202 P.3d 380.

Together *Shah* and *Peterson* stand for the principle that false

representations about the benefits of an existing insurance policy violate RCW 48.30.090, even where the actual policy benefits are clearly spelled out by policy language and approved by the insured prior to the loss.

In addition, defendant has violated RCW 48.30.180. That statute states in pertinent part:

“Twisting” prohibited. No person shall by misrepresentation or by misleading comparisons, induce or tend to induce any insured to ... retain any insurance policy.

Assurity’s attempt at conserving Mr. Hartman’s policy clearly were intended to “induce or tend to induce” Mr. Hartman to “retain” his insurance policy. The facts clearly establish that Mr. Hartman had manifested an intent to cancel his policy when he wrote to Assurity and requested that his policy be cancelled. In response, Assurity acknowledged receipt of his request and “encouraged” Mr. Hartman to review enclosed information in his policy “before making your final decision.” CP 116. It was in this same letter that the monthly benefit amount was misrepresented as \$10,000.00, rather than \$5,000.00. Thus defendant’s misrepresentation tended to induce Mr. Hartman to retain his policy by inflating the benefit of the bargain to Mr. Hartman. *Strother supra* is instructive on this point. In *Strother*, the court found a violation

of RCW 48.30.180 in the life insurance context when the insurer failed to send the policy holder required information as to the consequences of cancelling his policy. Here notice of the consequences of Mr. Hartman's decision to cancel his policy was sent to him but such information was inaccurate on the most material point-- the monthly benefit amount!

In addition, defendant has violated WAC 284-30-330(1) The regulation states in pertinent part:

The following are hereby defined... as unfair or deceptive acts... in the business of insurance, specifically applicable to the settlement of claims:

(1) Misrepresenting pertinent facts or insurance policy provisions.

Here, defendant misrepresented the monthly benefit policy provision to the insured. There is no requirement in the regulation that the misrepresentation be knowingly made or with intent to deceive. Neither is there any requirement within the regulation as to when the misrepresentation must occur. In *Matheny v. Unumprovident Corporation*, 594 F.Supp.2d 1212, 1225 (E.D.Wash 2009), the court applied Washington law and found that the insurer violated WAC 284-30-330(1) by misrepresenting policy provisions in the contract formation

stage prior to any loss being sustained. Thus the regulation does not require that the misrepresentation be made after a loss or during settlement attempts.

In addition, defendant has violated WAC 284-30-350(1) which states in pertinent part:

No insurer shall fail to fully disclose to first party claimants all pertinent benefits, coverages or other provisions of an insurance policy or insurance contract under which a claim is presented.

There is no requirement as to when the failure to disclose has to occur to be covered by the regulation. Here, the insurer failed to fully disclose to Mr. Hartman all of the pertinent provisions of his policy because the monthly benefit amount was misrepresented as being \$10,000.00 instead of the actual \$5,000.00 set out in the policy.

In summary, defendant has violated the first element of the *Hangman Ridge* test by either committing an act that has the capacity to deceive a substantial portion of the public or on a per se basis by violating RCW 48.30.090 and RCW 48.30.180 and WAC 284-30-330(1) and WAC 284-30-350(1).

b. Occurring in Trade or Commerce

Trade or commerce as used in the CPA includes only the entrepreneurial or commercial aspects of professional service. Acts that relate to billing or obtaining and retaining customers constitute trade or commerce. *Michael v. Mosquera-Lacy*, 165 Wn.2d 595, 603-604 (2009).

The *Hangman Ridge* court stated that this element, like the first, also is established by either:

1) an act or practice which has the capacity to deceive a substantial portion of the public or 2) that the act or practice constitutes per se unfair trade practice. A per se unfair trade practice exists when a statute which has been declared by the Legislature to constitute an unfair or deceptive act in trade or commerce has been violated. *Hangman Ridge* at 105 Wn.2d 785-786.

In this case, for the same reasons explained in the analysis under the first *Hangman Ridge* prong, defendant's act of misrepresenting the monthly benefit amount in the conservation letter had the capacity to deceive a substantial portion of the public. Similarly, defendant has committed a per se unfair trade practice by violating RCW 48.30.090 and 48.30.180 and WAC 284-30-330(1) and 284-30-350(1).

Finally, there is no question but that defendant's act occurred in

trade or commerce as defined by *Mosquera-Lacy supra* because the misrepresentation occurred in a conservation letter, the very purpose of which was to attempt to retain Mr. Hartman as a customer, after he had manifested his intent to cancel the policy.

c. Public Interest

The *Hangman Ridge* court stated that the public interest prong is established in the insurer/insured context by either 1) evaluation of a four-factor test or 2) a per se by showing that a statute has been violated that has specific legislative declaration of public interest impact. *Hangman Ridge* at 105 Wn.2d 791.

The four-factor test is as follows:

1) Were the alleged acts committed in the course of defendant's business? 2) Did defendant advertise to the public in general? 3) Did defendant actively solicit this particular plaintiff? 4) Did plaintiff and defendant occupy unequal bargaining positions? *Id.*

"Not one of these factors is dispositive, nor is it necessary that all be present." *id.*

Evaluation of these four factors yields the conclusion that three of the four factors cut in Hartman's favor. 1) It is undisputed that the act complained of was committed in the course of defendant's business. 2)

The act complained of was not part of advertising to the general public. 3) It is undisputed that defendant actively solicited this plaintiff in the act complained of since it the act took place in a conservation letter directed solely to the plaintiff. 4) It is undisputed that defendant and plaintiff occupied unequal bargaining positions because defendant is an insurer who wrote the insurance policy and plaintiff as a private party could not negotiate specific terms. Moreover, Mr. Hartman is not sophisticated in insurance. He clearly misunderstood the terms of his actual contract and testified in his deposition as to his continuing misunderstanding of the actual terms of his contract. CP 162 -163 (Hartman dep. p. 22, ll 19-25, p. 23, ll. 1-23); He is a high school graduate and has worked as a concrete mason. CP 145 (Hartman dep. p. 6, ll. 1-15). Consequently, the public interest prong is satisfied under the four-factor test.

Additionally, a per se public interest showing is made in this case. Defendant has violated RCW 48.30.090 and 48.30.180. The *Hangman Ridge* court stated that violation of any insurance statute constitutes a per se public interest showing because RCW 48.30.030 contains a specific public interest impact declaration. *Hangman Ridge* at 105 Wn.2d 791; *Accord Shah* at 130 Wn.App. 86; *Peterson* at 202 P.3d 380; *Strother* at 68

Wn.App. 244. Thus a per se public impact showing is made in this case as well as a showing under the four-factor test.

d. Injury to Business or Property

This prong requires a showing of specific injury or harm to business or property interests. *Hangman Ridge* at 105 Wn.2d 792. “The injury element will be met if the consumer’s property interest or money is diminished because of the unlawful conduct...” *Mason v. Mortgage America, Inc.*, 114 Wn.2d 842, 854, 792 P.2d 142 (1990). Loss of use of money due to under payment of insurance benefits is a recognized damage under the CPA. *Griffin v. Allstate*, 108 Wn.App 133, 148, 29 P.3d 777 (2001), *rev. denied*, 146 Wn.2d 1005, 45 P.3d 551 (2002). Under payment of insurance benefits due to unlawful conduct is an injury to property. *Shah* at 130 Wn.App. 86. In addition, being uninsured due to unlawful conduct is an injury to property. *Strother* at 68 Wn.App 244.

The Washington Supreme Court has defined property in the CPA context by citing to Black’s Law Dictionary:

Property is the right to possess, use, and enjoy a determinate thing...; the right of ownership. Black’s Law Dictionary 1335 (9th ed. 2009). *Cited in Ambach v. French*, 2009 WL 3031416 9/24/09.

In this case, plaintiff has been injured in his property interest in insurance benefits due to defendant's misrepresentation because he has been paid benefits in an amount less than was represented.

e. Causation

“A causal link is required between the unfair or deceptive act and the injury suffered by plaintiff.” *Hangman Ridge* at 105 Wn.2d 793. The Supreme Court has stated, “[w]e conclude where a defendant has engaged in an unfair or deceptive act or practice, and there has been an affirmative misrepresentation of fact, our case law establishes that there must be some demonstration of a causal link between the misrepresentation and the plaintiff's injury.” *Indoor Billboard* at 162 Wn.2d 83. However, “to establish injury and causation in a CPA claim it is not necessary to prove one was actually deceived. It is sufficient to establish that the deceptive act or practice proximately caused injury to the plaintiff's ‘business or property.’” *Panag* at 204 P.3d 902. Indeed, “a person whose property is diminished by a payment of money wrongfully induced is injured in his property. *Id.*(quoting *Chatanooga Foundry & Pipe Works v. City of Atlanta*, 203 U.S. 390, 396, 27 S.Ct. 65, 51 L.Ed. 241 (1906)).

The *Indoor Billboard/Washington* court held that in affirmative

misrepresentation cases, the proximate cause standard in WPI 15.01 is required to establish the proximate cause element in a CPA claim. “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* at 162 Wn.2d 84.

In this case, there is a direct causal link between Assurity’s misrepresentation and Hartman’s injury. The misrepresentation was the inflated monthly benefit amount in the conservation letter. The harm is payment of benefits in an amount less than had been represented.

It is undisputed that Hartman manifested his intent to cancel his policy prior to Assurity’s misrepresentation. CP 114. He did so with language expressing lack of knowledge about the policy’s particulars because he stated he was not aware that his wife took out the policy for him. *Id.* In response, Assurity wrote a conservation letter to Hartman which misrepresented the monthly benefit amount. CP 116. Shortly thereafter Hartman wrote back to Assurity on the back of the original conservation letter, that he now saw that it would be a mistake to cancel his policy and he remitted part of the premium with a request to rebill the remainder. CP118-119.

Hartman testified that the reason that he changed his decision to cancel was his review of the information contained in the conservation letter, particularly the \$10,000.00 misrepresentation. CP110 (Hartman dep. p. 21, ll. 9-18). There is no contrary evidence to the above sequence of events and no ill motive can be assigned to Hartman's change of mind because at the time he was not disabled and only became disabled later due to a sudden occurrence. CP 56, ll. 8-9. Rather, Hartman's decision to reconsider his expressed written desire to cancel his policy and pay his premium was the sole proximate result of his reliance on the conservation letter's contents, particularly the most material fact– the monthly benefit amount– in making that decision.

Likewise, his injury of payment of insurance benefits in an amount less than had been represented arose as the sole proximate result of the misrepresentation made in the conservation letter. There can be no other inference to these facts, especially given the tight time sequence from the first to last act. These sequence of events establish a direct, unbroken link between the misrepresentation and Hartman's injury. But for the misrepresentation, there would be no payment of insurance benefits in an amount less than had been represented and without the misrepresentation

there would be no payment of insurance benefits in an amount less than had been represented.

3. Actual Damages

This matter was resolved on cross summary judgment motions at the trial court level. The trial court granted Assurity's summary judgment motion and made no ruling on Hartman's cross summary judgment motion. RP 15, ll. 15-16. Should the Court of Appeals decide that the trial court granted Assurity's motion in error, Hartman requests that this Court either grant summary judgment in his favor or that the trial court be instructed to rehear Hartman's motion for summary judgment. Hartman further requests that this Court give guidance to the trial court as to how to calculate Hartman's actual damages.

Once the five-pronged *Hangman Ridge* test is established in a CPA plaintiff's favor, the court needs to determine the amount of actual damages sustained. *St. Paul Fire & Marine Insurance Company, v. Updegrave*, 33 Wn. App. 653, 660, 656 P.2d 1130 (1983). The CPA itself provides for actual damages as a remedy. RCW 19.86.090. The measure of damages on a CPA claim based on misrepresentation is 'benefit of the bargain'. *McRae v. Bolstad*, 32 Wn.App. 173, 178, 646 P.2d 771 (1982),

aff'd 101 Wn.2d 161 (1984). In *Matheny at* 594 F.Supp.2d 1226, the court held under Washington law that the measure of damages in the CPA context for misrepresenting policy provisions is the benefit of the bargain. Finally, in *Shah supra*, the court stated that in a case where the injury complained of is underinsurance due to misrepresentation of policy terms, actual damages are calculated based on the difference between the value bargained for by the insured and the amount actually paid by the insurer. *Shah* at 130 Wn.App. 86.

Here the actual damages sustained by plaintiff are the benefit of his bargain or monthly disability benefits in the amount of \$10,000.00. He has been paid monthly disability benefit installments in the amount of \$5,000.00. Therefore, plaintiff's actual damages are the difference between the represented \$10,000.00 monthly benefit and the \$5,000.00 paid monthly benefit for all monthly benefits paid to date and for each monthly benefit that is actually paid in the future.

4. Attorney Fees

“An injury cognizable under the [CPA] will sustain an award of attorney fees...” *Sign-O-Lite Signs, Inc., v. DeLaurentis Florists Inc.*, 64 Wn.App. 553-565, 825 P.2d 714 (1992). A successful private plaintiff is

entitled to attorney fees under RCW 19.86.090. “A successful plaintiff is one who establishes all five elements of a private CPA action. *Hangman Ridge* at 105 Wn.2d 798. Under the CPA attorney fees are calculated by establishing a lodestar fee and then adjusting it up or down based upon the contingent nature of success and in exceptional circumstances, based on the quality of the work performed. *Washington State Physicians Ins. Exchange v. Fisons Corp.*, 122 Wn.2d 299, 334, 858 P.2d 1054 (1993). Should this Court decide in Hartman’s favor on his CPA claim, attorney fees should be awarded under the CPA.

VI. CONCLUSION

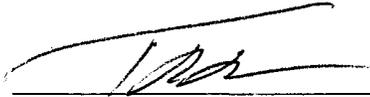
The trial court erred in granting Assurity’s motion for summary judgment and in failing to grant Hartman’s cross motion for summary judgment. Hartman established all five of the required elements under *Hangman Ridge* for his CPA claim. Therefore material issues of fact exist to defeat Assurity’s summary judgment motion. However, no material issues of fact exist to defeat Hartman’s cross motion for summary

judgment. Hartman requests that the trial court's grant of summary judgment to Assurity be reversed and Hartman requests that his motion for summary judgment be granted or in the alternative that he be granted leave to rene his motion for summary judgment.

DATED this 5th day of October, 2009

Respectfully submitted,

TODD R. RENDA, ATTORNEY AT LAW



Todd R. Renda, WSBA# 20779
Attorney for Appellant, Hartman.

VII. DECLARATION OF SERVICE

I hereby declare and state as follows:

- 1. I am Todd R. Renda, attorney of record for appellant, Terry S. Hartman. I am over eighteen years of age, have personal knowledge of the facts alleged herein, and I am otherwise competent to testify.
- 2. On October 5, 2009, I caused to be served upon the party, at the address and in the manner described below, the following document attached to this Declaration:

Brief of Appellant

- 3. Service to be made by hand delivery by delivering the same to ABC-Legal Messengers on October 5, 2009, for service on the following:

Gulliver A. Swensen
 Jerry Kindinger
 Teruyuki S. Olsen
 Ryan, Swanson & Cleveland
 1201 Third Ave., Ste 3034
 Seattle WA 98101-3034

FILED
 COURT OF APPEALS
 DIVISION II
 09 OCT -7 PM 1:50
 STATE OF WASHINGTON
 BY _____
 DEPUTY

DATED this 5th day of October, 2009, at Tacoma WA.

TODD R. RENDA, ATTORNEY AT LAW



Todd R. Renda, WSBA# 20779
 Attorney for Appellant, Hartman.