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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

GARY WADDOUPS

v.

NATIONWIDE LIFE INSURANCE COMPANY, ET AL.

Benton County Superior Court Cause No. 13-2-00759-0

Court of Appeals Division III Cause No. 332578

APPELLANT'S BRIEF

Eric Eisinger, WSBA No. #34293
Attorney for Gary Waddoups, Appellant

1333 Columbia Park Trail, Ste. 220
Richland, WA 99352
(509) 735-4444 – Telephone
(509) 735-7140 – Fax

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I. INTRODUCTION

This appeal comes before the Court upon the issue of whether the trial court properly granted summary judgment in favor of respondents Nationwide Life Insurance Company ("Nationwide"), financial advisor Clark L. Permann ("Permann"), and Permann's business entity Financial Management, Inc. ("Financial Management").

In 2008, Permann sold H. Marr Waddoups ("Marr") a single-premium immediate annuity ("SPIA") with no death benefit for $100,000.00. At the time of the sale, Marr was an eighty-five year old man who had been diagnosed with type II diabetes, chronic renal failure and other serious medical conditions. Marr was also the full time caregiver for his wife who suffered from advanced Alzheimer's disease. The SPIA was unsuitable for Marr based on his previously diagnosed medical conditions because it provided no death benefit. Marr would have to live almost six years just to break even. In addition, the SPIA was presented in a misleading fashion to indicate that it included a death benefit when no death benefit was actually provided. Neither the SPIA application nor the SPIA contract signed by Marr stated that there was no death benefit. In fact, these documents strongly implied the exact opposite. The SPIA application and contract called for the naming of a beneficiary, giving the impression that the annuity provided a death benefit. It is clear that Marr in fact believed there was a death benefit as he asked Permann to name his wife Elizabeth Waddoups as his beneficiary and Marr tracked the death benefit value of the

annuity by hand with each monthly payment in his personal ledger book.

Under the SPIA, Marr received monthly payments in the amount of $1,418. Unsurprisingly, Marr passed away less than three years after the sale from complications caused by his diabetes and chronic renal failure. Marr's death resulted in a net gain to respondents of approximately $51,788, more than half of the initial purchase price. As Permann stated shortly after Marr's death, the annuity was "maybe a bad idea."

Following Marr's death, the Estate of H. Marr Waddoups, through his surviving son and personal representative Gary Waddoups, filed this lawsuit for violation of the Consumer Protection Act ("CPA") and for Permann's violation of the duty of care and fiduciary duty as Marr's financial advisor. The trial court entered summary judgment for respondents and this appeal followed.

This Court should reverse the order granting summary judgment and conclude that as a matter of law the respondents engaged in unfair and deceptive conduct in violation of the CPA. The Court should further find that the trial court erred when it allowed the presentation of evidence by respondents in violation of the deadman's statute and by granting in part the respondents' motion to exclude expert witness testimony. Therefore, this Court should reverse the decision of the trial court and remand for trial on the issue of causation and damages under the CPA and on the issue of whether Permann breached his duties as a fiduciary to Marr.

II. ASSIGNMENTS OF ERROR

No. 1 The Trial Court Erred By Granting Respondents' Motions For Summary Judgment And By Entering Judgment For Respondents As To Appellant's CPA Claim.

No. 2 The Trial Court Erred By Granting Respondents' Motions For Summary Judgment And Entering Judgment For Respondents As To Appellant's Claim That Clark L. Permann Breached The Duty Of Care And His Fiduciary Duty As H. Marr Waddoups' Financial Advisor.

No. 3 The Trial Court Erred By Denying In Part Appellant's Motion to Strike.

No. 4 The Trial Court Erred By Granting In Part Respondents' Motions To Exclude The Testimony Of Appellant's Expert Witness John Olsen.

No. 5 The Trial Court Erred By Denying Appellant's Motion for Reconsideration.

III. STATEMENT OF THE CASE

This case involves the sale of an ultra-high risk annuity with no death benefit feature to an eighty-five year old man suffering from life threatening medical conditions. On December 24, 2008, Permann sold Marr a SPIA with no death benefit. *CP* 677. The annuity was issued by the Nationwide Life Insurance Company. *CP* 681-93. Marr paid $100,000 up front to Nationwide. *CP* 678. In exchange, Marr received a guaranteed

monthly benefit of $1,418 for the remainder of his life with no death benefit attached. *CP* 677. Marr had been previously diagnosed with type II diabetes, chronic renal failure and other serious medical conditions. *CP* 897-900. Marr passed away less than three years later, on October 30, 2011, resulting in his loss and the respondents' gain of $51,788.00, even before taking into account a discount rate. *CP* 599.

The annuity was sold to Marr in an unfair and deceptive manner because an ordinary consumer would not have understood that the annuity did not provide a death benefit. Nationwide's annuity application and contract required Marr to list a beneficiary, which gave the impression that the annuity provided a death benefit. *CP* 679. In addition, the application and contract did not disclose the absence of a death benefit. *CP* 677-94; 765-67. The only documented explanation of the sale was a booklet Permann gave to Marr entitled "Buyer's Guide to Fixed Deferred Annuities", which was reprinted by Nationwide for the sale. *CP* 751-58. Prior to the SPIA purchase, Marr had purchased only deferred annuities with guaranteed death benefits. *CP* 555-56. However, the Nationwide annuity was not a deferred annuity and the booklet contained no description of the SPIA that Marr was sold. *CP* 751-58. Presenting a booklet for deferred annuities implied that the Nationwide annuity included a death benefit.

Marr tracked the value of the supposed death benefit for the Nationwide annuity in his ledger book, showing that Marr was actually deceived into believing that it contained a death benefit. *CP* 377-88. This

corresponds with Permann's account summary statements, which Permann prepared for his meetings with Marr to discuss Marr's financial assets. *CP* 563-75. The account summary statements listed a blatantly incorrect cash value of $100,000 for the annuity even though the annuity was only a stream of income that had no asset value ($0) as shown by Nationwide. *CP* 563; 577. As a result, appellant's expert John Olsen concluded that a reasonably prudent consumer in Marr's position might well have been unaware that the annuity contract provided no death benefit. *CP* 552.

Permann owed a duty of loyalty and duty of care to Marr by virtue of his fiduciary status. However, Permann has given conflicting statements throughout the litigation about whether he recommended the purchase to Marr. Permann told Gary Waddoups, Marr's son, that the only reason he sold his father the annuity was because he "would have just gone elsewhere to buy it." *CP* 599. This statement first raised Gary Waddoups' suspicions that the annuity sale should be investigated. *Id.* Permann spoke against the annuity purchase in his initial answer to the complaint. "Defendants deny plaintiff's paragraph 3.8 and further allege that Clark L. Permann and Financial Management, Inc. *advised H. Marr Waddoups against the purchase…*" *CP* 25 (emphasis added). Permann stated in an email dated December 13, 2011, that the Nationwide annuity was "maybe a bad idea." *CP* 612.

> We also need to – they are researching other immediate annuities that Tamar (sic) may have purchased in the past. Certainly frustrated with those and I discussed my dealings with Tamar (sic) and why that was *maybe a bad idea*.

CP 612 (emphasis added). Permann never inquired into Marr's life expectancy and health condition, and paid little mind to the fact that Marr informed him that he suffered from diabetes. *CP* 415-18. Nonetheless, Permann signed a mandatory insurance form, which he submitted to Nationwide along with the annuity application, indicating that Permann believed the annuity to be a suitable sale, demonstrating his overriding desire to make a commission instead of giving appropriate financial advice. *CP* 679-80.

IV. ARGUMENT

This Court should reverse the trial court's order granting summary judgment and remand this matter for trial. The Court should conclude that the respondent's actions were unfair and deceptive as a matter law because an ordinary consumer in Marr's position could reasonably believe that the annuity provided a death benefit. Not only does the evidence show that Marr understood that the SPIA included a death benefit, the SPIA application and contract require the naming of a beneficiary and neither document states that the annuity does not provide a death benefit. Further, the financial statements associated with the SPIA showed an untrue cash value. Marr's reliance on these untrue values is shown in his ledger book, which reflects his misunderstanding that the annuity contained a refund feature (a death benefit). Consequently, the trial court erred when it granted summary judgment as to appellant's CPA claim which must be remanded for trial.

As his financial advisor, Permann owed Marr a duty of care and a

duty of loyalty to act on an informed basis and in the honest belief that the actions taken were in the best interests of his client, to recommend only suitable financial products and to put Marr's interests ahead of his own by virtue of his status as a fiduciary. Permann breached his fiduciary duty when he recommended and sold the annuity to Marr, knowing that it was not suitable, and by failing to reasonably inquire regarding the status of Marr's health and life expectancy and without presenting Marr with suitable alternatives. In addition, Marr's misunderstanding of whether the annuity provided a refund feature, coupled with Permann's misleading account summary statements, show Permann's participation and full knowledge of the deception that resulted in the loss of the remaining premium. Consequently, the trial court's grant of summary judgment must be reversed and this matter should be remanded for trial.

A. Standard Of Review

A trial court order granting summary judgment is reviewed de novo and all of the facts and reasonable inferences are considered in a light most favorable to the nonmoving party. *Holiday Resort Community Ass'n v. Echo Lake Associates, LLC*, 134 Wn. App. 210, 219, 135 P.3d 499 (2006). Summary judgment is properly granted when the pleadings and affidavits show there is no genuine issue of material fact and the non-moving party is entitled to judgment as a matter of law. *Id.*; CR 56(c). Only when reasonable minds could reach but one conclusion on the evidence should the court grant summary judgment. *Id.*

B. Appellant Has Presented Sufficient Evidence To Overcome Summary Judgment On His Consumer Protection Act Claim.

The Court should conclude that the appellant has established the unfair and deceptive nature of respondents' actions as a matter of law and that there remains a genuine issue of material fact as to causation and damages. The Washington legislature enacted the CPA, RCW 19.86 *et. seq*, for the purpose of protecting Washington citizens from unfair or deceptive trade practices. *Dwyer v. J.I. Kislak Mortg. Corp.*, 103 Wn. App. 542, 547-58, 13 P.3d 240 (2000). The CPA is intended to "compliment the body of federal law governing restraints of trade, unfair competition and unfair, deceptive and fraudulent acts and practices in order to protect the public and foster fair and honest competition." *Panag v. Farmers Ins. Co. of Washington*, 166 Wn.2d 27, 37, 204 P.3d 885 (2009). The statute declares that "unfair or deceptive acts or practices in… trade or commerce" are unlawful. RCW 19.86.020

The scope of the CPA is expansive. "A central purpose of the CPA is to provide an efficient and effective method of filling the gaps in common law and statutes." *Panag*, 155 Wn.2d at 54. "The CPA is a carefully drafted attempt to bring within its reach *every* person who conducts unfair or deceptive acts or practices in *any* trade or commerce" *Holiday Resort*, 134 Wn. App. at 220 (emphasis in original). The statute is to be "liberally construed" so that "its beneficial purposes may be served." *Id.* at 220 (*citing Short v. Demopolis*, 103 Wn.2d 52, 61, 691 P.2d 163 (1984)).

In addition to actions brought by the attorney general, the CPA

authorizes individual plaintiffs to sue for violations of the act. RCW 19.86.090. A private CPA plaintiff who is injured in his business or property "may bring a civil suit for injunctive relief, damages, attorney fees and costs, and treble damages." *Panag*, 166 Wn.2d at 37 (*citing* RCW 19.86.090). To prevail in a private CPA suit, the plaintiff must prove the five elements articulated in *Hangman Ridge Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 719 P.2d 531 (1986): (1) an unfair or deceptive act or practice, (2) occurring in trade or commerce, (3) affecting the public interest, (4) injury to a person's business or property, and (5) causation. *Id.* at 784.

Appellant addresses each of these elements although respondents did not move for summary judgment as to each element. In a summary judgment motion, the burden is on the party moving for summary judgment to prove by "uncontroverted facts" that there is no genuine issue of material fact. *Jacobsen v. State*, 89 Wn.2d 104, 108, 569 P.2d 1152 (1977). Moreover, the moving party must raise all of the issues in support of summary judgment. *White v. Kent Medical Center, Inc., P.S.*, 61 Wn. App. 163, 168-69, 810 P.2d 4 (1991). Here, at the trial court level, Nationwide only addressed elements (1), (4) and (5): whether respondents' engaged in an unfair or deceptive act, whether appellant was injured in his business or property, and causation. *CP* 265-66. Permann's motion for summary judgment only addressed whether there was sufficient evidence that respondents engaged in an unfair or deceptive act. *CP* 469-70. In addition,

the trial court's decision to grant summary judgment as to the CPA claim was based on the causation element. *RP* 74; *CP* 888.

1. As A Matter Of Law, Nationwide And Permann Engaged In An Unfair Or Deceptive Act Or Practice.

The Court should conclude that the conduct of Nationwide and Permann was unfair and deceptive under the CPA as a matter of law. Under the CPA, whether the defendants engaged in an "unfair or deceptive act or practice" may be predicated on: (1) a per se violation of statute; (2) an act or practice that has the capacity to deceive a substantial portion of the public; or (3) an unfair or deceptive act not regulated by statute that is in violation of the public interest. *Mellon v. Regional Trustee Services Corp.*, 182 Wn. App. 476, 488, 334 P.3d 1120 (2014) (*citing Klem v. Wash. Mut. Bank*, 176 Wn.2d 771, 787, 295 P.3d 11789 (2013)). Neither "unfair" nor "deceptive" are defined under the CPA. *Klem*, 176 Wn.2d at 784. "By broadly prohibiting 'unfair or deceptive acts or practices in the conduct of any trade or commerce,' RCW 19.86.020, the legislature intended to provide sufficient flexibility to reach unfair or deceptive conduct that inventively evades regulation." *Panag*, 166 Wn.2d at 49. As a result, the courts of this state have "allowed the definitions (of 'unfair' or 'deceptive') to evolve through a gradual process of judicial inclusion and exclusion." *Klem,* 176 Wn.2d at 784. In deciding whether a practice or act is unfair or deceptive, the court looks to federal court decisions that have approved or rejected administrative determinations made by the Federal Trade Commission ("FTC") as guiding, but not binding, authority. *Panag*, 166 Wn.2d at 47

(*citing* RCW 19.86.920). Whether a particular act or practice is "unfair or deceptive" is a question of law. *Panag*, 166 Wn.2d at 47.

a. The Sale Of The Annuity Was "Deceptive."

The Court should conclude that the conduct of the respondents was deceptive under the CPA. The trial court's ruling supports this decision. *RP* 73; *CP* 887 ("...if you were to look at just the contract in isolation, there may be some argument that he did not clearly convey that there would be no death benefits to Mr. Marr Waddoups' beneficiaries upon his death...").

An act or practice in trade or commerce is "deceptive" if it has the capacity to deceive a substantial portion of the public. *Dwyer*, 103 Wn. App. at 547. "Neither intent to deceive nor actual deception is required." *Id.* Rather, a plaintiff must show that the act in question "had a capacity to deceive a substantial portion of the public." *Panag*, 166 Wn.2d at 47. "Implicit in the definition of 'deceptive' under the CPA is the understanding that the practice mislead or misrepresents something of material importance." *Holiday Resort*, 134 Wn. App. at 226. "Deception exists if there a representation, omission or practice that is likely to mislead a reasonable consumer." *Panag*, 166 Wn.2d at 50 (internal quotation omitted). Whether the language is deceptive is viewed from the standpoint of the least sophisticated consumer. *Id.* A communication may be deceptive even if it contains accurate information if the "net impression" is likely to mislead. *Id.* Fine print notices and disclaimers that accurately communicate the nature of the transaction will not purge the "net impression" of a deceptive communication. *Id.* In addition, "[f]ailure to reveal a material

fact known to the seller and that the seller in good faith is bound to disclose, may be classified an unfair or deceptive act due to its inherent capacity to deceive." *Holiday Resort*, 134 Wn. App. at 226 (*citing Potter v. Wilbur-Ellis Co.*, 62 Wn. App. 318, 327, 814 P.2d 670 (1991)).

In *Panag*, the Court addressed whether collection notices sent by an insurer to uninsured motorists to recover subrogation were deceptive under the CPA. *Panag*, 166 Wn.2d at 50. The notices listed an amount due and were billed in such a way as to give the impression that the billed amount was a liquidated debt rather than a potential tort claim that is subject to dispute. *Id.* at 35. Even though the collection notices contained accurate information, the net impression was likely to mislead because the ordinary consumer would not understand the meaning of a "subrogation claim" and the notices gave the impression that there was no alternative to payment. *Id.* at 50. As a result, the Court held that the collection notices were deceptive and the Court of Appeals reversal of the trial court's order granting summary judgment was affirmed. *Id.* at 65.

Similarly, in *Dwyer v. J.I. Kislak Mortg. Co.*, 103 Wn. App 542, 547, 13 P.3d 240 (2000), the Court held that a mortgage company's practice of including miscellaneous services charges along with secured sums on its mortgage payoff statement constituted a deceptive act in violation of the CPA. The payoff statement included fax fees and miscellaneous service charges which did not have to be paid to pay off the balance of the loan and to reconvey title. *Id.* Because the plaintiffs requested a payoff amount, it

was reasonable for them to assume that the statement only contained those amounts required to pay off the mortgage, and that any other fees would be specifically identified as extraneous charges that were not connected to releasing the mortgage. *Id.* As such, the Court held that the payoff statements were deceptive as a matter of law and reversed the trial court's grant of summary judgment. *Id.* at 547-48.

In this case, the annuity sale was deceptive because the annuity application and contract requires the designation of a beneficiary, giving the reasonable impression that the annuity provides a death benefit. In addition, the annuity quote, application and contract fail to disclaim the absence of a death benefit as required by Washington law, and the account summary statements prepared by Permann and repeatedly presented to Marr over many months reflect that the annuity had a value equal to the amount of the purchase price and that Marr's wife was his beneficiary. A reasonable consumer would misunderstand the SPIA to provide a death benefit. Therefore, the Court should conclude that the annuity sale to Marr was deceptive under the CPA as a matter of law.

i. The Naming Of A Beneficiary Is Deceptive Because It Gives The Impression That The Annuity Provides A Death Benefit.

The SPIA application and contract are deceptive under the CPA because they give the impression that a death benefit exists by requiring the applicant to name a beneficiary. Nationwide's annuity application requires the applicant to name a beneficiary. *CP* 677. Nationwide acknowledges this requirement ("the annuity contract requires a 'beneficiary.'") *CP* 266.

On the first page of the application, the applicant must designate a beneficiary as either "primary" or "contingent". *CP* 677. The applicant must allocate the benefit, provide a statement of the applicant's relationship as to each beneficiary, and a list social security number and date of birth for each beneficiary. *CP* 677.

Below the beneficiary designation, the application provides for various income options. *CP* 677. The income option Marr selected was called "Single Life". *CP* 677. While there is a footnote next to the "Single Life" option, the footnote merely states "Birth Certificate of Annuitant Required." *CP* 677. Nowhere on the two page application does it state that the beneficiary is not actually a beneficiary of a death benefit. *CP* 677; 680.

Based on the application submitted, the contract information page confirms the name of the beneficiary. *CP* 684. In this case, the contract information page prepared by Nationwide and presented to Marr by Permann, states that Elizabeth Waddoups was the sole primary beneficiary of the annuity. *CP* 684.

Additionally, "beneficiary" is not defined in the annuity application. The term is first defined in the annuity contract. "The person designated to receive benefits under the Contract upon the later death of the Annuitant or the Joint Annuitant, if any, as applicable." *CP* 686. "Beneficiary" is further defined in the contract as follows:

> **Beneficiary**
>
> The Beneficiary is the person who <u>may receive benefits</u> under the Contract If the Annuitant (and the Joint Annuitant, if any) <u>dies after</u> the Income Start Date.

> If more than one Beneficiary survives the Annuitant (and the Joint Annuitant, if any), each will share equally unless otherwise specified on the application. If there is no surviving Beneficiary upon the death of the Annuitant, all Beneficiary rights will vest in the Contingent Beneficiary, and if more than one Contingent Beneficiary survives, each will share equally unless otherwise specified on the application. If no Beneficiary or Contingent Beneficiary survives the Annuitant (and the Joint Annuitant, if any), all Beneficiary rights will vest with the Owner(s), or the estate of the last surviving Owner.
>
> If the Annuitant (and the Joint Annuitant, if any) dies prior to the Income Start Date, the Beneficiary will be entitled to the proceeds of the single purchase premium if there is no surviving Owner or Joint Owner.

CP 688 (emphasis added). Although the contract's definition of "beneficiary" explains what will happen if the annuitant dies prior to the income start date (the beneficiary "will be" entitled to the proceeds of the single premium purchase), all it says about the effect of the annuitant's death after the income start date is that the beneficiary is the person who "may receive benefits." *CP* 688. For a purchaser of the annuity, the only place to look for further clarification on this is at the end of the contract.

> **DEATH PROVISIONS AFTER THE INCOME START DATE**
>
> **Death of Owner**
>
> If the Owner who is not the Annuitant dies after the Income Start Date, annuity payments will continue to be made to the Annuitant under the originally elected Income option and ownership rights will vest in any surviving Joint Owner. If there is no surviving Joint Owner, ownership rights will vest in the primary Annuitant.
>
> If the Owner who is also the Annuitant dies after the Income Start Date, the terms of Death of Annuitant section will apply.

> **Death of the Annuitant**
>
> If the Annuitant dies after the Income Start Date, *the terms of the income option as elected by the Owner* at time of application.

CP 693 (emphasis added). Looking back at the "Single Life" income option, which was the income option selected on the application in this case, the contract defines that term as follows:

> **Single Life**
>
> Annuity payments will be paid during the lifetime of the Annuitant. Payments will cease with the last payment due prior to the death of the Annuitant.

CP 689. While the "Single Life" definition makes it clear enough that the normal monthly payments will cease on the death of the annuitant, *nowhere* does it state that the beneficiary of the annuity will not receive a death benefit. For example, the contract could have stated this clearly ("a beneficiary of an annuity with a Single Life income option is not entitled to receive any death benefit if the annuitant dies after the income start date"). Because the annuity contract *does not* state this, the applicant is left to deduce that the "beneficiary" of an annuity under a Single Life income option will only receive the return of the premium in the rare circumstance where the annuitant dies after he signs the application and before he receives the first annuity payment on the income start date, which in this case was a period of only twenty-eight (28) days (the difference between Marr's premium payment of the $100,000 on Dec. 20, 2008 and the income start date of Jan. 17, 2009). *CP* 677-78. The Income Start Date is also referred

to as the "annuitization commencement date." *CP* 684.

Not only would an ordinary consumer understand a beneficiary to be much more than this, Nationwide's *own contract* defines a "Beneficiary" as the person who may receive benefits when the "Annuitant [...] dies after the Income Start Date." *CP* 688. Beneficiary, both as commonly understood and as defined under the contract, is not just the person who receives a refund of the purchase price within 28 days of the application date before the payments commence. Appellant's expert witness John Olsen gives this opinion:

> It is my opinion that a prudent consumer, seeing his wife identified as the beneficiary of his annuity and no indication that there is nothing for her to be beneficiary of (because the page says "Single Life" rather than "Life Only – No Death Benefit" or something similarly revealing) could reasonably expect that his annuity contains some death benefit. *CP* 552.

The language of the annuity application and contract were deceptive because the requirement that an applicant must name a beneficiary has the capacity to deceive the ordinary consumer to believe that the annuity provides a death benefit under the Single Life income option. For consumers choosing the "Single Life" income option, the only fair practice would be for Nationwide to strike the requirement that a beneficiary be designated or otherwise indicate that "beneficiary" means something other than how it is defined in the contract. It is not unreasonable to expect the annuity's application language to actually conform to the terms defined in the annuity contract itself. The annuity application and contract could be easily modified so as not to deceive future consumers. For some reason this

was not done. When viewed from the standpoint of the least sophisticated consumer, this Court should conclude as a matter of law that this constituted a deceptive act in violation of the CPA.

ii. Washington Law Requires That Annuities Without Death Benefits "To Include A Statement In A Prominent Place In The Contract That Such Benefits Are Not Provided." Respondent's Failure to Include Said Statement Is A Per Se Deceptive Practice.

The Court should conclude that the failure to expressly state that the annuity does not include a death benefit is deceptive as a matter of law under the CPA. RCW 48.23.490, which regulates the sale of insurance and annuities, provides as follows:

> Any contract which does not provide cash surrender benefits or does not provide death benefits at least equal to the minimum nonforfeiture amount prior to the commencement of any annuity payments shall include a statement in a prominent place in the contract that such benefits are not provided.

(emphasis added). In this matter, the SPIA sold to Marr includes no death benefit whatsoever, let alone a death benefit equal to the minimum nonforfeiture amount. *See CP* 677-94; 765-67. Thus, a statement in a "prominent place" in the contract stating that there was no death benefit was required. RCW 48.23.490.

Nowhere in the annuity application or contract does is it explicitly state that an annuity purchased under the Single Life income option does not provide a death benefit. *See CP* 677-94; 765-67. Instead, respondents rely on the definition of "Single Life", which states that "[p]ayments will

cease with the last payment due prior to the death of the Annuitant." *CP* 689. Although this adequately explains that regularly monthly payments will cease, which one could understand to mean the "income" portion of the annuity, it does not clarify whether there is a death benefit payable to the beneficiary. Appellant's expert witness offered the following opinion:

> The absence of any disclosure that Nationwide's "single life" annuity option provides for no death benefit in the annuity quote, the annuity application, and the Contract Information page of the contract might very well lead a prudent consumer, aware that the application and Contract Information page refer to a beneficiary, to believe that the beneficiary listed could receive a death benefit.

CP 560.

The only place this is addressed with greater clarity is on the "Supplemental Agreement" which Nationwide allegedly mailed to Marr after the annuity contract had already commenced and a monthly payment was made. *CP* 765-67. As a preliminary matter, Nationwide's purported "Supplemental Agreement" directly violates Washington law which requires that for annuity contracts, "the contract and the application therefor shall constitute the entire contract between the parties." RCW 48.23.170.

On the bottom of the "Supplemental Agreement," in small print, it states that there is no death benefit for a "straight life" annuity. *CP* 766. This is the <u>only</u> place where any of the annuity documents actually address this issue. The statement on the "Supplemental Agreement" is that there is no death benefit payable "under this option." *CP* 766. However, Marr did not purchase a "straight life" annuity – a term that is otherwise undefined in the contract. *CP* 766. Nationwide has no one but itself to blame if it

intended for the undefined term "straight life" to be synonymous with a term defined under the annuity contract. This is similar to Nationwide's use of the term "Beneficiary" in the annuity application that was inconsistent with how the term was defined in the contract as discussed *supra*. Moreover, it is a disputed issue of fact whether Marr ever received this "Supplemental Agreement" because Marr never signed for having read or received it. *CP* 765-67.

As the "Supplemental Agreement" is ineffective under the integration clause of the contract as required by RCW 48.23.170, the effort taken to generate such a document is damning evidence that the respondents knew full well there was a serious problem of full disclosure regarding the annuity sale to Marr. Even if Marr had received it, it did not adequately inform him of the absence of a death benefit because the disclaimer apparently is related to a different income option, rather than the "Single Life" option he selected. A fine-print disclaimer for such critically important information is inadequate if the "net impression" of the communication has the capacity to deceive. *Panag*, 166 Wn.2d at 50. As such, the annuity documents have the capacity to deceive an ordinary consumer due to the absence of a clear statement that the annuity did not provide a death benefit and this Court should conclude that the failure to include such a statement is deceptive as a matter of law.

iii. Permann's Communications With Marr Were Deceptive.

The Court should conclude that Permann's communications to Marr

were deceptive in violation of the CPA. From the time of the sale of the annuity until Marr's death, Permann prepared account summary statements for his meetings with Marr and Elizabeth Waddoups. *See CP* 563-75. All the account summary statements prepared for these meetings for over two years reflected that the annuity had a falsified current value of $100,000. *Id.*

In the days just after Marr passed away, Permann ordered his assistant, via email, to go into Marr's account and change the value of the Nationwide annuity to "$O" from what would have been a value of $100,000, noting that Marr's son Gary Waddoups would be meeting with him the next day. *CP* 573; 876. Gary met with Permann the next day after being presented with the changed account summary statement. *CP* 599. Permann never disclosed to Gary that the falsified account summary statement values had been changed just prior to presenting the corrected statement to him. *CP* 599-600. Permann's quick correction of the cash value amount that had been falsified for over two years, for the entire period between the purchase of the Nationwide annuity and the meeting with Gary Waddoups right after Marr's death, can only be interpreted as evidence of a conscious effort on Permann's part to deceive Marr into believing that the Nationwide annuity had a cash value and a benefit to be paid to his wife upon his death. Notes written on these account summary statements reflect that Marr relied on these statements to evaluate and understand his financial situation. *CP* 569; 571. The account summary statements during Marr's

lifetime are dated January 30, 2009, September 9, 2009, December 1, 2009, March 18, 2010, and September 7, 2010, after the income start date of January 17, 2009. *CP* 563-71. One of the statements, dated September 9, 2010, shows Marr's wife Elizabeth as a beneficiary of the annuity. *CP* 565. This was well after the twenty-eight (28) day window that his wife would have been entitled to receive a refund of the premium if Marr had passed before the income start date. Even though respondents claim that this is the only meaning of "beneficiary" under the annuity contract, it was nonetheless communicated to Marr eight months after the Income Start Date, when respondents state Elizabeth was technically no longer a beneficiary, that she was still listed by Permann as the beneficiary of an annuity that "as of 9/10/2009 12:06P" had a value of "$100,000". *CP* 565. These written communications had the capacity to deceive an ordinary consumer in Marr's position. Mr. Olsen, appellant's expert, states as follows:

> For a financial planning firm to prepare a report for any client showing a value for an asset which has no value is a serious matter. For that error to persist, even after corrections were made in the values of other assets on that report, is hard to understand if the preparing firm understands how to value the assets they report. Mr. Waddoups had no previous experience with how SPIAs work. *CP* 555.

These undisputed actions by Permann, both individually and in the aggregate, are deceptive as a matter of law in violation of the CPA.

iv. Permann's Misleading Statement To Nationwide Is A Per Se Deceptive Act.

The Court should conclude that Permman's representation to

Nationwide that the annuity was a suitable instrument for Marr violated Permann's statutory obligations and constitutes a per se deceptive practice under the CPA.

RCW 48.30.210 states that "a person who knowingly makes a false or misleading statement or impersonation, or who willfully fails to reveal a material fact, in or relative to an application for insurance to an insurer, is guilty of a gross misdemeanor, and the license of such person may be revoked." Violations of insurance regulations constitute a per se violation of the CPA. *Panag*, 166 Wn.2d at 43.

Here, on the "Crump Suitability Form", Permann made the following sales representatives confirmation to Nationwide:

> I acknowledge that I have made a reasonable effort to obtain information from the Owner concerning the Owner(s) financial status, investment objectives and other information considered reasonable. It is my belief that based on 1) The Information the Owner provided, 2) All the circumstances known to me at the time the recommendation was made, <u>the annuity being applied for, based on my recommendation is suitable</u> for the Owner(s) insurance needs and/or financial objections.

CP 679 (emphasis added).

While not effective until shortly after the sale of the annuity to Marr, the provisions of RCW 48.23.015 and WAC 284-23-390 are illustrative of the considerations a financial advisor or insurance producer must take into account in concluding that "the annuity being applied for, based on [their] recommendation is suitable."

> In recommending the purchase of an annuity [...] the insurance producer, or the insurer when no producer is involved, must have reasonable grounds for believing that

> the recommendation is suitable for the consumer on the basis of the facts disclosed by the consumer about their investments and other insurance products and as to their financial situation and needs.

RCW 48.23.015(2)(a).

> (2) In addition to the requirements in RCW 48.23.015, insurers and insurance producers must have reasonable grounds to believe the following requirements in recommending and executing a purchase or exchange of an annuity:
>
> (a) The consumer has been reasonably informed of various features of the annuity, such as the potential surrender period and surrender charge, potential tax penalty if the consumer sells, exchanges, surrenders or annuitizes the annuity, mortality and expense fees, investment advisory fees, potential charges for and features of riders, limitations on interest returns, insurance and investment components, and market risk;
>
> (b) The consumer would benefit from certain features of the annuity, such as tax deferred growth, annuitization, or death or living benefit;
>
> (c) The particular annuity as a whole, the underlying sub-accounts to which funds are allocated at the time of purchase or exchange of the annuity, and riders and similar product enhancements, if any, are suitable (and in the case of an exchange or replacement, the transaction as a whole is suitable) for the particular consumer based on his or her suitability information;

WAC 284-23-390(2)(a-c)(emphasis added).

Although Permann represented to Nationwide that he recommended the annuity as a suitable purchase, Permann answered the initial complaint by stating that he "advised H. Marr Waddoups *against the purchase*, including doing so in the presence of plaintiff, Gary Waddoups" *CP* 25 (emphasis added). Permann's attorney filed a declaration with the summary judgment motion claiming this was merely the result of a "drafting error."

CP 796. Permann's amended answer states a flat denial to paragraph 3.8 of the complaint. *CP* 34. This reflects a change in defense strategy not just the correction of a scrivener's error. In addition, Permann told Gary Waddoups that he sold his father the annuity because Marr "would have just gone elsewhere to buy it." *CP* 599. This statement implies that the blame for the loss of such a large sum of money was his father's fault. Permann also stated in an email dated December 13, 2011, approximately two months after Marr's death, that the Nationwide annuity was "maybe a bad idea." *CP* 612. This shows that Permann made a misleading statement to Nationwide on the Crump Suitablity Form, representing to Nationwide that the annuity was suitable for Marr, who was 85 years of age and in poor health, even though Permann has essentially admitted that it was not. A false statement made by an insurance sales representative, just to complete a sale, is a per se deceptive act in trade or commerce, and this Court should conclude that Permann's false representation to Nationwide of the suitability of the sale constitutes a deceptive act as a matter of law.

b. The Sale Of The Annuity Was "Unfair."

The Court should conclude that the sale of the SPIA to Marr was unfair in violation of the CPA as a matter of law. An act or practice in trade or commerce may be "unfair" even if not deceptive. *Klem*, 176 Wn.2d at 787 (2013). "The universe of 'unfair' business practices is broader than, and encompasses, the universe of 'deceptive' business practices." *Panag*, 166 Wn.2d at 51. "Business practices that are 'deceptive' are, *ipso facto*, 'unfair.'" *Id.*

> Our Supreme Court suggested that a defendant's act or practice might be "unfair" if it "causes or is likely to cause substantial injury to consumers which is not reasonable avoidable by consumers themselves and is not outweighed by countervailing benefits.

Mellon, 182 Wn. App. at 489-90 (*quoting Klem*, 176 Wn.2d at 787). In addition, a defendant's act or practice might be "unfair" if it "offends public policy as established by statutes or the common law or is unethical, oppressive, or unscrupulous." *Klem*, 176 Wn.2d at 786; *Mellon*, 182 Wn. App. at 490.

i. The Annuity Sale Was Unfair Because It Was Unsuitable Based On Marr's Life Circumstances.

The Court should conclude that the SPIA sale to Marr was unfair under the CPA because a SPIA with no death benefit was an unsuitable instrument. A defendant's act or practice might be "unfair" if it "offends public policy as established by statutes or the common law or is unethical, oppressive, or unscrupulous." *Klem*, 176 Wn.2d at 786.

In *Mellon*, the Court addressed whether a mortgage lender's presentation of a forbearance agreement to a debtor in default was unfair because the debtor was unemployed and would be manifestly unable to make a $10,000 balloon payment required under the agreement. *Mellon*, 182 Wn. App. at 490-91. The Court reversed the trial court's dismissal on 12(b)(6) grounds, holding that if the trial court found that the forbearance agreement was presented in bad faith there would be sufficient evidence to justify CPA relief for the lender's unfair act. *Id.*

In Washington, life insurance and annuities are coextensively

regulated based on their similar uses and similar moral hazard. *See* RCW 48.23.010. As a purveyor of both annuities and life insurance, Nationwide goes to great effort to screen out life insurance applicants with pre-existing medical conditions that decrease the applicant's life expectancy. *CP* 894-95. Nationwide does so to avoid the risk that it will have to pay out life insurance benefits after receiving only minimal premium payments from the applicant. Some medical conditions will render a life insurance applicant totally uninsurable because they affect the applicant's life expectancy so significantly. *CP* 894-95. Marr had numerous uninsurable, life threatening medical conditions, including:

- Chronic renal (kidney) failure;
- Uncontrolled, brittle diabetes mellitus (adult onset) with severe complications;
- Peripheral Vascular Disease ("PVD") and Peripheral Neuropathy;
- Vasculitis-Arteriosclerosis obliterans ("ASO"); and
- Mobility impairment with IADL limitations.

CP 894-95; 897-900.

Marr's PVD and ASO caused his toes to tightly curl under and caused the loss of sensation in both of his feet. *CP* 897-98. Marr's walking and standing ability was greatly impaired. *Id; CP* 416. He was at significant risk for the loss of his feet by amputation, common among diabetics. *Id.* He wore special shoes to minimize the risk of loss of his feet. *Id.* Approximately five months after the sale of the annuity, Marr's renal function failed to the point that he had to undergo kidney dialysis for the

remainder of his life. *CP* 452-53.

While this is not a life insurance case, Washington regulates life insurance and annuities coextensively under chapter RCW 48.23. As such, Nationwide's underwriting policies are instructive because they show what happens when insurance carrier bears the risk of the applicant's premature death. *CP* 894-95. The SPIA with no death benefit sold to Marr is the exact opposite of life insurance. The annuity involved the payment of a one-time premium for the right to receive monthly contract payments for the remainder of Marr's life. This meant the applicant bears all the risk of a premature death (dying before the life expectancy figure used by the annuity issuer to price the annuity). In the case of a SPIA without a death benefit, it is to the insurance carrier's benefit for the applicant to pass away before reaching the annuity's break-even point or before reaching the annuitant's life expectancy that was used to price the annuity. The more weighted an insurance company's portfolio is of no death benefit SPIA's with annuitants that pass away before the break-even point, the more profitable it is for the company. This critical information was never disclosed to Marr by Nationwide. Failure to disclose material information, needed for a consumer to make a sound purchase decision, is an unfair practice under the CPA. *Holiday Resort*, 134 Wn. App. at 226.

The documentary evidence indicates that Permann solicited the sale of the annuity. *CP* 814, para. 6. Marr did not have the expertise to evaluate the suitability of the annuity and relied on the advice of a financial advisor

who was his fiduciary and who was obligated to provide him with informed advice on the suitability of the Nationwide annuity. Yet, Permann made no effort to screen Marr for any pre-existing medical conditions in order to make an appropriate recommendation. *CP* 414-18. Permann had superior knowledge related to uninsurable medical conditions and life expectancy, although he feigns to have no such background. *Id.* Uninsurable medical conditions are regularly dealt with in the life insurance business. This field of practice, evaluating insurance risk, is called life insurance underwriting. Permann is a CLU ("Chartered Life Underwriter"). *CP* 558. Yet, Permann made no effort to determine and did not determine that Marr suffered from multiple life expectancy decreasing medical conditions. *CP* 415-18. He did not confirm whether Marr's diabetes was controlled or uncontrolled, or whether he had complications related to diabetes, or whether he had other uninsurable medical conditions, or to otherwise inquire into Marr's health beyond general observation of Marr's condition. *CP* 902-03. This left Marr in a position of "self-screening" the suitability of the Nationwide annuity and the entire risk involved in entering into the annuity contract, all without the knowledge or tools to properly accomplish this critical task.

Marr trusted Permann as his fiduciary to confirm that this was an appropriate transaction. This required Permann to make appropriate inquiries regarding whether Marr had any conditions that would affect his life expectancy, disclose to Marr the impact and effect of those conditions, and to recommend all financial products and strategies accordingly. *Cf*

RCW 48.23.015; WAC 284-23-390 (illustrating appropriate suitability inquiries). Selling a no death benefit SPIA to an elderly person with one or multiple uninsurable medical conditions is inappropriate and unconscionable. The life expectancy figure used by the annuity issuer to price (the monthly payout figure in this case) this annuity, was an average life expectancy, for a general population of 85 year old males. *CP* 550. The life expectancy figure for Marr was 5.8 years, and the break-even point was 5.88 years with a discount rate of 0% (which is a completely unreasonable assumption in itself, making the proper break-even point even longer). *Id.* None of Marr's pre-existing medical conditions were used to price this annuity. *Id.* Average life expectancy means that of the relevant population fifty percent will die before and fifty percent will die after the average. Consequently, if Marr had been as healthy as the average 85 year old, he would have had only a fifty percent chance of ever living to the break-even point and having the entire $100,000 single premium paid back to him by monthly payment. Factoring in, as would be proper to make a sound purchase decision, the loss of interest and the effect of his pre-existing medical conditions on life expectancy and the chance of ever receiving back the entire premium, the odds are far less than fifty percent in Marr's situation. These odds were never explained to Marr. Permann stated he had no background to determine Marr's life expectancy. *CP* 415-18. Outrageously, Permann allowed Marr to believe that a ten year life expectancy was an acceptable figure to evaluate the suitability of this

annuity. *CP* 414. A bet on red on a roulette wheel has better odds (only a slightly less than fifty percent chance of doubling one's money) of being a sound financial decision than purchasing this annuity. Because of the inherent risk, "'[l]ife only annuities represent only a small fraction of immediate annuities sold… most clients are not willing to let the insurance company 'keep the money'." *CP 558.* Unethical and unscrupulous trade practices violate the CPA. *Blake v. Fed. Way Cycle Ctr.*, 40 Wn. App. 302, 310, 698 P.2d 578, 583 (1985) (*quoting Federal Trade Comm'n v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 n. 5 (1972)). This annuity was unsuitable, material information was not disclosed to Marr, and under the circumstances the sale was unethical and unscrupulous in violation of the CPA.

ii. The Annuity Sale Was Unfair Because Permann Failed To Provide Suitable Alternatives.

The Court should conclude that the SPIA annuity sold to Marr without a death benefit was unfair because Marr was not provided with information regarding suitable alternatives. Generally, an insurance agent or broker assumes only those duties normally found in any agency relationship. Those duties include the obligation to exercise good faith and carry out instructions. *AAS–DMP Mgmt., L.P. v. Acordia Nw., Inc.*, 115 Wn. App. 833, 839, 63 P.3d 860 (2003). However, an enhanced duty can arise when the insurance agent and the customer have a special relationship. *Id.* A special relationship arises when (1) an agent holds himself out as a specialist and receives a special fee on top of the premiums normally paid

by the customer, or (2) there is a longstanding relationship with some interaction regarding coverage, coupled with the insurance agent giving advice and the customer's detrimental reliance on that advice. *Id.* (*quoting Suter v. Virgil R. Lee & Son, Inc.*, 51 Wn. App. 524, 528, 754 P.2d 155 (1988).

In this case, in addition to selling the annuity, Permann had an ongoing relationship with Marr as his Certified Financial Planner ("CFP"). *CP* 558. In his dealings with Marr, as his professional financial advisor, Permann was bound by the CFP Board Rule requiring him to "place the interest of the client ahead of his or her own." *Id.* For a consumer to make an informed decision, he or she must be advised of the advantages and disadvantages of purchasing an annuity with or without a refund feature (no death benefit). Although a no-refund annuity generally provides slightly more income, this comes at the cost of no minimum guaranteed payout. *CP* 551. As Mr. Olsen notes, "[t]here is no documented evidence that Mr. Permann showed Mr. Waddoups a quote for a life annuity with a refund feature or even told Mr. Waddoups that this type of annuity is available. Mr. Waddoups could not determine which type was most suitable for him because Mr. Permann denied to him the information required to make such a decision." *CP* 551. Permann instructed his assistant to only obtain quotes for a SPIA with no death benefit. *CP* 814. Seeing the two monthly payment figure choices side-by-side would have allowed Marr to make the important decision – is the slightly more monthly income worth the ultra-high risk

attached – in a sound fashion. He was never allowed that choice. *CP* 814.

Marr had numerous sound alternatives, had he only been informed of them. These include:

- a single life immediate annuity with a death benefit;
- a joint life annuity;
- leaving cash in a money market account and making withdrawals as needed;
- annuitizing one of the three deferred annuities that he and his wife already owned;
- a medically underwritten annuity, which would provide a much higher monthly payout; and

CP 315; 17.

Because Permann failed to show Marr any suitable alternatives to the single life annuity and failed to comply with the CFP Board standards and rules, the sale of the annuity was unfair under the CPA.

iii. The Annuity Sale Was Unfair Because the Annuity Contract Was Not Provided To Marr In A Timely Fashion.

The Court should additionally conclude that the failure to provide Marr with the annuity contract in a timely fashion constituted an unfair practice under the CPA. In addition to failing to disclose the absence of a death benefit, the contract was delivered late (on 2/3/09), well after the annuity income start date (1/17/09) when Marr received his first monthly payment and after the annuitization commencement date (1/17/09). *CP* 694; 684; 677. RCW 48.23.170 prohibits the practice of piecemealing an annuity contract. The late delivery also violated terms of Nationwide's

contract and undermined the purpose of the "10 day free-look" period, which is to give the consumer a meaningful and fair opportunity to review the terms of the annuity to decide if they really want it before any payments are made. The contract specifically provides that "[t]he income start date must be no earlier than the day after the end of the ten day look period and no later than 12 months after the Date of Issue." *CP* 690. Here, the date of issue was December 24, 2008, the income start date was January 17, 2009, but the contract delivery date, which starts the "10 day free look" period, was not until February 3, 2009. *CP* 684; 694. As a result, the annuity contract had already commenced and Marr had already received his first payment weeks before he first had an opportunity to review the contract. Because the annuity application Marr signed was so sparse, this was particularly unfair. Marr was an elderly man, in poor health and had no reasonable opportunity to understand the terms and conditions of the annuity, especially where they were buried in a maze of fine print and unclear descriptions. Elderly people are particularly susceptible to exploitation from such practices. The untimely deliver of the annuity contract was in violation of the annuity contract itself and was an unfair practice by the contract's own terms and under the circumstances.

2. The Sale Of The Annuity Occurred In Trade Or Commerce.

The Court should conclude that the sale of the annuity occurred in trade or commerce. An act or practice occurs "in trade or commerce" when the sale of assets or services directly or indirectly affects the people of the

State of Washington. *Stephens v. Omni Ins. Co.*, 138 Wn. App. 151, 173, 159 P.3d 10 (2007)(*citing* RCW 19.86.010(2)). Plaintiffs need not have a direct consumer transaction with the defendants for the CPA to apply. *Id.* In this case, it is clear that Marr's procurement of the SPIA from Permann and Nationwide occurred in trade or commerce. This Court should make such a finding as a matter of law.

3. The Sale Of The Annuity Affects The Public Interest.

The Court should conclude that the sale of the annuity to Marr affects the public interest. RCW 19.86.093 describes three ways in which an unfair or deceptive act is "injurious to the public interest." In a private action in which an unfair or deceptive act or practice is alleged under RCW 19.86.020, a claimant may establish that the act or practice is injurious to the public interest because it:

1. Violates a statute that incorporates this chapter;
2. Violates a statute that contains a specific legislative declaration of public interest impact; or
3. (a) Injured other persons; (b) had the capacity to injury other persons; or (c) has the capacity to injure other persons.

As the Washington State Supreme Court has recognized:

> Both the insurance industry and the debt collection industry are highly regulated fields. A primary purpose of the intensive regulation of these industries is to create public confidence in the honesty and reliability of those who engage in the business of insurance and the business of debt collection. Our legislature has declared violations of the regulations applicable to either industry implicate the public interest and constitute a per se violation of the CPA.

Panag, 166 Wn.2d at 43.

Here, Permann violated RCW 48.30.210 by making a false or misleading statement to Nationwide regarding the suitability of the annuity sale. The annuity also violates RCW 48.23.470 by failing to prominently disclose the absence of a death benefit, as discussed *supra*, which affects the public interest.

Alternatively, the sale of the annuity affects the public interest independent of the statutes regulating insurance. Whether the public interest is implicated is an issue to be determined by the trier of fact. *Stephens*, 138 Wn. App. at 177. Where the acts complained of involve "essentially a consumer transaction", the following factors are considered:

> (1) Were the alleged acts committed in the course of the defendant's business? (2) Are the acts part of a pattern or generalized course of conduct? (3) Were repeated acts committed prior to the act involving plaintiff? (4) Is there a real and substantial potential for repetition of defendant's conduct after the act involving plaintiff? (5) If the act complained of involved a single transaction, were many consumers affected or likely to be affected by it?

Id. (*citing Hangman Ridge*, 105 Wn.2d at 790).

Where the complaint involves "essentially a private dispute", the following factors are considered:

> (1) Were the alleged acts committed in the course of defendant's business? (2) Did defendants advertise to the public in general? (3) Did defendant actively solicit this particular plaintiff, indicating potential solicitation of others? (4) Did plaintiff and defendant occupy unequal bargaining positions.

Id. "No one factor is dispositive, nor is it necessary that all be present." *Id.*

Here, the facts demonstrate that the annuity sale occurred in the context of the respondents' businesses and that the annuity was sold to Marr

as a part of a broader effort to market, advertise and solicit sales of single premium annuities from other Washington residents. Moreover, there is a substantial possibility of reoccurrence, and as an elderly man seeking professional advice, Marr did not occupy an equal bargaining position. There is ample evidence that the SPIA sale implicated the public interest and this Court should make such a finding as a matter of law.

4. The Sale Of The Annuity Injured The Plaintiff's Business Or Property.

The annuity sale injured plaintiff's "business or property" insofar that Marr passed away before receiving a full return on his premium. "The injury involved need not be great, or even quantifiable." *Ambach v. French*, 167 Wn.2d 167, 172, 216 P.3d 405 (2009). "Because the CPA addresses 'injuries' rather than 'damages,' quantifiable monetary loss is not required." *Frias v. Asset Foreclosure Services, Inc.*, 181 Wn.2d 412, 431, 334 P.3d 529 (2014). Here, the lost premium after Marr's death was $51,788.00. *CP* 599. Although Marr passed away, his claim survived to his estate under RCW 4.20.046 and this loss was a loss of his "business or property." This Court should make such a finding as a matter of law.

5. Adequate Evidence Supports That The Unfair Or Deceptive Acts Of The Respondents Caused The Injury Complained Of.

The final element of a CPA claim is causation. A CPA plaintiff is required to show that the defendants' acts caused plaintiff's injury. In *Indoor Billboard/Washington, Inc. v. Integra Telecom of Washington*, 162 Wn.2d 59, 170 P.3d 10 (2007), the Court held that inducement by the

defendant or reliance by the plaintiff are not required to establish causation, and instead adopted a proximate cause standard. "A plaintiff must establish that, but for the defendant's unfair or deceptive practice, the plaintiff would not have suffered an injury." *Id.* at 83. "There must be some demonstration of a causal link between the misrepresentation and the plaintiff's injury." *Id.*; *see* 6A Wash. Prac., Wash. Pattern Jury Instr. Civil, WPI 310.07 (6th ed.). Mere payment of an invoice containing a false or misleading statement *may or may not*, by itself, establish causation, but payment may be considered with all other evidence on the issue of proximate cause. *Indoor Billboard*, 162 Wn.2d at 83 (emphasis added). There may be more than one proximate cause. WPI 310.07. "Proximate cause is a factual question to be decided by the trier of fact." *Indoor Billboard*, 162 Wn.2d at 83.

Indoor Billboard is directly on point. In that case, Indoor Billboard contracted with Integra for telecommunication services. Integra charged a "presubscribed interexchange carrier charge" or "PICC" surcharge to Indoor Billboard. Integra's billing, which referred to the PICC under "taxes and surcharges", implied that the surcharge was required by the Federal Communications Commission ("FCC") although it was not. The Court found this was an "unfair or deceptive act" because "whether the surcharge was FCC regulated and required could be of material importance to a customer's decision to purchase the company's services." *Id.* at 78. Moreover, the Court engaged in a lengthy analysis of causation. *Id.* at 78-85. Indoor Billboard argued that causation was established by merely

paying the invoices. On the other hand, Integra argued that Indoor Billboard would have purchased the telephone service even if they had known that the PICC was not regulated and required by the FCC. In its analysis, the Court rejected inducement or reliance-based theories of causation, and applied a "but for" causation standard. *See* WPI 310.07 ("The Supreme Court has 'firmly rejected the principle that reliance is necessarily an element of the plaintiff's CPA claim'", citing *Schnall v. AT&T Wireless Services, Inc.*, 171 Wn.2d 260, 277, 259 P.3d 129 (2011)). "A plaintiff must establish that, but for the defendant's unfair or deceptive practice, the plaintiff would not have suffered an injury." *Id.* at 83. Because causation is "factual question to be decided by the trier of fact", the Court reversed summary judgment and remanded to the trial court. *Id.* at 83, 85.

Here, Marr was injured in his business and property by the loss of the unrefunded premium. That loss was caused because the annuity was recommended to Marr and Marr was sold an annuity that did not provide a death benefit. Multiple unfair and deceptive acts and practices were incorporated by the defendants to ensure that Marr did not question the recommendation and to ensure the sale was completed. After the sale, falsified account summary statements continued the deception. The entire annuity sale was unfair and deceptive and if that unfairness and deception had not occurred, Marr would not have suffered the loss. The evidence supports this conclusion.

First, on the page of Marr's ledger book, he posted month by month

the cash values of all the annuities he and his wife owned. *CP* 377-88; 480; 620. The entries were simple postings of cash values he took from account statements mailed to him by the various annuity companies or cash values from statements given to him by Permann. *Id.* These cash values were equal to the death benefits for all the annuities Marr owned. His entries showed a decreasing monthly cash value for the Nationwide annuity, decreasing each month by the amount of each payment, or $1418, received by automatic deposit to his bank account. *Id.* Had the annuity included a refund feature, the figure Marr entered for each month - the single premium of $100,000 less the payments he had received to date - would have been the exact amount of the death benefit to be paid upon his death. On the other hand, it would have been illogical to show a decreasing cash value with each monthly payment had Marr correctly understood the annuity to only be a stream of income with no cash value. There is no sensible reason to track a cash value on a ledger page showing the cash value of other assets, when that cash value does not exist. His ledger book reflects his contemporaneous understanding of his annuities, and there is no dispute that Marr's accounting was incorrect. Based on the ledger book alone, a reasonable juror could conclude that Marr believed the Nationwide annuity had a remaining death benefit value that would pay out to his beneficiary at the time of his death.

Nationwide tacitly admits that Marr's ledger is consistent with what would have happened if the annuity provided a refund feature ("(h)ad there

been a death benefit, Mr. Waddoups did not have the information to track it and it may or may not have guaranteed return of the entire investment") *CP* 649 (emphasis added). Nationwide asserted this in its amended reply to the motion for summary judgment to correct its prior statement to the trial court: ("(h)ad there been a death benefit, Mr. Waddoups did not have the information to track it, nor would it have decreased in exact proportion with every monthly payment, such that Mr. Waddoups was guaranteed the return of his entire intial investment."). *CP* 637 (emphasis added); *See CP* 642. The appellant's position is that Marr's ledger reflects the remaining value of his initial investment. Nationwide's correction acknowledges this as a plausible interpretation of Marr's ledger. Assuming that the annuity provided a refund feature, Marr's accounting was right.

Second, Marr's ledger book is consistent with Permann's falsified account summary statements. These statements showed the Nationwide annuity as a current asset with a value of $100,000. Based on the type of annuity purchase, the $100,000 valuation was entirely wrong, but that valuation left the impression that the annuity was more than just a stream of income.

Lastly, the naming of Marr's wife as his beneficiary and the lack of disclosure that the annuity did not provide a death benefit strongly communicated that the annuity would pay her the remaining unpaid premium if he passed away.

Because "proximate cause is a factual question to be decided by the

trier of fact", *Indoor Billboard*, 162 Wn.2d at 83, the trial court erred when it entered summary judgment for respondents. There is ample evidence from which a trier of fact could find that Marr purchased the annuity without knowing that it did not provide a death benefit and that this directly caused the loss of the substantial unpaid premium amount.

C. Appellant Has Presented Sufficient Facts To Show That Permann Has Breached His Fiduciary Duty As Marr's Financial Advisor.

The Court should conclude that the trial court erred in granting summary judgment to Permann on whether he breached his fiduciary duty to Marr. "In a fiduciary relationship one party 'occupies such a relation to the other party as to justify the latter in expecting that his interests will be cared for....'" *Micro Enhancement Int'l, Inc. v. Coopers & Lybrand, LLP*, 110 Wn. App. 412, 433, 40 P.3d 1206, 1217 (2002) (*quoting Liebergesell v. Evans*, 93 Wn.2d 881, 889–90, 613 P.2d 1170 (1980)). The plaintiff must prove (1) existence of a duty owed, (2) breach of that duty, (3) resulting injury, and (4) that the claimed breach proximately caused the injury. *Miller v. U.S. Bank of Wash.*, 72 Wn. App. 416, 426, 865 P.2d 536 (1994). A fiduciary under a special relationship owes an "enhanced duty of care" which includes the obligation to render proper and competent advice. *AAS-DMP Mgmt*, 115 Wn. App. at 839.

Here, it is undisputed that Permann was Marr's fiduciary. *CP* 580. Permann is a Registered Investment Advisor (RIA), a Certified Financial Planner (CFP), a Chartered Life Underwriter (CLU), and a Chartered Financial Consultant (ChFC). *CP* 558. Permann's website promises the

following to his clients:

> A credentialed planner is important because they are bound by a "Code of Ethics" to do what's in the best interest of the client…
>
> One additional consideration in selecting a financial advisor is whether their firm is a Registered Investment Advisor (RIA). This means that they are registered with their state or the Securities Exchange Commission (SEC) and can legally call themselves a financial planner, as well as *they are treated as a fiduciary and must give you advice that is in your best interest… not just sell you a suitable product.*

CP 579-80 (emphasis added). Permann's Certified Financial Planner (CFP) credentials also designates him as a fiduciary to any client to whom he provides elements of financial planning. *CP* 579-580.

As a fiduciary, Permann owed a duty to Marr to put his client's interests first, to act with due care in the management of his client's assets, to not mislead clients, to avoid conflicts of interest, and to fully disclose and fairly manage unavoidable conflicts. *CP* 559. In addition, Permann owed an obligation to Marr to recommend only those financial products which, based on the information learned about the client, are in the client's best interest and are "suitable" for the client. *CP* 559.

Here, Permann violated Marr's trust by selling Marr an unsuitable annuity, by failing to gather information regarding Marr's health and life expectancy to make a suitable recommendation, by failing to present Marr with alternative financial products, and by misleading Marr with the repeated use of blatantly misleading account summary statements. In Permann's own words, the Nationwide annuity was "maybe a bad idea." *CP* 612. In his report detailing the sale, appellant's expert agrees:

> For the above reason, I believe that the sale of this annuity by Mr. Permann to Mr. Waddoups was clearly unsuitable, that it violated industry practices of the time…

CP 561. *See CP* 811-12.

Consequently, the trial court erred when it granted summary judgment for respondents. There is ample evidence to proceed to trial on appellant's breach of fiduciary duty claim.

D. The Court Should Reverse The Trial Court's Denial Of Appellant's Motion To Strike.

The Court should conclude that the trial court erred in denying in-part the appellant's motion to strike testimony proffered in violation of the deadman's statute. Because there is no documentation to support that Marr knew he was purchasing a SPIA without a death benefit, the respondents heavily rely on Permann's account of the sale, and particularly the assertion that Marr brought Permann a SPIA quote from New York Life which he asked Permann to match. The appellant disputes Permann's account of those conversations and Marr is no longer alive to offer differing testimony. Evidentiary rulings made in conjunction with a summary judgment motion are reviewed de novo. *Warner v. Regent Assisted Living*, 132 Wn. App. 126, 135, 130 P.3d 865, 871 (2006), *as amended* (July 21, 2006).

The deadman statute, RCW 5.60.030, is intended to "prevent interested parties from giving self-serving testimony about conversations or transactions with the decedent." *Erickson v. Robert F. Kerr, MD, PS*, 125 Wn.2d 183, 187, 883 P. 2d 313 (1994). "In general, testimony about a transaction with the deceased is defined as testimony about business or the

management of any affair, where the testimony could be contradicted by the deceased if he or she were still alive." 5A Wash. Prac., Evidence Law and Practice § 601.20 (5th ed.). The deadman's statute applies to actions brought on behalf of the estate. *Id.* at 189-90. The statute prohibits "a party in interest" from testifying "in his or her own behalf as to any transaction" with the decedent. *Id.* The statute may be waived if the adverse party introduces testimony at trial regarding the transaction in question. *Id.* at 187-88. However, the introduction of records or documents related to the transaction will not be found to waive the deadman statute's protection. *Id.* at 188. In addition, both parties may retain expert witnesses to make inferences based on admitted documents related to the transaction without constituting a waiver. *Id.*

Here, the trial court found that as a matter of fundamental fairness that Permann should be permitted to testify to his conversations with Marr because of appellant's assertion that Permann misrepresented to Marr that the annuity provided a death benefit. *RP at 71*. However, there is no fundamental fairness exception to the deadman's statute. *See Lasher v. Univ. of Washington*, 91 Wn. App. 165, 170, 957 P.2d 229, 232 (1998) (doctor could not testify to oral warning to patient or his "habit" of giving such warning, therefore, "both parties now have no choice but to rely on the" prepared records). And in this case, Permann's misrepresentations, the account summary statements, are in writing. *CP* 563-71. Admitting records or documents does not waive the deadman statute. *Erickson*, 125 Wn.2d at

188. Marr is no longer alive to contradict anything Permann may testify to. As a result, the trial court erred when it denied appellant's motion to strike Permann's declaration. *CP* 672-76; 621-22; 839-40.

E. The Trial Court Erred By Granting In Part Respondents' Motions To Exclude The Testimony Of Appellant's Expert Witness John Olsen.

The trial court erred when it excluded appellant's expert from testifying regarding the suitability of the annuity based on Marr's health and life expectancy, from testifying regarding whether the annuity documents might lead a consumer to believe that the annuity provided a death benefit, and from testifying regarding the absence of documentation regarding the annuity. *CP* 848-49.

The admissibility of expert testimony is governed by ER 702. Expert testimony is admissible if "scientific, technical, or other specialized knowledge will assist the trier of fact" regarding matters outside the competence of an ordinary layperson. ER 702; *Reese v. Stroh*, 128 Wn.2d 300, 308, 907 P.2d 282 (1995). Qualified experts may testify regarding virtually any subject so long as the testimony will be helpful to the trier of fact and is not based solely on conjecture. 33 Washington Prac. § 20.5 (2013). Evidentiary rulings made in conjunction with a summary judgment motion are reviewed de novo. *Warner*, 132 Wn. App. at 135. Depending on the nature of the exclusion, expert witness exclusion in the context of summary judgment is reviewed either de novo or for abuse of discretion. *Lakey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 919, 296 P.3d 860, 865

(2013).

Appellant's expert John Olsen has worked in the life insurance industry for more than forty years, holds a CLU designation and has extensive experience in the financial services industry. *CP* 546. He has substantial experience with annuity sales and has written a multiple articles and books on the subject of the suitability of annuities. *CP* 546-47. Mr. Olsen's opinion that the annuity sale was unsuitable is based in part on Marr's previously diagnosed medical conditions. *CP* 811; 897-900. Although Mr. Olsen is not a medical doctor, he is entitled to rely on Marr's medical diagnoses as a part of his suitability analysis because an annuitant's health and life expectancy is a central component to considering the suitability of an annuity sale. *CP* 550. An expert opinion can be based on facts or data "made known to the expert" and need not be personally observed or known to the expert. *Katare v. Katare*, 175 Wn.2d 23, 38, 283 P.3d 546 (2012) ("That an expert's testimony is not based on a personal evaluation of the subject goes to the testimony's weight, not its admissibility"). Furthermore, Mr. Olsen's testimony regarding the suitability of an annuity is not testimony regarding Marr's medical condition per se, but rather an evaluation of the suitability of the annuity because of his medical conditions. Such evaluations are common in the life insurance industry, and therefore Mr. Olsen's non-medical background is irrelevant. *CP* 894-95; *Johnston-Forbes*, 181 Wn.2d at 354. This testimony is at the core of appellant's claims against respondents. *See CP* 187, para.

3.3. This testimony would be helpful to a trier of fact and as such the trial court errred by excluding this testimony.

Furthermore, Mr. Olsen's expertise regarding the annuity documentation, and the failure of the Nationwide annuity application and contract to clearly state the absence of a death benefit such that a consumer might be led to believe that the annuity included a death benefit is an opinion that is helpful to the trier of fact. This opinion is based on the annuity application and contract itself, and is supported by the facts of the case and is not merely speculative. *Johnston-Forbes*, 181 Wn.2d at 352-53. As such, the trial court's order to exclude Mr. Olsen's testimony in part must be reversed.

F. The Trial Court Erred By Denying Appellant's Motion For Reconsideration.

The trial court erred in denying appellant's motion for reconsideration for all of the reasons stated herein. Appellant submitted additional materials to the court on reconsideration. *CP* 873-907. These materials were considered as part of appellant's motion for reconsideration. *CP* 941 ("After reviewing the Plaintiff's Motion for Reconsideration… as well as the attachments to the foregoing and the file in this matter…"). "In the context of summary judgment, there is no prejudice if the court considers additional facts on reconsideration." *Martini v. Post*, 178 Wn. App. 153, 162, 313 P.3d 473 (2013). "Generally, nothing in CR 59 prohibits the submission of new or additional materials on reconsideration." *Id.* "The decision to consider new or additional evidence presented with a motion for

reconsideration is squarely within the trial court's decision." *Id.* In this matter, the trial court erred when it denied reconsideration, based on the additional information submitted by appellant.

G. Appellant Is Entitled To An Award Of Attorney Fees.

Pursuant to RAP 18.1, appellant requests that the Court authorize the trial court to award appellate attorney fees related to this appeal when appellant ultimately prevails on the merits.

V. CONCLUSION

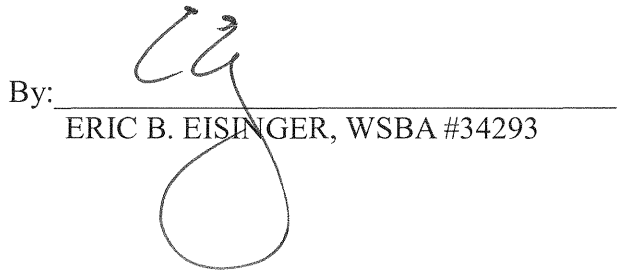
Marr Waddoups was sold the Nationwide annuity in an unfair and deceptive manner. An ordinary consumer in Marr's position could reasonably believe that the Nationwide annuity provided a death benefit, because the annuity application he signed and the contract he finally received required the naming of a beneficiary and did not state that there was no death benefit. Permann failed to provide material information required to make a sound purchase decision. Moreover, Marr kept track of his Nationwide annuity death benefit in his ledger book. He made entries on a monthly basis showing the death benefit of the annuity with each monthly payment, reflecting his belief that the annuity contained a refund feature. Marr misunderstood a central feature of the annuity –if he passed away, his entire premium would be lost. Even worse, Permann falsified accounting statements to perpetuate this misunderstanding.

This Court should rule as a matter of law that respondents engaged in an unfair or deceptive act or practice, in trade or commerce, in a manner

that affected the public interest, and that Marr was injured in his business or property. On the issue of causation, this Court should reverse the trial court's grant of summary judgment and remand this matter for trial on that element of appellant's CPA claim alone. In addition, this Court should reverse the trial court's grant of summary judgment on plaintiff's claim for breach of duty as a financial advisor, reverse the trial court's denial of appellant's motion to strike, reverse the trial court's granting in part of respondents' motion to exclude and award attorney fees to appellant.

RESPECTFULLY SUBMITTED this 30th day of June, 2015

WALKER HEYE MEEHAN & EISINGER, PLLC
Attorneys for Appellant



By:_____
ERIC B. EISINGER, WSBA #34293

On the 30th day of June, 2015, I served a true copy of:

Appellant's Brief

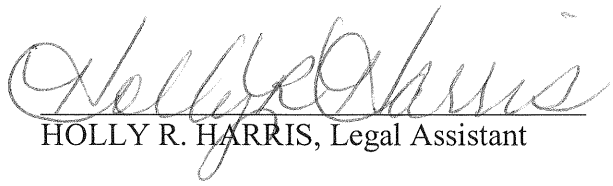
By e-mail per stipulated e-service/facsimile agreement to:

Matthew Turetsky
Averil Rothrock
Schwabe Williamson & Wyatt, P.C.
mturetsky@schwabe.com
vnicholson@schwabe.com
jhicok@schwabe.com
rdavies@schwabe.com
arothrock@schwabe.com

Michael B. Merchant
Black Helterline, LLP
mbm@bhlaw.com
tcr@bhlaw.com

I certify the foregoing to be true and correct under the penalty of perjury under the laws of the State of Washington.

Executed this 30th day of June, 2015, at Richland, Washington.



HOLLY R. HARRIS, Legal Assistant