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NO. 33257-8-III
COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

GARY WADDOUPS, as the Personal Representative
for the Estate of H. Marr Waddoups,

Appellant,

vs.

NATIONWIDE LIFE INSURANCE COMPANY, an Ohio Corporation,
FINANCIAL MANAGEMENT, INC., a Washington Corporation, and
CLARK L. PERMANN and JANE DOE PERMANN, husband and wife,

Respondents.

RESPONDENTS' JOINT BRIEF

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I. INTRODUCTION

The annuity at issue in this appeal provided just what Marr Waddoups (“Marr”) wanted: a large guaranteed income stream for the rest of his life for a premium that was only a small portion of his assets. Plaintiff Gary Waddoups (“Gary”), Marr’s son, failed to present evidence to support his claims because the annuity was never meant to contain a payout after Marr’s death.

Marr was a sophisticated investor who—it is undisputed—had a firm grip on his financial planning and believed he would live another ten years. He disclosed no significant health concerns to the agent/broker Clark Permann even though he had diabetes. Gary offers no evidence that Marr was misled or confused about what he bought, or that the annuity was not suitable for Marr’s investing objectives.

All evidence shows the opposite. Marr directed insurance agent Clark Permann to shop this type of annuity and perfectly understood it. Marr specifically sought a guaranteed income stream annuity like many investors were seeking after the financial crisis of 2008. Marr rejected other products that contained a death payout. Marr and Permann discussed the features of the annuity and how long Marr would have to live to make money on the purchase. Marr considered himself in good health. Marr’s financial planning documents show, and Marr told

Permann when he bought the annuity, that despite his diabetes Marr expected to live ten more years. No less than three documents concerning the annuity, including the annuity itself, describe the lack of a death benefit for the annuity that Marr chose. Marr possessed materials obtained from other insurers when he was shopping for the same type of annuity—without a death benefit—for his wife. The circumstances show that Marr understood there would be no payout upon his death and that he had to live a certain number of years to recoup his premium. This is confirmed not only in multiple conversations Marr had with Permann, but also in a conversation Marr had with his stepdaughter that Gary never sought to exclude. When he bought this annuity, Marr deliberately prioritized his personal income for the rest of his life over a death benefit for his heirs.

Gary may be disappointed that the annuity does not benefit him, but he failed to show that is what Marr wanted, much less create a triable issue of fact that any deceptive act or breach of duty by Respondents caused any damage to Marr's estate. Absent genuine issues of material fact, Gary was not entitled to a trial. Despite raising new issues, assigning error to multiple orders, and obligating Respondents to address obscure points, Gary fails to show he is entitled to reversal. This Court should affirm the summary judgment in favor of Respondents.

II. STATEMENT OF THE ISSUES¹

1. Whether to affirm summary judgment because no reasonable juror could find that Respondents violated the Consumer Protection Act or breached the duty of care where the uncontested evidence shows that Marr understood and selected this annuity to meet his reasonable investing objectives?

2. Whether to affirm the trial court's discretionary limitation of Gary's financial expert's testimony to the expert's area of expertise, preventing the expert from testifying about Marr's medical conditions and life expectancy? Should the Court even decide the issue where: 1) the evidence shows that Permamm met the standard of care to which the expert testified; and 2) Gary failed to submit evidence to show that Permamm should have known about a serious medical condition that would shorten Marr's life expectancy?

3. Whether to affirm the admission of all of Permamm's declaration (CP 672-76) over Gary's motion to strike portions (CP 621-22) because Gary waived any protection from the deadman's statute? Should the Court even decide the issue where: 1) Gary failed to meet his burden of proof, regardless of whether Permamm's testimony is considered; 2) Permamm's *deposition* testimony is in the record without objection; and 3) evidence independent of Permamm shows that Marr received disclosures and understood that the annuity had no death benefit?

4. Whether to affirm the denial of Gary's motion for reconsideration that was unsupported by any legal or factual ground under CR 59 and included inadmissible documents full of hearsay?

5. Whether to affirm dismissal for lack of standing?

6. Whether Gary is entitled to an award of attorney fees as a result of these appellate proceedings, having submitted no authority or argument in his brief?

III. COUNTER STATEMENT OF THE CASE

This appeal concerns a Nationwide INCOME Promise annuity

¹ Contrary to RAP 10.3(a)(4), Gary provided no issue statements.

purchased by Marr in December 2008. CP 681-93. The Washington State Insurance Commissioner has approved this annuity. CP 674. The income start date was January 17, 2009. CP 684. Marr passed away in October 2011. CP 599 ¶ 6. His son Gary sued Respondents as Personal Representative of Marr's estate, contending that Marr's estate was damaged because the annuity contained no payout on Marr's death.

A. Marr Waddoups Purchased an Annuity with No Death Benefit to Safeguard His Income Level During His Lifetime

1. Marr knowledgeably managed his considerable financial assets

Marr was a highly educated and intelligent man. CP 355, CP 292. He earned a Master's Degree in Agronomy from Utah State University. CP 284. He worked as an agronomist for nearly 60 years, running his own business most of that time. CP 284-85. He managed his business, worked in the garage, cared for his 35 fruit trees, and was busy with his Church and other charitable work well into his eighties. CP 284-85, CP 291-92, CP 352-54, CP 358-59, CP 364-65. He was adept at finance and had a keen interest in managing his assets. CP 355-56, CP 294-95. Marr and his wife had \$3 million in assets. CP 423, CP 679. He kept meticulous handwritten records about these assets. CP 377-88.

Gary does not dispute that his father was adept at managing his

financial assets. Gary admits that his father was fully capable of understanding financial products and competent to make decisions regarding his finances when he purchased the Nationwide annuity in 2008. CP 296-97. There is no evidence in the record to the contrary.

2. Marr selected an annuity with no death benefit to meet his objective of a high, guaranteed monthly income payment

In November 2008, Marr approached agent/broker Clark Permann, one of several agents with whom he previously had worked, intent on purchasing a single premium immediate annuity (“SPIA”) with no death benefit. CP 401-03, CP 412.² Marr brought Permann a quote for this type of annuity from the New York Life Insurance Company. CP 401-03. He wanted Permann to shop it for similar annuities with high monthly payments. *Id.* Permann is a registered financial advisor with offices in Yakima and the Tri-Cities. Over the course of several meetings, Permann explored Marr’s reasons and strategy for wanting to purchase this specific product. CP 404-09.

Like many Americans in 2008, Marr anticipated declining income

² Permann testified during a deposition about the sale of the Nationwide annuity to Marr. Nationwide submitted this deposition testimony—contained in Appendix A—to support the summary judgment motions. CP 399-424. Gary has objected to other submissions, see CP 621-622, but Gary never objected to admission of this testimony.

from his financial portfolio as a result of losses sustained in the economic downturn. *Id.* He also expected to receive gradually less income from a contract with his former business partner and son-in-law, who had purchased his agronomy business. *Id.* With the SPIA, Marr sought a guaranteed stream of additional income to maintain his lifestyle and continue to make his charitable contributions for the remainder of his life. *Id.* He wanted the SPIA annuity because it offered a high monthly payment. CP 401-03. Marr had other assets for the benefit of his heirs that were available for distribution. CP 307, CP 423, CP 442.

Permann repeatedly informed Marr that there was no death payout. CP 413-15, CP 420-21. He explained to Marr that he had to live five to seven years in order to receive payments equal to the amount of the single payment premium. *Id.* They discussed Marr's health and how long he expected to live. CP 414-17. Marr stated that he had lost weight due to his diabetes, but had no health concerns. CP 414-17, CP 424. Marr described an active lifestyle to Permann, including housework, caring for his orchard, and consulting work that required him to be out in the fields. CP 406, CP 418. Marr informed Permann that he planned to live for another ten years.³ CP 414.

³ Marr's financial records confirm that he was planning his financial future based on an expectation that he would live through 2016. CP 307, CP 377.

Marr and Permann discussed alternative financial vehicles to generate guaranteed income. Permann showed Marr the monthly payments he would receive if he purchased annuities with and without death benefits. CP 422-23. Marr rejected an annuity with a death benefit because he wanted to maximize the guaranteed monthly payment. *Id.* The annuity premium represented a small fraction, less than 5%, of Marr and his wife's liquid net worth. CP 423, CP 679. A SPIA with no death benefit was a suitable choice to achieve Marr's stated objectives. CP 412-14. Permann shopped other insurance companies and they identified the Nationwide annuity as having the highest payout. CP 411-12. Marr purchased the Nationwide annuity for himself, and another SPIA with no death benefit for his wife. CP 675.

3. The terms of the annuity contract and writings are consistent with this choice

“An annuity is a contract in which an insurance company makes a series of income payments at regular intervals in return for a premium or premiums” CP 751. The Nationwide INCOME Promise annuity, approved by the Washington State Insurance Commissioner, requires a single premium payment. CP 674, CP 689.

Annuity products include a variety of “income options.” CP 755. Throughout the litigation, the parties have described the Nationwide SPIA

as not having a “death benefit.” That is a shorthand way of describing a “life only” income option with no payout after death. The Buyer’s Guide to Fixed Deferred Annuities (“Buyer’s Guide”), prepared by the National Association of Insurance Commissioners, describes this income option as follows:

Life Only - The company pays income for your lifetime. It doesn’t make any payments to anyone after you die. This payment option usually pays the highest income possible. You might choose it if you have no dependents, if you have taken care of them through other means or if the dependents have enough income of their own.

CP 755.

SPIAs with no death benefit are appropriate financial products when the intent of the annuitant is to maximize his or her monthly income payment on a fully guaranteed basis. CP 345, CP 499. SPIAs are especially attractive products in uncertain economic environments. *Id.* Not surprisingly, the economic collapse of 2008 resulted in a substantial increase in the purchase of SPIAs. *Id.*

The Nationwide contract uses the term “Single Life” for its “Life Only” income option. CP 689. Under the heading “Income Options,” the contract states in plain language: “Single Life: Annuity payment 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. In

contrast, the “Single Life with Installment Refund” income option pays a lower monthly income payment, but includes a death benefit, describing the refund option this way: “If the Annuitant dies prior to receiving aggregate annuity payments that are at least equal to the single purchase payment, then the Beneficiary will receive payments until all of the payments made under the Contract equal the single purchase payment.” CP 689.

An annuitant’s age and sex determine the monthly income payment under a SPIA. The older the annuitant is when benefits begin, the higher the monthly payment will be. If an annuitant dies earlier than the actuarial tables project, the premium may not be recouped. Conversely, if the annuitant lives longer than the actuarial tables project, the annuitant has a guaranteed stream of income that could far exceed the actual premium paid for by the annuitant. CP 674. Marr contracted for a monthly payment of \$1,418. CP 674. It would have taken a little less than six years to recoup the premium. He thought he would live at least ten years. CP 377-414. His death was a surprise to his family. CP 370.

The parties have referred to the Nationwide annuity as having no “death benefit” because, once Marr began receiving the monthly payments like he did, no payments would be made to anyone after Marr died. There is one circumstance where this annuity policy includes a death benefit if

the purchaser dies “before the income payments start.” The Buyer’s

Guide explains it this way:

Death Benefit – In some annuity contracts, the company may pay a death benefit to your beneficiary if you die before the income payments start. The most common death benefit is the contract value or the premium paid, whichever is more. CP 755.

Nationwide’s annuity included such a benefit. CP 693. Thus, the identification of a “beneficiary” in the application was necessary so Nationwide would know who to pay if Marr died before he received any payments.⁴ But Marr did not die before he received any payments.

4. As bargained for, the annuity provided no death payout when Marr died

Marr died on October 30, 2011. His stepdaughter Ms. Sickles-Miller testified that his death was a surprise. CP 370. Nationwide had paid Marr the monthly income to which it agreed for 34 months. CP 3. Gary questions the wisdom of his father’s purchase because the annuity did not result in any benefits to heirs or beneficiaries, including him. Gary contends that Marr might not have known that there was no death payout when he purchased the Nationwide annuity. He offers no evidence supporting his contention; instead, he offers speculation by him and his

⁴ Respondents continue to refer to the annuity as one without a “death benefit” to remain consistent with the testimony of the parties and other witnesses, including Gary’s expert insurance witness Mr. Olsen.

expert. All the evidence is to the contrary.

The following undisputed facts support the conclusion that Marr understood the product had no death payout:

- Marr came to Permann with a quote for a SPIA with no death benefit. CP 401-03, CP 412.
- Permann informed Marr on numerous occasions that the annuity did not include a death benefit. CP 413-15, CP 420-21.
- Permann showed Marr numerous SPIAs with, and without, a death benefit. CP 422-23.
- The Nationwide contract states, “Payments will cease with the last payment due prior to the death of the Annuitant.” CP 689.
- The Nationwide Supplementary Agreement Data Page for Individual Annuity Contract, which was provided to Marr, states: “You have selected an annuity for a Straight Life under which Monthly payment will be made during the guaranteed period. There is no death benefit payable under this option.” CP 766.
- Marr’s stepson and business partner of many years testified that Marr always read contracts before signing them. CP 531-32.
- Permann gave Marr two copies of the Buyer’s Guide to Fixed Deferred Annuities, authored by the National Association of Insurance Commissioners, which describes life only annuities as follows: “The company pays income for your lifetime. It doesn’t make any payments to anyone after you die. This payment option usually pays the highest income possible.” CP 419, CP 755.
- While he was considering and purchasing the Nationwide annuity, Marr also obtained quotes and contracts for his wife Elizabeth for a SPIA with no death benefit from West Coast Life Insurance, which she canceled because Permann found a higher paying product. CP 675, CP 695-715. Marr was provided West Coast’s “Annuity Illustration Narrative,” which describes the “Single Life Only” payout

option as follows: "Payments will continue to be made as long as the Annuitant is alive. Payments will stop upon the death of the Annuitant, no matter how few or how many payments have been made." CP 697.

- After Elizabeth canceled the West Coast Life Insurance annuity, Marr obtained quotes and contracts from Penn Mutual for a different SPIA for Elizabeth also with no death benefit. CP 675, CP 716-50. Marr was provided Penn Mutual's "Supplemental Application for Single Premium Immediate Annuity," which states: "I fully understand that I am purchasing a NO REFUND ANNUITY. There is no Death Benefit at the time of my death." CP 675, CP 739.
- Marr purchased two more SPIAs with no death benefits for himself and his wife from Western United Life Assurance Company almost a year later in or about September 2009. CP 444-50.
- Toward the end of 2009, Marr had a conversation with his stepdaughter Ms. Sickles-Miller discussing the absence of a death benefit in the Nationwide annuity and expressing his understanding that he needed to live for seven years to recoup his premium. CP 369.

This evidence shows that the annuity transaction was fairly and truthfully disclosed by the product materials and explained by the agent in a way that any reasonable consumer would understand. The evidence also shows that Marr (a sophisticated consumer) actually understood it. In contrast, Gary produced no evidence that Marr failed to understand the purchase, was deceived or was not properly advised.

B. After Marr Died, Marr's Son Gary Waddoups Sued Under Multiple Theories to Recover Damages for Lack of a Death Benefit

Gary Waddoups sued Permann, Permann's company Financial Management, Inc., and Nationwide in March 2013. CP 1-6 (Complaint);

CP 187-98 (Amended Complaint). He alleged three causes of action to recover for lack of a death benefit in the Nationwide annuity: violation of the Washington Consumer Protection Act (Chapter 19.86 RCW), breach of fiduciary duty, and “violation” of the Insurance Code.⁵ CP 187-98.

Respondents moved for summary judgment on all three claims, adopting each other’s arguments. CP 254-76, CP 457-76. No cross-motion was brought. The trial court ruled on evidentiary motions as part of the summary judgment motion practice. See CP 839-58.

Gary sought reconsideration without offering grounds or authority under CR 59. CP 859-72. The trial court denied reconsideration. CP 970-71.

IV. ARGUMENT

The trial court correctly granted summary judgment to Respondents. Gary offered no evidence to support his claims. Gary’s theory that his father may not have understood the lack of a death benefit is predicated on conjecture. All of the actual evidence in this case shows that Marr was fully informed and Permman breached no duty of care.

⁵ Gary does not address the third claim in his brief, so it is not before the court. The third claim was properly dismissed for the same reasons as the first and second claims. In addition, the third claim fails because there is no private right of action under the Insurance Code, RCW Chapter 48.30 et seq. See *Evergreen International Inc. v. American Casualty of Reading, PA*, 52 Wn. App. 548, 557, 761 P.2d 964 (1988); *Trinidad v. Metropolitan Property and Casualty Ins. Co.*, 2013 WL 6729639 (W.D. Wash. 2013).

Further, Gary cannot establish proximate cause. Other issues raised by Gary are insubstantial. Summary judgment is proper if reasonable persons could only reach but one conclusion from all the evidence. *McKee v. Am. Home Prods. Corp.*, 113 Wn.2d 701, 782 P.2d 1045 (1989). That is the case here. This Court should affirm.

To survive summary judgment, a plaintiff must “set forth specific facts showing that there is a genuine issue for trial.” CR 56(e). A plaintiff must make a prima facie showing of each element. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)). Conjecture cannot sustain a party’s evidentiary burden. *Callahan v. Keystone Fireworks Mfg. Co.*, 72 Wn.2d 823, 829, 435 P.2d 626 (1967) (distinction exists between a reasonable inference and “that which is mere conjecture.”) (quoting *Gardner v. Seymour*, 27 Wn.2d 802, 808-09, 180 P.2d 564 (1947)). Here, Gary has not made a prima facie showing to support his claims. Dismissal was correct.

A. Gary Offered Insufficient Evidence to Support the CPA Claim Where No Evidence Shows That the Annuity Sale Was Unfair or Deceptive or That Marr Believed He Was Purchasing an Annuity That Included a Death Benefit

The trial court correctly dismissed the CPA claim. No evidence demonstrates any unfair or deceptive act in the annuity sale. The annuity

contract documents and the evidence of Permann's conduct show a forthright and transparent transaction. Gary's argument that Marr *might* have misunderstood is insufficient to avoid summary judgment. The overwhelming evidence is to the contrary. Further, no evidence shows that a SPIA with no death benefit was unsuitable and therefore unfair or deceptive. It precisely met Marr's stated financial objectives to devote a small portion of his assets to a high, guaranteed monthly income as many investors did after the 2008 market crash. Gary argues that his father suffered severe health ailments that made the purchase unsuitable, and attempted after judgment to add evidence on this issue. The record is devoid of admissible evidence to demonstrate this and, more significantly to the issue on appeal, Gary never showed that Marr revealed health concerns to Permann when they discussed Marr's health and longevity. To the contrary, Marr communicated that even with diabetes he expected to live another ten years.

Gary disapproves of his father's purchase in hindsight. But the evidence supports one conclusion only: Marr understood and accepted the risk that he might not recover the premium in order to meet his objective of a guaranteed income stream with large payments as a small portion of

his financial portfolio. This Court should affirm the summary judgment.⁶

None of Gary's CPA authorities dictate a different outcome. The inquiry under the CPA is fact specific. Gary offered insufficient evidence to establish the five necessary elements of a CPA claim: (1) an unfair or deceptive act or practice; (2) occurring in trade or practice; (3) affecting the public interest; (4) an injury to the plaintiff's business or property; and (5) a causal link between the unfair or deceptive acts and the injury. *See Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780, 719 P.2d 531 (1986); RCW 19.86.020. An act is unfair or deceptive if it has the capacity to deceive a substantial portion of the public. *Nelson v. Nat'l Fund Raising Consultants, Inc.*, 120 Wn.2d 382, 392, 842 P.2d 473 (1992). To establish causation under the CPA, a plaintiff must show that "but for" the defendant's unfair or deceptive practice, the plaintiff would not have suffered an injury. *Indoor Billboard/Washington, Inc. v. Integra Telecom of Wash., Inc.*, 162 Wn.2d 59, 81, 84, 170 P.3d 10 (2007) (despite liberal interpretation of the CPA, a "but for" proximate cause analysis is essential to a CPA claim). *Id.* at 81.

Gary failed to establish the first, fourth and fifth elements including

⁶ Gary asks for a ruling from this Court "as a matter of law" that an unfair or deceptive act occurred. AB 8. Gary never moved for affirmative relief in the trial court. He is not entitled to any legal ruling from this Court that he has established any element of his claims. The only issue is whether he submitted sufficient evidence to support reversal of the dismissal.

showing an “unfair or deceptive” act and “but for” causation of an injury.

1. Gary offered no evidence to show an unfair or deceptive act.

Gary failed to show any unfair or deceptive act. All of the facts and circumstances instead prove a truthful and transparent transaction that Marr understood and that furthered his financial objectives. Although a defendant has no burden to disprove a plaintiff’s theory, the undisputed facts of his case do so conclusively.

Gary alleges that Nationwide’s and Permann’s communications were confusing and failed to adequately disclose that the annuity did not include a death benefit. To make his argument, Gary turns a blind eye to the evidence. He relies on isolated portions of certain communications and his contentions of how this might be confusing. This is insufficient. The undisputed facts show that the transaction did not have the capacity to deceive a substantial portion of the public. The transaction was not unfair or deceptive. Marr selected the annuity he wanted to generate a large, lifetime guaranteed income stream.

Beginning with the contract itself, the terms unambiguously state that no payments would occur after Marr’s death. That alone is a sufficient reason to affirm the trial court. Marr always thoroughly read and understood the terms of the contracts into which he entered, according

to his son-in-law and business associate of over 20 years. CP 350-51, 357-58. His habits were consistent with Washington law, under which parties are bound to know and understand the terms of contracts voluntarily signed. *National Bank of Washington v. Equity Investors*, 81 Wn.2d 886, 912, 506 P.2d 20 (1973). Here, the Contract Information Page identifies the “Income Option Elected” as “Single Life.” CP 684. The contract describes this selection as: “Annuity payment will be made during the lifetime of the Annuitant. Payment will cease with the last payment due prior to the death of the Annuitant.” CP 689. This was the choice Marr selected.

In contrast, the “Single Life with Installment Refund” option with a lower monthly income payment, which Marr did not select, is described in the same section as: “Annuity payments will be made during the lifetime of the Annuitant. If the Annuitant dies prior to receiving aggregate annuity payments that are at least equal to the single purchase payment, then the Beneficiary will receive payments until all of the payment made under the Contract equal the single purchase price.” CP 689. The distinctions between the two are plain. They are also set forth together, allowing a purchaser to perceive the contrast between them.

Nationwide then sent Marr a Supplementary Agreement to Individual Annuity Contract, which confirmed his selection, stating,

You have selected an annuity for a Straight Life under which Monthly payments will be made during the guaranteed period. There is no death benefit payable under this option. Upon your death, payments will stop.

CP 676, 755-67. (emphasis added). Marr received the Supplementary Agreement before the ten-day cancellation period expired. *Id.* It is consistent with his election in the annuity.

Gary complains that the term “Straight Life” in the Supplementary Agreement is not the same as “Single Life” in the annuity. *See* Appellant’s Brief (“AB”) 19-20. Gary offers no evidence to show that this caused any confusion. The annuity shows that Marr selected the option that maximized his income during life and not the alternative choice that would have benefitted Gary. The Supplementary Agreement reinforces that no misunderstanding occurred by confirming Nationwide’s understanding that Marr selected an annuity without a death benefit: “There is no death benefit under this option.” If this had been inconsistent with Marr’s desire, Marr could have canceled or clarified the transaction with Permann. But he did not. Nothing in the contract is deceptive.

Gary argues that identification of a “beneficiary” in the annuity application might have confused Marr. AB 13-18. As noted above, what “might” have happened is speculative. The identification of a beneficiary has a purpose within the contract because the annuity *does* provide for a payout to the specified beneficiary if the annuitant dies before the

payments begin. Under “Death of Annuitant,” a refund of the single purchase payment to the Beneficiary occurs if the applicant dies before the income start date. CP 693, CP 755.⁷ RCW 49.23.490 requires this particular death benefit “prior to the commencement of any annuity payments” or requires a disclosure that such benefit does not exist.⁸ The specification of a “beneficiary” had a specific purpose consistent with the terms of the annuity that was, in fact, required by Washington law. Because Marr began receiving payments on the annuity, this benefit was never triggered. The existence of the beneficiary provision in the annuity does not support Gary’s claim under the CPA.

Gary now argues that Nationwide violated RCW 49.23.490 by not disclosing the lack of a death benefit in a prominent place. AB 18-20. Because Gary raises this argument for the first time on appeal, the Court should not consider it. RAP 2.5(a) (“The appellate court may refuse to review any claim of error which was not raised in the trial.”). If the Court

⁷ “Death Benefit – In some annuity contracts, the company may pay a death benefit to your beneficiary if you die before the income payments start. The most common death benefit is the contract value or the premium paid, whichever is more.” CP 755.

⁸ “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.” RCW 49.23.490 (emphasis added).

does entertain it, the Court should conclude that Gary misreads the statute. As already noted, the statute relates to lack of a death benefit “prior to commencement of any annuity payments.” RCW 49.23.490 (*see supra*, note 8). Nationwide’s policy provides this death benefit. That is precisely why Marr was asked to specify a beneficiary. Because the annuity provides the referenced benefit, Nationwide was not required by the statute to disclaim it. No violation is shown. It is uncontested that the State of Washington approved the annuity for sale.

Gary also complains that the Investment Account Summaries prepared quarterly by Permarr after Marr’s purchase of the annuity include reference to a “Total Value” of \$100,000 for the annuity, which Gary alleges *might* be misleading. AB 20-21. *See also* CP 563, 565, 567, 569, 571, 573, 575. Gary first raised this argument in the Motion for Reconsideration, and offered no reason it could not have been previously argued. This Court should not consider it.

Even if the evidence is considered, however, it does not support Gary’s theory. The \$100,000 value in these subsequent summaries does not demonstrate that Marr or Permarr misunderstood whether the annuity contained a death benefit—it is silent on the issue. Further, the value remains a constant \$100,000 and does not fluctuate as Nationwide made monthly payments over time. This directly contradicts Gary’s other

speculative argument that the *subtraction* of income payments from the premium in Marr's own ledger indicates Marr was tracking a death benefit. AB 39-40.⁹ The arguments are not only speculative, they are contradictory regarding what Gary contends they might show. Neither is sufficiently probative to show that Marr failed to understand that the annuity had no death benefit or any unfair or deceptive act.

Finally, Gary argues that liability exists under RCW 48.30.210¹⁰ because he alleges Permann falsely certified to Nationwide that the annuity was suitable, and this substantiates deception. AB 22-24. But the certification is not a communication to Marr. This statute provides a mechanism to hold accountable those that make false statements to insurers; it does not state a prohibition on conduct toward purchasers. Further, Gary never supports the premise that Permann's certification was knowingly false, as discussed immediately below in Section IV.A.2. On this record, no jury could conclude it was knowingly false.

⁹ Gary identifies a single page in the ledgers where Marr subtracted the amounts received from Nationwide from the initial payment. CP 620. This may show that Marr was tracking his recovery against the initial payment, but it does nothing to show that he did so *because he thought there was a death benefit*.

¹⁰ "Misrepresentation in application for insurance. 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 any such person may be revoked." RCW 48.30.210.

Gary's allegation that Marr might have been confused remains unsubstantiated by the evidence Gary offered and his arguments. The evidence to the contrary is overwhelming, including all evidence listed with record citation in the Counter Statement of the Case, *supra*, III.A.4. On this record, no juror could find an unfair or deceptive act.

2. No evidence shows that the annuity was unsuitable and therefore unfair or deceptive

Gary failed to establish that the annuity was unsuitable. He also fails to show that Permann knew or should have known any facts that would have shown unsuitability. The CPA claim cannot survive.

- a. None of the lay testimony or documentary evidence shows that the annuity was unsuitable and that Permann should have known it.

Gary never argued to the trial court that Marr's diabetic condition in December 2008 rendered the policy unsuitable. *See* CP 583-87. Gary waived the argument, as argued in reply (*see* CP 646-47). This supports affirmance. No competent evidence supports the argument to this Court. The record contains no testimony from any witness, including from a doctor, that in December 2008 Marr had serious health concerns or that Marr's diabetes was not controlled. Gary has never presented any evidence that Marr's diabetes would, or was expected to, shorten Marr's life. Further, it is undisputed Marr *disclosed* no serious health concerns to

Permarr. When Permarr and Marr discussed his health in the context of the annuity purchase, Marr mentioned only his diabetes diagnosis and indicated that he thought he would live another ten years.¹¹ Indeed, Marr appeared to be an active senior, working in his orchards and conducting field tests. When he died, it came as a surprise to his family. CP 370. No evidence shows that Permarr did, or should have, judged the annuity unsuitable based on Marr's health.

This Court should take care to distinguish the evidence submitted at the summary judgment proceedings from the additional evidence Gary submitted on reconsideration without justification or foundation. Gary fails to distinguish between the evidence throughout his entire brief, repeatedly asserting medical conditions that were not in evidence at the summary judgment hearing. The only medical fact established at the time of summary judgment was that Marr had diabetes.

Scratching the bottom of the evidentiary barrel, Gary tries to impugn the transaction by relying on a mistake in Permarr's Answer, which mistake was corrected within days. See AB 24-25. Permarr's attorney filed an Answer indicating that Permarr had counselled Marr against purchasing the annuity. CP 27 at ¶ 15. This immediately was

¹¹ Marr's belief he would live about another ten years informed all of Marr's financial planning. See CP 307, CP 377.

amended to eliminate the averment. *See* CP 36-37 at ¶ 17 (Amended Answer). Permann testified in his deposition that after making a comprehensive inquiry of Marr as to his financial strategy and the objective of the annuity, Permann believed that the annuity was consistent with Marr’s reasonable financial strategy, what Marr disclosed about his health when Permann inquired, and what Permann knew of Marr.¹² No unfair or deceptive act is shown by the original answer.

Gary also offers his own testimony that Permann said Marr “would have just gone somewhere else to buy” a SPIA with no death benefit, *see* AB 25 citing CP 599, but this also fails to carry his burden that the annuity was unsuitable. Even if Permann said this, it demonstrates that Marr, a competent, sophisticated investor, knew what he wanted. It does not support an inference that Permann knowingly sold an unsuitable annuity or that the annuity was in fact unsuitable.

Finally, Gary offers a misreading of Permann’s notes when he argues that Permann admitted that the Nationwide annuity was “maybe a

¹² Marr shared with Permann detailed ledgers demonstrating the declining income. CP 404. Permann testified that “And after talking with him about that, it became more evident to me why he wanted it and why it would fit his scenario, in light of our other discussions.” CP 404. Even if this Court assumed based on the Answer that Permann initially counseled against a SPIA with no death benefit—which is contrary to all other evidence—this is consistent with Permann’s testimony that discussion with Marr caused Permann to conclude the annuity met Marr’s objectives and was suitable.

bad idea.” See AB 25. Permann’s note states: “We also need to – [Bob Sickles and Cheryl Miller] are researching other immediate annuities that [Marr] may have purchased in the past. Certainly frustrated with those and I discussed my dealings with [Marr] and why that was maybe a bad idea.” CP 620. Permann’s notes do not refer to the Nationwide annuity, as Gary wrongly argues. After Marr’s death, Marr’s children were “researching *other* immediate annuities” apart from the Nationwide annuity, as Gary’s own testimony shows. CP 599. These were annuities purchased later through another broker and did not include the annuity at issue in this lawsuit. CP 444-50. Marr’s health declined dramatically *after* the Nationwide annuity was purchased. CP 298, 301-02. The notes reflect that “other” annuities purchased through another broker “may” have been a bad idea. The evidence is not relevant to Gary’s proof regarding the Nationwide annuity. Even if Permann had been referring to the Nationwide annuity, this bare reference is insufficient to support a finding that the annuity was unsuitable or that Permann knew it.

In hindsight, given that Marr died in October 2011, any annuities may appear a “bad idea” if one were interested in maximizing recovery of proceeds by Marr’s heirs. But this is not the inquiry to determine suitability. Marr knowingly bargained for a fully guaranteed stream of income for the remainder of his life. As already noted, this annuity was

approximately 5% of Marr's assets. For this small portion of his assets, he prioritized his personal income for the rest of his life over a death benefit for his heirs. This was a reasonable strategy. Gary fails to show otherwise. A reasonable juror could not find an unfair or deceptive act.

Finally, Gary argues that the sale of the annuity was unfair because the contract was delivered after the "income start date." AB 33-35. He suggests that the delivery of the contract violated RCW 48.23.170, breached the contract, and deprived Marr of the ten-day free-look period. Prior to this appeal, Appellant never argued that the delivery date violated RCW 48.23.170 or that it was a breach of contract. He argued that the delivery undermined the ten-day free-look period at oral argument on the summary judgment motion. Verbatim Report 38. Again, under RAP 2.5(a), this Court should not entertain the new theory.

The new theory also fails on the merits. RCW 48.23.170 states nothing about the timing or delivery of annuity contracts, nor does it use the term "piecemealing." Appellant fails to show that the alleged late delivery deceived or confused Marr. A breach of contract is not a CPA violation. *Lightfoot v. McDonald*, 86 Wash.2d 331, 335-36, 544 P.2d 88 (1976). Lastly, the ten-day free-look period is triggered by the delivery of the contract, not the income start date. CP 683 ("Within ten days of the day the Contract is received by the Owner, it may be

returned for any reason to the Home Office of the Company or the agent through whom it was purchased.”). Therefore, the alleged late delivery had no impact on Marr’s right to cancel.

- b. Gary’s expert testimony does not establish unsuitability.

Mr. Olsen’s testimony failed to support a finding of unsuitability. Gary improvidently attempted to rely on his insurance expert to testify about medical issues. But Mr. Olsen has no medical training to allow him to opine on diabetes or its impact on Marr’s life expectancy. CP 331-32, CP 341. The evidence shows that Permann complied with the standard of care articulated by Mr. Olsen.

Mr. Olsen testified only that it is “arguable” among brokers whether diabetes renders a SPIA with no death benefit unsuitable. CP 502. That does not establish a standard of care nor create a triable issue of fact. Mr. Olsen testified that an agent is not required to have any medical training or expertise in life expectancy. CP 334-35, CP 341. If the annuitant looks healthy and discloses that he plans to live for another ten years, the agent may rely on that information, according to Mr. Olsen. CP 343-44. An agent is not required to request an annuitant’s medical records or conduct an investigation into the annuitant’s health status. CP 332-33. Instead, Mr. Olsen testified that the standard of care requires an agent

selling a SPIA with no death benefit to: (1) inquire of the annuitant about his or her health; and (2) explain to the annuitant that the absence of a death benefit means that he or she has to live for a certain length of time to recover the premium.¹³ CP 333. Permann took all of these actions.

The trial court properly limited the scope of financial industry expert Mr. Olsen's testimony to the sale of annuities. The trial court correctly concluded that Mr. Olsen was not qualified to testify that the annuity was unsuitable because of Marr's health status. Mr. Olsen testified that he has no medical training to allow him to opine on diabetes or its impact on the life expectancy of Marr. CP 331-32, CP 341. Mr. Olsen nevertheless attempted to go beyond his own expertise and postulate opinions based on medical expertise that he lacked, as follows:

Q. For the purpose of underwriting, insurance companies are going to – view Type 2 diabetes that's controlled by, you know, medication differently. Fair?

A. That's correct.

Q. And a broker may view that differently as well?

A. I don't know what you mean by that.

Q. Well, some brokers may argue, disagree with you that when Type 2 diabetes is well controlled by medication that it isn't suitable to sell to an 85-year-old –

A. I said it wasn't arguably suitable.

Q. Say that again.

¹³ Gary cites RCW 48.23.015 and WAC 284-23-390 as "illustrating appropriate suitability inquiries." AB 29-30. The statute and regulation do not apply to this case; both became effective after Marr purchased the Nationwide annuity. Even if they had legal relevance, which they do not, the record shows Permann obtained such information.

A. I said arguably it's not suitable because of the diminished life expectancy.

Q. And arguably it is suitable because Type 2 diabetes can be controlled and some people might view that as a controlled Type 2 diabetes doesn't have an effect or at least an unknown effect on the –how that's going to or at least an unknown effect on the –how that's going to impact a person's life expectancy.

A. Well, based upon the medical information I'm seeing here, it would appear that it was unsuitable.

CP 502.

The trial court correctly recognized that Mr. Olsen was not a qualified medical expert and that the portions of his opinions related to Marr's health and life expectancy lacked foundation; the trial court consequently limited Mr. Olsen's testimony to insurance issues. See CP 1039-41 (order granting in part Respondents' motion to exclude).

A trial court's decision to exclude expert testimony is reviewed for abuse of discretion even on summary judgment. *Lakey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 919, 296 P.3d 860 (2013) (reviewing trial court's exclusion on summary judgment of expert testimony under ER 702 for abuse of discretion); *McKee v. Am. Home Prods. Corp.*, 113 Wn.2d 701, 706 (reviewing trial court's evaluation of an expert's qualifications for purposes of summary judgment hearing for abuse of discretion). Gary misconstrues *Lakey* to argue otherwise. See AB 46.

The admissibility of expert testimony is governed by ER 702 and depends on whether: "(1) the witness qualifies as an expert; (2) the

opinion is based upon an explanatory theory generally accepted in the scientific community; and (3) the expert testimony would be helpful to the trier of fact.” *State v. Willis*, 151 Wn.2d 255, 262, 87 P.3d 1164 (2004).

“Conclusory or speculative expert opinions lacking an adequate foundation will not be admitted.” *Stedman v. Cooper*, 172 Wn. App. 9, 16, 292 P.3d 764 (2012). A witness’s qualifications as an expert must be established by the party presenting the witness. *Doty-Fielding v. Town of South Prairie*, 143 Wn. App. 559, 566, 178 P.3d 1054 (2012), citing ER 702. In light of these standards, this Court should affirm the trial court’s exclusion of Mr. Olsen’s testimony regarding medical issues and life expectancy.¹⁴ Gary fails to show that the trial judge abused its discretion.

¹⁴ Mr. Olsen relied on the Complaint for factual background on Marr’s diabetic condition, CP 328-29, CP 331, a timeline made by Gary that is not substantively admitted into evidence, CP 279 ¶ 12, 452-54, and an Internet search for analysis of the impact of diabetes on life expectancy. CP 334-41. But he admitted that he has no information about the qualifications of the authors of the articles. CP 334-40. Nor did he testify that this is the type of article he or any broker could rely on. One of the authors, holding himself out as a naturopath, proffered as his primary recommendation to ignore the recommendations of physicians and the American Diabetes Association. CP 391. Ironically, even if the authors were qualified, the point of their articles—a point Mr. Olsen missed—was that life expectancy is reduced when diabetes *goes untreated*. CP 390 (“This is especially tragic because the vast majority could relatively easily control the disease the rest of their lives and have completely normal blood sugars without any medications, as this is one of the easiest chronic diseases to normalize.”). Gary failed to offer evidence that Marr’s diabetes was untreated or that Permann should have known it was untreated.

Gary argues that the exclusion was error because Marr's diabetes was a known condition, not in dispute, and that Mr. Olsen was merely rendering an insurance opinion divorced from medical analysis. This is inaccurate. Mr. Olsen testified that insurance agents *disagree* about whether diabetes renders the sale of a SPIA without a death benefit to an 85-year-old unsuitable. CP 502. He could not state a standard of care in the industry on this point. Further, Gary submitted no evidence elucidating Marr's conditions and gave Mr. Olsen no medical expert testimony on which to rely.

Gary cites *Johnston-Forbes v. Matsunaga*, 181 Wn.2d 346, 333 P.3d 388 (2014), see AB 47-48, to argue error, but this authority supports affirmance. In *Johnston-Forbes*, the trial court held that a biomechanical expert could testify about forces involved in a car accident and could compare those forces to activities of daily living. 181 Wn.2d at 356. The expert, however, "did not opine as to whether the forces involved in the crash would have caused injuries to anyone in general or to [the plaintiff] in particular." *Id.* Thus, the expert's testimony properly was limited to his expertise, and avoided reaching a conclusion that required medical expertise. The Court of Appeals and the Supreme Court affirmed. *Id.*

Here, the trial court understood the distinction articulated in *Johnston-Forbes* and properly applied it. The trial court permitted

Mr. Olsen to testify about the sale of annuities and the standard of care of insurance agents related to suitability. The court prevented Mr. Olsen, however, from opining on the suitability of the annuity “based upon Mr. Waddoups’ health or life expectancy” where Marr’s health and life expectancy had not been established by other evidence and Mr. Olsen held no expertise in these areas. As in *Johnston-Forbes*, Mr. Olsen could not reach conclusions that required application of medical expertise.

Gary tries to support Mr. Olsen’s testimony with reference to the late submission in his reconsideration materials of an “uninsurable conditions” document. This attempt is unavailing. Mr. Olsen never testified about “uninsurable conditions” or provided any list of medical conditions or diabetes symptoms on which insurance agents can rely to evaluate the suitability of an annuity. The document does not support any of Mr. Olsen’s opinions. This Court should not find that the trial court abused its discretion in limiting Mr. Olsen’s opinion testimony.

On reconsideration, Gary attempted to include evidence of Marr’s medical conditions, but simply attached purported records containing hearsay to the declaration of his counsel without foundation. See CP 873-74, CP 894-95, CP 897-900. The trial court denied reconsideration. “Motions for reconsideration are addressed to the sound discretion of the trial court.” *Perry v. Hamilton*, 51 Wn. App. 936, 938, 756 P.2d 150

(1988) (“[A] reviewing court will not reverse a trial court’s [reconsideration] ruling absent a showing of manifest abuse of that discretion.”) Denial was proper for multiple reasons.

Introduction of “[n]ewly discovered evidence” is allowed if the party “could not with reasonable diligence have discovered” it. CR 59(A)(4). As Respondents showed in their response (see CP 926), Gary offered no justification under CR 59 for reconsideration including any facts to justify the submission of new materials and revised expert opinions. See CP 873-74.¹⁵ The submissions attached to Gary’s attorney’s declaration contained unauthenticated documents rife with hearsay. *Id.* The materials were inadmissible and untimely.¹⁶

This last ditch effort also fails on the merits; the materials do not support reversal. No medical or other document or testimony demonstrates that any of Marr’s symptoms or diagnoses reduced the life expectancy of a diabetic undergoing regular medical care like Marr.

¹⁵ The trial court already had granted Gary an extension to obtain the initial opinion of Mr. Olsen, see CP 50-56, CP 179-81, because Gary had encountered difficulty finding a willing expert. See CP 171 (“Willing expert witnesses in this area, both by expertise and geography, are not easy to find.”). Mr. Olsen hails from St. Louis, Mo. CP 157.

¹⁶ Gary appears to suggest in his brief that the trial court ruled on admissibility of the tardy, unsupported evidence in his favor. See AB 48. This is not shown by the order, which contains no evidentiary ruling but simply denies reconsideration. See CP 970-71.

Further, nothing shows that anything in these submissions ever was communicated to Permann. The evidence is uncontroverted that Permann was unaware of information contained in Marr's medical records. Gary's expert already has testified that Permann had no duty to obtain medical records or confirm Marr's representations that he had diabetes and expected to live ten more years. According to Mr. Olsen, Permann could rely on Marr's answers without conducting further investigation.¹⁷

Mr. Olsen's testimony did not establish unsuitability. Also, given Mr. Olsen's testimony on the standard of care of an agent considering suitability based on health, the only conclusion a juror could make on this record is that Permann satisfied the standard. Again, the trial court properly dismissed the CPA claim for lack of evidence of an unfair or deceptive act.

3. Gary offered insufficient evidence to establish injury and causation

Gary also failed to submit evidence to support the necessary CPA elements of injury and causation. As noted, the CPA requires both an injury to the plaintiff's business or property and a causal, "but for" link

¹⁷ Permann specifically inquired about Marr's health and how long he expected to live. CP 414-417. Marr mentioned that he had lost weight to manage his diabetes, but he had no significant health concerns. CP 414-17, CP 424. Marr also described his activities, including housework, gardening, and consulting work in the fields. CP 406, CP 418. Marr informed Permann that he planned to live for another ten years. CP 414.

between the unfair or deceptive acts and the injury suffered by plaintiff. *See Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., supra*, 105 Wn.2d at 780; *Indoor Billboard/Washington, Inc., supra*, 162 Wn.2d at 81; RCW 19.86.020. Putting aside Gary's arguments that the annuity contract might be confusing in the abstract or that it was "arguably" unsuitable, the uncontroverted evidence is that Marr, a sophisticated, hands-on investor, purchased the annuity he wanted. He wanted the "guaranteed maximum income he could get," CP 407, and was willing to give up a death benefit to get it. This course of action made sense because his monthly income had declined due to reduced payments on the contract for the sale of his business and the losses he sustained on his bond portfolio. *See* CP 402, 405-06. No evidence shows Marr would have altered his strategy based on modified explanations in the contracts or additional discussions. Proof of "but for" causation requires evidence that an actionable act or omission caused injury. Gary offered no evidence to show this. This negates the causation element.

Marr and Permann talked about the suitability of the annuity, the relationship of Marr's life expectancy to the annuity, and the absence of a death benefit; Marr continued to want this annuity, as Permann testified:

Q. Do you recall, in the three or four meetings that you had with him between when he originally presented you with a New York Life quote and when he signed the

application, if health concerns came up in your conversation with him?

A. We talked about how long he would have to live to receive all of his money back, and I think it was around five, six years, and he knew that. He knew exactly what that was. And that was part of our discussion, because I'm concerned about that. And I shared that with him and I made sure he understood that.

CP 410.

Q. So, what did you do, if anything, to determine that it was a suitable annuity?

A. Like I mentioned before, we talked about his situation, his goals, his need for income, his other assets. We considered his portfolios and I talked about total return in, you know, every – a lot of the things that we talked about in about every review meeting that we had with him. And why he wanted that, why it would fit, and what the pluses and minuses of that decision might be. So that's – those kind of suitability issues.

And I talked with him about, you know: You have to live this long to get all the money back, this does not have a death benefit, and that's what you're looking for.

And I believe we talked about those that do have death benefits or other refund-type features, but they had much lower payout. And that was not of interest to him, he wanted the maximum amount. And so we had some pretty fair discussions about it for those reasons.

CP 413-14.

Lastly, at the time that the "Single Life" box was checked on the annuity application, Permann told Marr that "it was for his life only and it would end at death." CP 421.

Q. Did you tell him that there was not a death benefit?

A. Yes.

Q. Did you tell him that on the date that you went through this application and signed it?

A. We talked about that before the application, as well as at this time.

CP 421.

The uncontroverted evidence is that Marr intentionally selected the annuity without a death benefit. The trial court correctly concluded that the only reasonable conclusion from the evidence is that Marr knowingly made his choice; therefore, the standard of care was not violated and causation of an injury was not shown. Verbatim Report 74. The trial court relied on the admissible testimony of Gary's expert Mr. Olsen to reach these conclusions. *Id.* 74:5-24 ("And the testimony from even the plaintiff's expert is that if he was aware and made this choice, that that would not be a violation of the standard for the agent....").

Excluding Permann's testimony, as Gary asks this Court to require under the deadman's statute, does not change the outcome. The remaining evidence shows that Marr initiated the transaction asking for a specific product, i.e., a SPIA. See CP 556 (introduced by Gary). Marr purchased the same type of annuity with no death benefit for his wife. CP 675, 695-750. The annuity, the "Buyer's Guide to Fixed Deferred Annuities" and the annuity materials for his wife's contract all describe the annuity

choices with and without death benefits. Marr's financial ledgers demonstrate that he was planning his financial future based on an expectation that he would live another ten years. CP 307, CP 377.

The uncontradicted testimony of Marr's stepdaughter Ms. Sickles-Miller demonstrates his actual knowledge and understanding of the risks associated with the annuity, as she testified:

Q. Did you discuss whether there was a death benefit with the Nationwide annuity with either your stepfather or mother at any prior, at a subsequent point?

A. Later and I'm thinking it must have been probably the fall of that year, then we did talk about it. What we talked about was that you know, if you get so much per month -- I don't recall all of the conversation, but I recall one part of the conversation that is you get so much per month for so many years that you need to live seven or eight years to get your initial investment back and we had that discussion about how that works for the return of your investment, just, you know, Marr was very good with accounts and math. I mean, he did a lot of math. It always appeared to me that he was adding and subtracting and dividing without a calculator, but he was pretty good with that and we talked about that there was risk involved.

CP 368-69.

Q. When you and he were talking about his needing to live a certain length of time to get a return on that investment, was it your understanding in that discussion that was because when he died he wouldn't get any more money from the annuity?

A. At that time I did know there was no death benefit, so yes.

CP 375.

Given the disclosures in the annuity contract, Supplementary Agreement, Buyer's Guide, the other annuity contracts without death benefits, Marr's discussions with Sickles-Miller, and Marr's undisputed capacity to manage his affairs and understand them, even if Permann's testimony were not considered, Gary still has no evidence to establish that Respondents caused Marr's estate to suffer any loss.

B. This Court Should Affirm the Trial Court's Dismissal of the Breach of Duty Claims

Gary failed to offer sufficient evidence to support a breach of duty claim like he failed to support the CPA claim. The discussion in the preceding sections, including IV.A.2, *supra*, establish this. Mr. Olsen's testimony establishes a standard of care that the record shows Permann met. Further, just as Gary cannot establish causation under the CPA, he cannot establish causation for this tort claim.

"Negligence requires the following, well-established elements: (1) the existence of a duty to the person alleging negligence; (2) breach of that duty; (3) resulting injury; and (4) proximate cause between the breach and the injury." *Am. Commerce Ins. Co. v. Ensley*, 153 Wn. App. 31, 42, 220 P.3d 215 (2009) (dismissing claims of breach of duty against the insurance agent). Speculation and conjecture are not enough to support a finding of

negligence. *Ruff v. County of King*, 125 Wn.2d 697, 707, 887 P.2d 886 (1995). As required by *Young v. Key Pharm., Inc., supra*, 112 Wn.2d at 225, Gary failed to make a prima facie showing of each of these elements. In order to prevail on his claim against Permann, Gary would have to establish that (1) Permann failed to meet his obligation to consider, and advise Gary about, the suitability of the Nationwide annuity, (2) the annuity was, in fact, unsuitable, and (3) Marr would not have purchased the annuity if Permann had informed him that there was no death benefit, because Marr did not already understand that there was no death benefit. Gary is unable to establish any of these key issues.

Mr. Olsen testified that the standard of care requires an agent selling a SPIA with no death benefit to: (1) inquire of the annuitant about his or her health; and (2) explain to the annuitant that the absence of a death benefit means that he or she has to live for a certain length of time to recover his or her initial payment. CP 333. Mr. Olsen testified that the disclosure regarding lack of a death benefit may be provided orally or in writing. CP 507. As to the nature of the inquiry into an annuitant's medical condition, Olsen testified that the agent is entitled to rely on the representations of the annuitant. CP 333. If the annuitant looks healthy and discloses that he plans to live for another ten years, the agent may rely on that information. CP 343-44. Mr. Olsen also testified that an agent is

not required to have any medical training or expertise in life expectancy.
CP 334-35; CP 341.

The evidence shows that Permann met the standard of care, and that Marr was intent on purchasing the SPIA even knowing there was no death benefit. The tort claim was properly dismissed.

C. Gary Waived Application of the Deadman's Statute to Bar Permann's Testimony, and, Even if He Did Not, Sufficient Evidence Apart from Permann's Testimony Shows That Marr Understood His Purchase

The trial court correctly ruled that Gary waived any protection of the deadman's statute to bar Permann's testimony.¹⁸ Even if Permann's testimony were excluded, other uncontradicted evidence continues to show that Marr was informed and understood his purchase.

If properly invoked, the deadman's statute can prevent self-interested testimony about a transaction with a decedent, requiring that:

in an action or proceeding where the adverse party sues or defends as executor, administrator or legal representative of any deceased person, . . . then a party in interest or to the record, shall not be admitted to testify in his or her own behalf as to any transaction had by him or her with, or any statement made to him or her, or in his or her presence, by any such deceased, incompetent or disabled person[.]

¹⁸ Although Respondents found no case addressing application of the deadman's statute that states the standard of review, courts "review de novo the interpretation of statutes including their application." *State v. Stone*, 165 Wn. App. 796, 806, 268 P.3d 226 (2012).

RCW 5.60.030. A party waives these protections by failing to object to the evidence, by cross-examination beyond the scope of direct examination, or by presenting testimony favorable to the estate about the transaction with the decedent at issue. *Botka v. Estate of Hoerr*, 105 Wn. App. 974, 980, 21 P.3d 723 (2001). A “transaction” is broadly defined as “the doing or performing of some business between the parties, or the management of any affair.” *Estate of Lennon v. Lennon*, 108 Wn.App. 167, 174, 29 P.3d 1258 (2001). Gary waived the protections by failing to object to Permann’s deposition testimony and by introducing testimony about the very transaction he now seeks to exclude. Permann’s testimony is therefore admissible.

Even if it were not admissible, summary judgment still should be affirmed. The evidence demonstrates Permann’s disclosure and Marr’s understanding that the annuity contained no death benefit.

1. Gary waived the deadman’s statute by not objecting to Permann’s deposition testimony submitted by Respondents in support of their summary judgment motions.

In support of their summary judgment motions, Nationwide submitted the deposition testimony of Permann describing several conversations with Marr leading up to the annuity purchase. *See* CP 399-424. Permann testified that in these conversations Marr and he explored

Marr's reasons for wanting the annuity, how this annuity fit into his declining income and financial portfolio, and the fact that the annuity did not include a death benefit. CP 399-424. Gary failed to object. He has never moved against or objected to this testimony. Absent an objection, the evidence is admissible.

Gary moved to strike a declaration that had been submitted by Permann. CP 621-31. This motion did not include Permann's deposition testimony that was already of record, and which included the same subject matter. Failure to invoke the deadman's statute and allowing the admission of testimony on summary judgment waives the statute's protections, even where the statute is invoked in opposition to some testimony about the decedent's conversations. *Botka*, 105 Wn. App. at 981-82. Like in *Botka*, Gary failed to seek to exclude all evidence regarding the transaction. Gary waived protections of the statute.

Further, Gary's own expert Mr. Olsen made numerous references to Permann's testimony, summarizing Permann's account of the transaction. *See* CP 546-61. Thus, Gary himself has submitted the content of Permann's testimony, thereby waiving the statute.

2. Gary waived the deadman's statute by opposing Respondents' summary judgment motions with evidence concerning the transaction he later sought to exclude.

Alternatively, Gary also waived the protection of the deadman's statute by presenting evidence concerning the transaction he later sought to exclude. Courts will not allow a party to introduce testimony about a transaction and then assert the deadman's statute to prevent the adverse party's explanatory testimony. *Johnson v. Peterson*, 43 Wn.2d 816, 819, 264 P.2d 237 (1953); *Botka, supra*. This extends both to direct testimony of the transaction as well as testimony implying that the transaction did not occur. "The deadman's statute precludes not only positive assertions that a transaction or conversation with the decedent took place, but also testimony of a 'negative' character denying interactions with the decedent. Such negative testimony by an adverse party in the context of a summary judgment motion constitutes a waiver of the deadman's statute and *opens the door to rebuttal* from the interested party." *Botka*, 105 Wn. App. at 980-81 (emphasis added). *See also Bentzen v. Demmons*, 68 Wn. App. 339, 345-46, 842 P.2d 1015 (1993) (protections of deadman's statute waived); *Estate of Lennon*, 108 Wn.App. at 180 (same).

Like in *Botka* and *Bentzen*, Gary waived the protections of the deadman's statute by submitting testimony concerning the transaction

between Marr and Permann. Permann should be permitted to rebut it. For example, Gary submitted his own declaration testifying about the communications between Marr and Permann: “I met with Clark Permann on Thursday November 17, 2011. That meeting is when Mr. Permann told me that he only sold my father the nationwide annuity because he (H. Marr Waddoups) ‘would have just gone elsewhere to buy it.’” CP 599. Given Gary’s introduction of this evidence, the deadman’s statute does not prevent Permann from addressing the transaction, explaining why he did sell the annuity and what he and Marr discussed regarding suitability. Gary implies that the transaction was consummated for improper reasons without allowing Permann to explain it. The deadman’s statute does not support this one-sided approach.

Gary also cited as evidence Permann’s initial Answer and Affirmative Defenses, in which it was stated that “Clark L. Permann and Financial Management, Inc. advised H. Marr Waddoups against the purchase, . . .”¹⁹ Gary submitted this evidence not merely to show apparent inconsistent statements by Permann, but also in support of his

¹⁹ Permann and Financial Management, Inc. filed the original answer on June 5, 2013, and amended the answer two days later on June 7, 2013. The Amended Answer removed the mistaken allegation that Permann recommended against the annuity and that Gary was present during the meeting. CP 23-40. Counsel for defendants stated the mistake was “the result of a drafting error not caused by [Mr. Permann].” CP 796.

theory that Permarr believed the annuity was unsuitable and as substantive evidence of what occurred between Permarr and Marr.²⁰ This opens the door to Permarr's explanation of the transaction and discussions.

Gary also introduced Mr. Olsen's testimony that Permarr failed to inform Marr that there was no death benefit. CP 544, 551. In light of these submissions, Permarr is entitled to address the transaction.

Even on appeal, Gary continues to use Permarr's testimony of the transaction in support of his own claims, citing to Permarr's testimony. *See* AB 6 ("Permarr ... paid little mind to the fact that Marr informed him that he suffered from diabetes."), citing Permarr's testimony at CP 415-18; AB 29 ("Yet, Permarr made no effort to screen Marr for any pre-existing medical conditions in order to make an appropriate recommendation"), citing Permarr's testimony regarding disclosures to Marr at CP 414-18. The deadman's statute does not allow Gary to pick and choose what evidence of the transaction to admit and what to exclude.

The trial court was correct to allow Permarr's testimony.

²⁰ In some circumstances, introduction of pleadings will not support waiver if the evidence was offered to show inconsistency. *See Boettcher v. Busse, Jr.*, 45 Wn.2d 570, 585, 277 P.2d 368 (1954) (No waiver because original complaint was not introduced as admissions of the facts, but for the purpose of showing inconsistent statements). Here, however, Gary introduced for the purpose of showing as a factual matter that Permarr judged the annuity unsuitable.

3. Other evidence demonstrated that Marr understood the annuity had no death benefit.

Permann's testimony is not essential to affirmance. Gary has never met his evidentiary burden to support with evidence his speculation that his father might have been confused whether the annuity had a death benefit. His effort, such as offering the averments in Permann's Answer that Permann counseled against the annuity and that Marr would have gone elsewhere to buy the annuity, is not evidence that Marr did not understand the transaction, or that he was misled. Moreover, as already discussed numerous times, evidence apart from Permann's testimony establishes that Marr was not confused and received full disclosures. Therefore, even if the deadman's statute excluded Permann's testimony, Respondents still were entitled to summary judgment.

D. This Court Alternatively Can Affirm for Lack of Standing

This Court alternatively can affirm as a matter of law because Gary "as the Personal Representative for The Estate of H. Marr Waddoups" lacks standing. *See* CP 67-68 ¶ 1.1 (Amended Complaint). *See also* CP 465-66 (Respondents' standing argument). Gary has not shown that the Estate is the real party in interest, then or now. *See* CP 587-89. The Estate has never had an interest in the annuity. Pursuant to Marr's will, all assets transferred at death to Marr's revocable living trust. CP 769 ("All

of my property of whatever nature and kind, wherever situated, shall be distributed to my revocable living trust.”). Pursuant to CR 17, dismissal is proper when the real party in interest was not difficult to discern, like in this case. *See Sprague v. Sysco Corp.*, 97 Wn. App. 169, 173, 982 P.2d 1202 (1999); *Rinke v. Johns-Manville Corp.*, 47 Wn. App. 222, 228, 734 P.2d 533 (1987). The Trust was the real party in interest. The Trust’s subsequent assignment of that interest to Gary in his personal capacity, *see* CP 485 ¶ 5, does not establish the right of the PR to sue. Unlike the plaintiff in *Rinke*, Gary has never fixed the problem. Standing is lacking.

E. Gary Is Not Entitled to an Attorney Fee Award

Court rules require a party requesting fees on appeal to “devote a section of its opening brief to the request for the fees or expenses.” RAP 18.1(b). Gary’s bald request is insufficient under RAP 18.1(b). *See Wilson Court Ltd. P’ship v. Tony Maroni’s*, 134 Wn.2d 692, 710 n. 4, 952 P.2d 590 (1998); *Austin v. U.S. Bank of Wash.*, 73 Wn. App. 293, 313, 869 P.2d 404 (1994). This Court should deny the request. If the Court inquires further, Gary concedes that any award must await a successful result in the trial court. AB 49. In his complaint, Gary alleged the prevailing party provision in the CPA, Ch. 19.86 RCW. *See* CP 198. Gary would have to prevail on the merits to win fees.

V. CONCLUSION

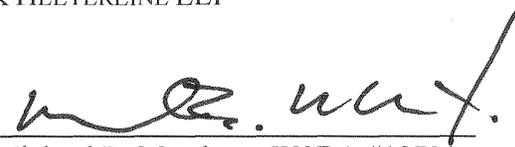
Gary's allegations in this action are unsupported by any evidence. He attempts to rely on speculation and conjecture, but this does not meet his evidentiary burden to present a prima facie case to survive summary judgment. On this record no reasonable juror could find for Gary. The evidence shows that Marr bought exactly what he desired. No unfairness or deception occurred. There was no breach of duty. The trial court's summary judgment should be affirmed.

Respectfully submitted this 20th day of ~~July~~ ^{August}, 2015.

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APPENDIX

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR THE COUNTY OF BENTON

GARY WADDOUPS, as Personal)	
Representative for The Estate of)	
H. Marr Waddoups,)	
)	
Plaintiff,)	
)	
vs.)	NO. 13-2-00759-0
)	
NATIONWIDE LIFE INSURANCE)	
COMPANY, an Ohio Corporation,)	
FINANCIAL MANAGEMENT, INC., a)	
Washington Corporation, and)	
CLARK L. PERMANN and JANE DOE)	
PERMANN, husband and wife,)	
)	
Defendants.)	
)	

DEPOSITION UPON ORAL EXAMINATION OF
CLARK PERMANN

Taken on Tuesday, April 22, 2014
at the Oxford Suites
1701 East Yakima Avenue
Yakima, Washington 98901

REPORTED BY: RENE' T. LaCOURSIERE, RMR, CRR
CCR NO. 2472

1 things that we already knew about them.

2 Q. Okay.

3 A. And their scenario.

4 Q. And are their signatures at the bottom of "Olsen0146" in Box
5 No. 5?

6 A. Yes.

7 Q. And do you have a reason to believe they signed any other
8 time other than November 26, 2008?

9 A. I don't believe so.

10 Q. Is this a document that you reviewed with them or they had
11 an opportunity to read before signing?

12 A. At the time of signing they would have had it.

13 These, this has to -- was either prepared in
14 advance of that meeting or they had to sign it shortly after
15 we had our meeting and we provided it to them, because you
16 can tell that it's been filled in on the computer instead of
17 handwritten.

18 Q. Okay. But you believe the selections here in Boxes 3 and 4
19 represent their answers to those questions?

20 A. The liquid net worth is too low. I don't believe it's
21 accurate.

22 Q. It says one million dollars?

23 A. Yes.

24 Q. What would be a more accurate figure?

25 A. Between two and three million.

1 Q. Okay. But this one is for the Ohio National annuity?

2 A. Correct. We talked about this one too, before, on a -- with
3 a different form.

4 Q. Can you look at Box No. 6 on page three of Exhibit 11.

5 Now, this handwriting looks different. Is that
6 your handwriting?

7 A. No, it's not.

8 Q. Do you know whose it is?

9 A. That would be a staff person, probably maybe Corina.

10 Q. Do you recall discussing Exhibit 11 with Marr and Elizabeth
11 Waddoups?

12 A. Yes. I talked about all these issues.

13 Q. And do you recall if they had an opportunity to read this
14 before they signed?

15 A. If they didn't get it at the time of signature, they got it
16 shortly thereafter and we talked about those issues.

17 And I would have given my assistant the specific
18 instructions of what to put in that box. And that form that
19 you saw, which had all my handwriting on it? It would have
20 been listed, you know, on something like that or in a
21 Copytalk, 'cause we use that extensively.

22 Q. Okay. Let's change gear to the Nationwide annuity. You had
23 mentioned that there was a discussion that you had with Marr
24 Waddoups that brought about the subject of an immediate
25 annuity, he brought it up; is that correct?

1 A. Yes.

2 Q. Can you describe that, please?

3 A. Marr contacted me and -- I knew he had had experience with a
4 variety of annuities in the past. And he contacted me, he
5 had numbers from New York Life on a single premium immediate
6 annuity, no death benefit, quote that he had gotten from
7 them. And that's what he was interested in.

8 And he wanted to maximize his monthly income,
9 because he saw it declining from his portfolio and contract
10 and other sources of income.

11 Q. Do you recall whether he brought up this New York Life quote
12 with you before November 26, 2008, or after, which is when
13 the Ohio National documents were completed that we just
14 looked at?

15 A. Oh, he brought it up before.

16 Q. And was --

17 A. Because the date of the Nationwide annuity is before that.

18 Q. Was it an actual quote or was it like on a mailer that
19 somebody might get, you know --

20 A. No.

21 Q. -- in the mail?

22 A. He got the numbers. He had a relationship with somebody at
23 New York Life and he got the actual notes from them.

24 Q. Do you have any idea who that person is?

25 A. I don't.

1 Q. Do you recall what the quote was?

2 A. I don't know the exact number.

3 Q. Do you recall what kind of an annuity it was?

4 A. Single Premium immediate annuity, no death benefit. It was
5 the maximum payout they would possibly give. And that's
6 what he wanted and was looking for.

7 Q. And why did he say that that's what he wanted and what he
8 was looking for?

9 A. Because he wanted the most income he could get.

10 Q. When did you first hear that from him?

11 A. Right at the outset of us talking about it. I think -- I
12 think he -- I talked to him on the phone. If not, it was
13 right in a meeting where we discussed it.

14 I can't -- I'm sorry, it's been six years, I can't
15 recall, but it was right at the -- it would have been right
16 at the outset.

17 Q. At the outset of your relationship with him or . . .

18 A. No, discussing that particular goal of his when he brought
19 it up in November-December of '08.

20 Q. It looks like you had some earlier meetings with him back in
21 June, with Marr and Elizabeth. Do you recall it coming up
22 during those meetings, on either June 10 or June 30, 2008?

23 A. I don't.

24 Q. Do you recall it coming up any time between those
25 June meetings and the November-December 2008 time frame?

1 A. It was completely isolated from our other meetings. He
2 brought it up and we talked about it at that time.

3 Q. Do you know if this was a solicited or unsolicited quote
4 from New York Life from this other broker?

5 A. I believe it was unsolicited. I'm -- I don't believe
6 anybody contacted him and tried to sell it to him.

7 I think he talked to them about it and asked about
8 the options and got the numbers and then let me know. And
9 basically said, you know: Is this good? And can you beat
10 it? And . . .

11 Q. Would it be fair to say that this single premium immediate
12 annuity with no death benefit was inconsistent or is
13 inconsistent with the initial investment objective that they
14 told you in Exhibit 1, which was for "Income with Moderate
15 Growth"?

16 A. I had talked with Marr at length about why he wanted that
17 and what his interest was. And at that time he shared with
18 me a lot of detail about his income amounts and ledgers.

19 And some of the pieces that we've talked about,
20 passed around, had detail of what his income was, what it
21 was going to be. And it was the declining income that he
22 was concerned with.

23 And after talking with him about that, it became
24 more evident to me why he wanted it and why it would fit his
25 scenario, in light of our other discussions.

1 Q. So even when he presented this New York Life quote to you,
2 would you still put him in the same investment objective
3 category of "Income with Moderate Growth" or do you think
4 when this came up that kind of put him into another category
5 of type of client or investor?

6 A. I think those products fit in their own category and the
7 rest of his portfolio still fit in "Income with Moderate
8 Growth."

9 Q. What did he tell you was the reason that he needed more
10 income?

11 A. Well, it's like I mentioned, he said that he was getting
12 less money on a contract that he had, he was getting a lot
13 less money.

14 I think he had suffered, you know, somewhere 40,
15 50, 60, 70,000 dollars in losses on his bond portfolio that
16 he had, I think it was Baker Boyer, and he was frustrated.
17 He was getting less income from those sources and wanted to
18 maintain that, so he could continue his charitable
19 contributions and other things that we provided, we talked
20 about.

21 Because I had copies of those. He gave me copies
22 of those in our meeting and I photocopied them. That's why
23 they had his stamp, his sticker on them of his home address
24 up at the top of it, those were his.

25 Q. So when you say "less money on a contract," what contract

1 are you referring to?

2 A. Yeah.

3 Q. Do you know?

4 A. The contract? I believe it was Robert Sickles who was
5 buying out his agronomy business.

6 And Marr was still working. He would come in and
7 tell me about things he was doing out in the field and GPS
8 tracking of probes and the amount of alkalinity and acidity
9 in the soil at different places in a field and how much
10 water there was and the thickness of the soil and how well
11 plants grew.

12 And how you could take and customize circles to
13 water and fertilize and -- you know, it was pretty technical
14 about what you could do with technology. And we talked
15 about that. And that business that he had sold was
16 providing him lower and lower amounts of income.

17 Q. Did he tell you how much?

18 A. I think it's on the reports. I can't recall an exact
19 amount, but it shows up on his ledgers.

20 Q. Did it strike you as an odd thing that he would have -- that
21 he approached you initially with this New York Life quote
22 for a SPIA with no death benefit?

23 A. I --

24 Q. Were you taken by surprise?

25 A. I don't think I'm really surprised at anything, I -- 'cause

1 I get clients that come to me with all kinds of investments.

2 But I want to know why. I want to know why he
3 wants that, what it's for, what the objective and purpose
4 is, and what he's trying to do. And if it doesn't fit, then
5 let's talk about it.

6 Q. Is there anything else in terms of the "why" question, why
7 he wanted it, besides what you've already told me?

8 A. He wanted the most guaranteed maximum income that he could
9 get.

10 Q. How many conversations do you think you had with him before
11 you obtained the Nationwide quote?

12 A. At least two or three.

13 Q. Let me rephrase my question, because that's a poor question.

14 How many questions about this issue of getting a
15 SPIA with no death benefit did you have with him before you
16 got the Nationwide quote? Two or three?

17 A. Before I got the quote --

18 Q. Yes.

19 A. -- or we signed the application?

20 Q. Before you got the quote.

21 A. At least one or two.

22 Q. Okay. What about before you signed the application, before
23 he signed the application?

24 A. Probably at least three or four conversations.

25 Q. How many of those --

1 A. We didn't just get one quote; we got several quotes.

2 Q. How many of those were in person?

3 A. At least two.

4 Q. Did you --

5 A. We aren't exclusive to Nationwide, so we got quotes from a
6 lot of carriers, trying to find who would pay the highest
7 maximum income to him. And we looked at a variety of types.

8 Q. Isn't it true that you tried to talk him out of buying a
9 SPIA with no death benefit?

10 A. I discussed it with him. I don't know that I would phrase
11 it that way, that I "tried to talk him out of" it. I don't
12 believe that's accurate.

13 And if I've -- you know, if something's been said
14 in my behalf by my attorney or somebody, I don't think
15 that -- to the contrary, I don't think that's completely
16 accurate.

17 Q. Well, I'm only asking you about your recollection --

18 A. Yeah.

19 Q. -- of your conversation with him.

20 A. Uh-huh.

21 Q. Do you remember recommending against the purchase of a SPIA
22 with no death benefit?

23 A. I don't believe at any time I told him, You should not buy
24 this, if that answers your question.

25 Q. And do you think it's fair to say --

1 A. We talked about the positives and negatives and the pluses
2 and minuses of doing that at length.

3 Q. And you think it's fair to say that you didn't try to talk
4 him out of it? In other words, you had enough reservations
5 about whether this was an appropriate fit for him that you
6 tried to dissuade him and maybe send him another direction?

7 A. We talked about his overall goals and objectives and what
8 his other investments were, what -- the concept of total
9 return, how much potential income he was getting from
10 different investments. And that, that didn't change his
11 mind in any fashion, to my recollection.

12 He felt that that's what he wanted and it made
13 sense to him and that -- you could tell he wasn't someone
14 who just yanked a bunch of money from investments. He
15 wanted income and he wanted to pull income from somewhere to
16 continue what he'd been doing in the past. And it was
17 diminishing and that was his concern.

18 Q. What in particular did he want to continue? Do you
19 remember?

20 A. He wanted to -- somewhere around -- and I believe it's in
21 his ledgers and the documents that we've looked over, that
22 he wanted to be at or around that 100,000-a-year mark to
23 continue the charitable contributions that he had made to
24 Boy Scouts, I talked with him at length about that.

25 He was involved in Junior Achievement, we talked

1 about that. We were thinking of creating a chapter in
2 Yakima that had been disbanded and making some gifts and
3 things to his heirs, but he didn't talk about -- a lot about
4 making large sums of donations to his heirs.

5 Q. Did he talk with you at all about health concerns for either
6 himself or his wife?

7 A. Not in detail.

8 Q. Do you remember --

9 A. I knew that he had diabetes.

10 Q. Do you remember, in the three or four meetings that you had
11 with him between when he originally presented you with a New
12 York Life quote and when he signed the application, if
13 health concerns came up in your conversation with him?

14 A. We talked about how long he would have to live to receive
15 all of his money back, and I think it was around five,
16 six years, and he knew that. He knew exactly what that was.

17 And that was part of our discussion, because I'm
18 concerned about that. And I shared that with him and I made
19 sure he understood that.

20 Q. Would you agree that it was your job as his financial
21 advisor to make a recommendation to him regarding the
22 suitability of this particular annuity to his circumstances?

23 A. Sure.

24 Q. And did you make a recommendation to him?

25 A. I think it was more in terms of him coming to me with this

1 idea and this product and saying: This is what I want to do
2 and here's what I'm interested in doing. What do you think?
3 Is there something better? And how do I go about achieving
4 this goal?

5 And if that's what you call a recommendation, a
6 discussion with him, then yeah.

7 Q. I understand that you discussed the purchase of a SPIA with
8 no death benefit with him.

9 A. Uh-huh.

10 Q. And I understand that you're saying that you didn't
11 recommend against the purchase of one.

12 But I also hear you saying that you didn't
13 recommend that he purchase one; is that correct?

14 A. Well, he came to me with a quote. And so there wasn't a
15 solicitation of Marr in going to him with numbers,
16 saying: Hey, I think you should buy an immediate annuity
17 from me. That didn't happen at all.

18 He came to me with quotes. And I said: Let's make
19 sure this fits. And let's make sure that this is the
20 highest payout that you can possibly get and you're not
21 shortchanging yourself by using one company versus the
22 other, because the annuity rates and the payout amounts from
23 one company to the next differ dramatically. And there's a
24 difference and you need to shop it out.

25 And we got at least three or four different quotes

1 from different companies, one of them was Nationwide, before
2 I even talked with him further about what those monthly
3 amounts were.

4 Q. Well, let me come back and ask my question in another
5 way: During this period of time that we're talking about
6 through December of 2008 into January 2009, is it true that
7 there was never a conversation where you came to Marr or
8 Elizabeth and said: This particular Nationwide annuity
9 suits your needs and I'm recommending it?

10 A. I don't think I'd use those words, because it was already a
11 given from his standpoint of: This is what I want. Here's
12 why I want it. Go find me the best that you can or forget
13 it.

14 Q. And do you believe that you did find him the best that you
15 could of what he said he wanted to buy?

16 A. I believe that we found the best rates that we could find,
17 and that was our reasoning for using Nationwide, because we
18 got -- like I said, we got quotes from several companies
19 just to make sure.

20 Q. Did you do a suitability analysis of this particular
21 annuity?

22 A. On the --

23 Q. For the Nationwide I mean.

24 A. They require that. And we used Crump at the time. And
25 Crump requires a suitability form with the quotes and

1 applications.

2 Q. And I understand you signed the Crump suitability form; is
3 that correct?

4 A. Uh-huh, uh-huh.

5 Q. But what I'm -- is that a yes or a no?

6 A. Yes.

7 Q. Okay. But what I'm asking you is, did you do a suitability
8 analysis to determine whether the Nationwide annuity was
9 suitable for Mr. Waddoups?

10 A. What does that mean, "suitability analysis"?

11 Q. Did you make a determination, after reviewing his situation,
12 whether this was a suitable product for him to purchase?

13 A. Well, evidently I did, because I felt like it was
14 appropriate and I went and secured quotes for him. And we
15 discussed it and felt like that was the positive course of
16 action to take. So if that's what you're calling it, yes.

17 Q. So what did you do, if anything, to determine that it was a
18 suitable annuity?

19 A. Like I mentioned before, we talked about his situation, his
20 goals, his need for income, his other assets. We considered
21 his portfolios and I talked about total return in, you know,
22 every -- a lot of the things that we talked about in about
23 every review meeting that we had with him. And why he
24 wanted that, why it would fit, and what the pluses and
25 minuses of that decision might be. So that's -- those are

1 kind of the suitability issues.

2 And I talked with him about, you know: You have to
3 live this long to get all the money back, this does not have
4 a death benefit, and that's what you're looking for.

5 And I believe we talked about those that do have
6 death benefits or other refund-type features, but they had a
7 much lower payout. And that was not of interest to him, he
8 wanted the maximum amount. And so we had some pretty fair
9 discussions about it for those reasons.

10 Q. So he was 85 years old when he purchased this annuity from
11 Nationwide; is that right?

12 A. I believe so.

13 Q. Did you tell him how long he would have to live in order for
14 him to get the principal back on the Nationwide annuity?

15 A. Yeah. We discussed it was about five, six, seven years,
16 right in there.

17 Q. So how long -- how old did you tell him he had to live to,
18 to get his money back?

19 A. I don't know that we quoted an age. But I asked him about
20 how long he expected to live and he thought like ten years
21 or to 95.

22 Q. And how many years did you tell him he had to live --

23 A. To get his money back?

24 Q. -- to get his money back?

25 A. Five to seven years. That's what I just mentioned.

1 Q. You actually told him that?

2 A. Yeah.

3 Q. And --

4 A. Because we figured it out together. At the fourteen
5 eighteen a month times 12 months, you know, you're --
6 you're dividing that by a hundred thousand to get an
7 amount.

8 Q. Did you do anything in this time period to determine what
9 his life expectancy was?

10 A. I'm not -- I'm not sure how you'd do that without -- with my
11 background.

12 Q. Okay.

13 A. I was aware of his diabetes. I knew he drove. He brought
14 Elizabeth to the office. He wasn't using, you know,
15 crutches, walkers, things like that. I didn't have any
16 in-depth knowledge of anything more than what he told me.

17 Q. So it's not like you looked at a life expectancy table for
18 him during this time period; is that right?

19 A. I don't believe I did.

20 Q. Okay. You mentioned "diabetes." What was your knowledge of
21 his diabetic condition at the time when he signed the
22 application for the Nationwide annuity?

23 A. That he had diabetes.

24 Q. What else?

25 A. I didn't -- I didn't know anything about fluctuating blood

1 sugar levels until I read it in the documents that were
2 provided.

3 Q. Okay. Were you aware of what he was doing to manage his
4 diabetes?

5 A. No. I vaguely recall him talking about, you know, losing a
6 little weight, but that's -- that's pretty -- I couldn't --
7 I couldn't pin that down, so . . .

8 Q. Do you --

9 A. It sounds reasonable.

10 Q. Do you recall what his shoes looked like?

11 A. He wore tennis shoes.

12 Q. Okay. Do you recall the --

13 A. That's all I -- that's all I remember.

14 Q. Do you recall if they looked like some kind of special
15 podiatrist tennis shoes?

16 A. Not that I recall.

17 Q. Do you recall him walking funny or with any difficulty?

18 A. He was slow, like most people in their 80s and 90s would be,
19 that's all I recall.

20 Q. What did his general appearance look like at that time?

21 A. He was bright, alert. He had a little bit of back
22 posture (indicating) -- he leaned over a little bit more
23 than you and I, but that's all I recall. I didn't notice
24 any diminished mental capacity at all.

25 Q. Did you ask him about his health prior to him signing the

1 application for the annuity?

2 A. We had talked about it in general here and there, but there
3 weren't any, you know, big health issues.

4 I think he mentioned to me that he had been in the
5 hospital in the summer. But until I heard why, I couldn't
6 put a finger on why he was in the hospital. And I don't
7 remember hearing why.

8 Q. Do you know what summer you recall him being in the
9 hospital, what year?

10 A. I didn't even recall it till it was mentioned today,
11 so . . .

12 We may -- and I don't know that I met with him
13 right around that time. I think I had met with him before
14 and then afterwards, so -- because he wouldn't have come in,
15 because he was in the hospital or . . .

16 Q. Do you specifically remember discussing his health condition
17 from the time that he brought you the New York Life quote to
18 when he signed the Nationwide annuity application?

19 A. We talked about how long he would have to live. I don't
20 know that there are other health issues that we talked
21 about.

22 Q. So not that you recall?

23 A. (Moving head up and down.)

24 Q. Yes?

25 You'll have to answer out loud.

1 A. Yes. Sorry.

2 Q. Okay.

3 A. Sorry.

4 Q. Do you recall any discussions with him regarding his wife's
5 health?

6 A. I don't -- I don't recall any discussions about being a
7 formal caregiver. I know that he was doing some cleaning
8 and cooking. I know he worked in his garden. I know he
9 worked in his orchard.

10 And he -- in our relationship, you know, he talked
11 about going out and, you know, working and doing some things
12 out in the field. I don't . . .

13 Q. What about his wife's health, though, do you remember
14 talking with Marr about his wife's health?

15 A. Not a lot.

16 Q. Do you remember talking to Elizabeth about her health?

17 A. No.

18 Q.- What was her appearance during this December 2008 time
19 frame?

20 A. She was always thin. I recall having a conversation later
21 on with her daughter, with -- is it Cheryl and Marla --
22 about, you know, she had some forgetfulness, but she was
23 pretty healthy and doing well. That's what they indicated
24 to me. And I know that's -- that's what I recall from
25 talking with them.

1 Q. Did you tell him that?

2 A. I believe so, that, you know, in a case where someone's
3 concerned about, Well, who is this company and are they
4 solid and are they going to stand by the promises made, we
5 would discuss that.

6 Q. Do you recall if you provided Mr. Waddoups with any other
7 information related to this Nationwide annuity, other than
8 the quote, before he signed the application?

9 A. Whatever literature we got from Crump. And the buyer's
10 guide comes with these, typically. I can't recall if
11 Nationwide has their own brochure. And we talked about the
12 Crump suitability form and application, so those, those
13 things.

14 Q. Do you recall providing Mr. Waddoups with a brochure
15 regarding the Nationwide annuity?

16 A. The buyer's guide. Those come with the quotes and they come
17 with the information that we get from them.

18 Q. So you recall giving him one of those?

19 A. Yes.

20 Q. The buyer's guide on fixed annuities?

21 A. Yes.

22 Q. Okay. To your knowledge had he ever bought a fixed annuity
23 before?

24 A. He had.

25 Q. Had Elizabeth Waddoups purchased a fixed annuity before?

1 actually take the time to read through it?

2 A. Yeah. I went through it with him, because we had the quote
3 number on here (indicating). And I specifically wrote out,
4 this is my handwriting, "\$1417.43" a month. And we went
5 through each of the boxes. And he elected not to have
6 income tax withheld from this in particular.

7 Q. Do you know, in going through this document with him, if you
8 read through the entirety of the document with him?

9 A. I don't believe I recited everything to him out loud.

10 Q. Can you tell me today what parts you read to him and what
11 parts you didn't?

12 A. I -- I don't know that I read verbatim all of the parts. We
13 covered the points on here (indicating) and how much it was
14 and the quote number, the single life only option, the
15 amount of income tax withheld.

16 He wanted the payments to be direct deposited into
17 his bank account, we collected a voided check for that. And
18 that was -- that was our discussion.

19 Q. Did you discuss with him, at the time you filled out this
20 form, the income options for this annuity?

21 A. We talked about those, as we had earlier when we were
22 looking at quotes and the amount of quotes and how much
23 money he would get.

24 Q. Did you specifically discuss what it meant that he was
25 purchasing a single life annuity?

1 A. I did.

2 Q. What did you tell him?

3 A. That it was for his life only and it would end at death.

4 Q. Did you tell him there was a death benefit of life?

5 A. I did not.

6 Q. Let me rephrase that question, because I didn't ask it very
7 well.

8 Did you tell him that there was not a death
9 benefit?

10 A. Yes.

11 Q. Did you tell him that on the date that you went through this
12 application and signed it?

13 A. We talked about that before the application, as well as at
14 this time.

15 Q. So you did tell him that on this particular date?

16 A. Yes.

17 MR. MERCHANT: I'm going to object. This has
18 been asked and answered about 16 times, so why don't you
19 move on.

20 MR. EISINGER: We'll keep moving.

21 Q. (By Mr. Eisinger) When was the -- one other question about
22 this document. After this application was completed, when
23 was the next time you took a look at this document?

24 A. I don't know that we would have lots of reason to look at it
25 again. I'm not sure, because we would have gotten back

1 A. I don't.

2 Q. Do you know if there's any way to find that out?

3 A. I don't believe so. They've changed enough staff at the
4 offices that we're working with that . . .

5 Q. Did you or your staff talk to anyone at Nationwide regarding
6 the Nationwide annuity quote or the securing a Nationwide
7 annuity?

8 A. I didn't talk with anybody that I know of personally at
9 Nationwide; my staff may have.

10 Q. Are aware of any situations where they did talk to someone
11 or is it just --

12 A. I'm not.

13 Q. -- an outside possibility?

14 A. I don't know.

15 Q. You said that you got other annuity quotes other than the
16 Nationwide annuity; is that right?

17 A. Uh-huh, yep.

18 Q. Do you recall which carriers the annuity quotes were from?

19 A. I don't. I'm sorry.

20 Q. Do you recall whether they were SPIAs with no death benefit?

21 A. They were.

22 Q. Did you --

23 A. I believe we got some other quotes that had some lower
24 payouts that were with refunds or death benefits as well.

25 Q. Did you ever present Mr. Waddoups with a quote for a SPIA

1 with a death benefit in this time frame of the sale of the
2 Nationwide annuity?

3 A. We talked about several quotes. And he wasn't interested in
4 anything but the maximum payout, so those were disregarded,
5 yeah -- I mean they were discarded. And we -- he wanted the
6 maximum monthly benefit and that was his goal.

7 Q. Do you know how many SPIAs with no death benefits you showed
8 him other than the Nationwide quote?

9 A. At least three to four, three or four.

10 Q. Other than Copytalk or Exhibit No. 17, which is this
11 list (indicating), can you think of anywhere else that we
12 can look to find out what those quotes were?

13 A. I can't. We have searched.

14 Q. Did the Waddoupses' wealth affect the way in which you
15 interacted with them in the sale of this annuity?

16 A. What do you mean?

17 Q. Did your conversations with them and whether you made or
18 didn't make a recommendation for the sale of -- for the
19 purchase of this annuity, was that affected by their wealth?

20 A. It's certainly a factor in suitability. I -- I believe the
21 annuity purchased with Nationwide represented less than
22 5 percent of their liquid net worth. And that was -- that
23 was a key factor.

24 And Marr told me that, you know, he wasn't worried
25 about leaving a death benefit to each other or to his

1 MR. MERCHANT: You can answer. What do you
2 remember your conversation with Mr. Waddoups being about the
3 Nationwide annuity at that meeting? You can answer that
4 question.

5 A. That there was no death benefit.

6 Q. (By Mr. Eisinger) Do you have any reason to believe that
7 Gary Waddoups knew that there was no death benefit with the
8 Nationwide annuity before that meeting with him?

9 A. I think -- I think he should have. It was pretty clear in
10 the contract and in our talk in that meeting.

11 I don't know -- before that? I believe we reviewed
12 it in our meeting with Marr and discussed it and . . .

13 Q. And when was that meeting?

14 A. That was that time frame I gave you when I met with Gary and
15 Marr together before his death. I can't remember the exact
16 date of that. It was somewhere around, you know, six months
17 to a year after January of 2009.

18 Q. At the time that you sold the Nationwide annuity to
19 Mr. Waddoups, did you have a belief as to whether his
20 diabetes affected his life expectancy?

21 A. Marr was not concerned about his diabetes affecting his life
22 expectancy, I don't believe. And he didn't express that to
23 me, so I -- I -- I'm uncertain as to what impact that would
24 have had or that he was concerned about it at all.

25 I know that -- on your question about Gary's

EXHIBIT 6

EXHIBIT 6

10/23
 1. 10% PD
 average 3.47% = .28/100

	1	2	3	4	5	6	7	8	9	10
	1	gross	3,282	234						
	2	non estate	- 769	808						
	3	net estate	2,513	434						
	4	+ 7000 20%	73	605						
	5	+ 3 years	24	402						
	6									
	7		estate	debt	yr end	ann. interest/in	removed	divided by		
	8	2010	2,513,000	170,800	2/1/11	0.1042/100	10,000	10,000	10,000	
	9	2011		2,342,200	2/1/12	0.1042/100	10,000	10,000	10,000	
	10	2012		2,171,400	2/1/13	0.1042/100	10,000	10,000	10,000	
	11	2013		2,000,600	2/1/14	0.1042/100	10,000	10,000	10,000	
	12	2014		1,829,800	2/1/15	0.1042/100	10,000	10,000	10,000	
	13	2015		1,659,000	2/1/16	0.1042/100	10,000	10,000	10,000	
	14	2016		1,488,200	2/1/17	0.1042/100	10,000	10,000	10,000	
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THE MERS CORPORATION, DAYTON, OH 45402

PRECEDENCE DATA P&G NO. 55-1504

WADOUPS
 EXHIBIT NO. 8
 4/22/14
 Rene T. LaCourse

SUMMARY

SUMMARY
2009

I

	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
1	LOA W/ BANK CHARGE											
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WADSWORTH
 EXHIBIT NO. 9
 4/20/14
 René T. LaCourse

2 SUMMARY 2010

	DEC	NOV	OCT	SEP	AUG	JULY	JUNE	MAY	APR	MARCH	FEB	JAN	YEAR
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8 SUMMER 2011

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9 REC 2009 WJAL

REC 2009 WJAL

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ANDREWS WIFE
750-3450

10 RBC 2010

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1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	32	33	34	35	36	37	38	39	40	41	42	43	44	45	46	47	48	49	50	51	52	53	54	55	56	57	58	59	60	61	62	63	64	65	66	67	68	69	70	71	72	73	74	75	76	77	78	79	80	81	82	83	84	85	86	87	88	89	90	91	92	93	94	95	96	97	98	99	100

17

LAL Annual
1999
1999-2000

		JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR THE COUNTY OF BENTON

GARY WADDOUPS, as Personal
Representative for The Estate of H. Marr
Waddoups,
Plaintiff,

vs.

NATIONWIDE LIFE INSURANCE
COMPANY, an Ohio Corporation,
FINANCIAL MANAGEMENT, INC., a
Washington Corporation, and CLARK L
PERMANN and JANE DOE PERMANN,
husband and wife,
Defendants.

No. 13-2-00759-0

ORDER GRANTING DEFENDANTS'
MOTIONS FOR SUMMARY
JUDGMENT

This matter, having come before the Court upon 1) Defendant Nationwide Life Insurance Company's Motion for Summary Judgment, and 2) Defendants Financial Management, Inc.'s, Clark L. Permamn's, and Jane Doe Permamn's Motion for Summary Judgment. The Court reviewed the materials submitted, specifically:

1. Defendant Nationwide Life Insurance Company's Motion for Summary Judgment;
2. Defendant Nationwide Life Insurance Company's Memorandum of Points and Authorities in Support of its Motion for Summary Judgment;
3. Declaration of Matthew Turetsky in Support of Defendant Nationwide Life

ORDER GRANTING DEFENDANTS' MOTIONS FOR
SUMMARY JUDGMENT - 1

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Telephone: 206.622.1711

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0-000000843

 ORIGINAL

1 Insurance Company's Motion for Summary Judgment;

2 4. Defendants Financial Management, Inc.'s, Clark L. Permann's, and Jane Doe
3 Permann's Motion for Summary Judgment;

4 5. Declaration of Michael B. Merchant in Support of Defendants' Motions for
5 Summary Judgment;

6 6. Declaration of Clark L. Permann in Support of Defendants' Motions for
7 Summary Judgment;

8 7. Plaintiff Gary Waddoups' Response to Defendants Financial Management,
9 Inc., Clark L. Permann, and Nationwide Life Insurance Company's Motions for Summary
10 Judgment;

11 8. Declaration of Gary Waddoups in Response to Defendants' Motions for
12 Summary Judgment;

13 9. Declaration of John Olsen in Response to Defendants' Motions for Summary
14 Judgment;

15 10. Defendant Nationwide Life Insurance Company's Amended Reply in Support
16 of its Motion for Summary Judgment;

17 11. Defendants Financial Management, Inc.'s, Clark L. Permann's, and Jane Doe
18 Permann's Reply in Support of their Motion for Summary Judgment;

19 NOW, therefore it is hereby **ORDERED, ADJUDGED AND DECREED** that:

20 Defendants Nationwide Life Insurance Company's Motion for Summary Judgment is
21 GRANTED. Defendants Financial Management, Inc.'s, Clark L. Permann's, and Jane Doe
22 Permann's Motion for Summary Judgment is GRANTED. All claims asserted by Plaintiff
23 Gary Waddoups against Defendants Nationwide Life Insurance Company, Financial
24 Management, Inc., Clark L. Permann, and Jane Doe Permann are dismissed with prejudice
25 and costs.
26

ORDER GRANTING DEFENDANTS' MOTIONS FOR
SUMMARY JUDGMENT - 2

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DONE IN OPEN COURT this ____ day of _____, 2014.

HONORABLE CAMERON MITCHELL

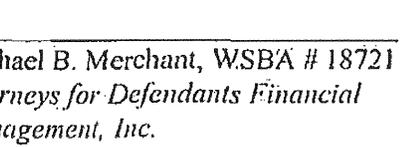
Presented by:

SCHWABE, WILLIAMSON & WYATT, P.C.

By: 

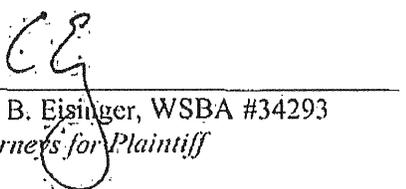
Matthew Turetsky, WSBA #23011
Thomas V. Dulcich, WSBA #13807
Virginia R. Nicholson, WSBA #39601
*Attorneys for Defendant
Nationwide Life Insurance Company*

BLACK HELTERLINE LLP

By: 
Michael B. Merchant, WSBA # 18721
*Attorneys for Defendants Financial
Management, Inc.*

Approved as to form:

WALKER HEYE MEEHAN & EISINGER, PLLC

By: 
Eric B. Eisinger, WSBA #34293
Attorneys for Plaintiff

ORDER GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT - 3

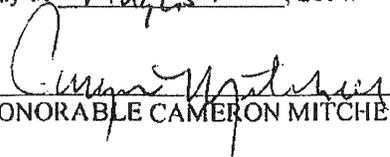
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SCHWABE, WILLIAMSON & WYATT, P.C.
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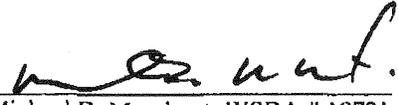

HONORABLE CAMERON MITCHELL

Presented by:

SCHWABE, WILLIAMSON & WYATT, P.C.

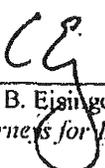
By: 
Matthew Turetsky, WSBA #23011
Thomas V. Dulcich, WSBA #13807
Virginia R. Nicholson, WSBA #39601
*Attorneys for Defendant
Nationwide Life Insurance Company*

BLACK HELTERLINE LLP

By: 
Michael B. Merchant, WSBA # 18721
*Attorneys for Defendants Financial
Management, Inc.*

Approved as to form:

WALKER HEYE MEEHAN & EISINGER, PLLC

By: 
Eric B. Eisinger, WSBA #34293
Attorneys for Plaintiff

ORDER GRANTING DEFENDANTS' MOTIONS FOR
SUMMARY JUDGMENT - 3

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR THE COUNTY OF BENTON

GARY WADDOUPS, as Personal
Representative for The Estate of H. Marr
Waddoups,
Plaintiff,

vs.

NATIONWIDE LIFE INSURANCE
COMPANY, an Ohio Corporation,
FINANCIAL MANAGEMENT, INC., a
Washington Corporation, and CLARK L
PERMANN and JANE DOE PERMANN,
husband and wife,
Defendants.

No. 13-2-00759-0

ORDER GRANTING IN PART AND
DENYING IN PART PLAINTIFF'S
MOTION TO STRIKE

This matter, having come before the Court upon Plaintiff Gary Waddoups' Motion to
Strike and having reviewed the materials submitted, and having specifically reviewed:

1. Plaintiff Gary Waddoups' Motion to Strike;
2. Defendant Nationwide Life Insurance Company's Response to Plaintiff's
Motion to Strike;
3. Defendants Financial Management, Inc.'s, Clark L. Permann's, and Jane Doe
Permann's Response in Opposition to Plaintiff's Motion to Strike; and
4. Plaintiff Gary Waddoups' Supplemental Memorandum Regarding Motion to
Strike Portions of Declaration of Clark Permann.

ORDER DENYING PLAINTIFF'S
MOTION TO STRIKE - 1

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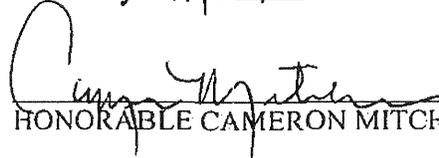
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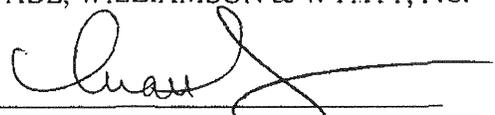
 ORIGINAL

1 The Court finds that the Plaintiff has waived the deadman's statute. The Court finds
2 that the statement in paragraph 4 of Mr. Permann's Declaration that Mr. Marr Waddoups
3 verbally expressed to Mr. Permann that he understood that "neither he nor his beneficiaries
4 would receive anything upon his death" is hearsay. Plaintiff Gary Waddoups' Motion to
5 Strike is granted insofar as that statement in Paragraph 4 is not considered. In all other
6 respects, the Motion to Strike is denied.

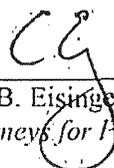
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8 DONE IN OPEN COURT this 4th day of August, 2014.

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10 
HONORABLE CAMERON MITCHELL

11 Presented by:
12 SCHWABE, WILLIAMSON & WYATT, P.C.

13
14 By: 
15 Matthew Turetsky, WSBA #23611
16 Thomas V. Dulcich, WSBA #13807
17 Virginia R. Nicholson, WSBA #39601
Attorneys for Defendant
Nationwide Life Insurance Company

18 Approved as to form:
19
20 WALKER HEYE MEEHAN & EISINGER, PLLC

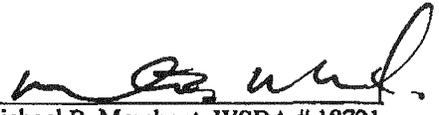
21
22 By: 
23 Eric B. Eisinger, WSBA #34293
Attorney for Plaintiff

24
25
26
ORDER DENYING PLAINTIFF'S
MOTION TO STRIKE - 2

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BLACK HELTERLINE LLP

By: 

Michael B. Merchant, WSBA # 18721
Attorneys for Defendants Financial Management, Inc.

ORDER DENYING PLAINTIFF'S
MOTION TO STRIKE - 3

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR THE COUNTY OF BENTON

GARY WADDOUPS, as Personal
Representative for The Estate of H. Marr
Waddoups,

Plaintiff,

vs.

NATIONWIDE LIFE INSURANCE
COMPANY, an Ohio Corporation,
FINANCIAL MANAGEMENT, INC., a
Washington Corporation, and CLARK L
PERMANN and JANE DOE PERMANN,
husband and wife,

Defendants.

No. 13-2-00759-0

ORDER GRANTING IN PART
DEFENDANT NATIONWIDE LIFE
INSURANCE COMPANY'S MOTION
TO EXCLUDE IMPROPER OPINIONS
OF JOHN OLSEN

This matter, having come before the Court upon Defendant Nationwide Life
Insurance Company's Motion for to Exclude Improper Opinions of John Olsen and having
reviewed the materials submitted, and having specifically reviewed:

1. Defendant Nationwide Life Insurance Company's Motion to Exclude
Improper Opinions of John Olsen;
2. Defendants Financial Management, Inc.'s Clark L. Permamn's and Jane Doe
Permamn's Motion to Join Nationwide Life Insurance Company's Motion to Exclude
Improper Opinions of John Olsen;
3. Plaintiff Gary Waddoups' Response to Defendant Nationwide Life Insurance

ORDER GRANTING IN PART DEFENDANT NATIONWIDE
LIFE INSURANCE COMPANY'S MOTION TO EXCLUDE
IMPROPER OPINIONS OF JOHN OLSEN - 1

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Telephone 206.622.1711 Fax 206.465.8888

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ORIGINAL

1 Company's Motion to Exclude Expert Opinion of John Olsen;

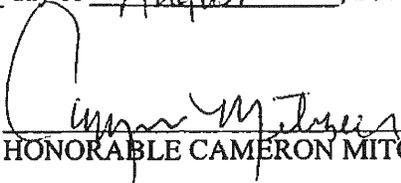
2 4. Declaration of John Olsen in Response to Defendant Nationwide's Motion to
3 Exclude Expert Opinion; and

4 5. Supplemental Declaration of Matthew Turetsky in Support of Motion to
5 Exclude Improper Opinions of John Olsen.

6 NOW, therefore it is hereby **ORDERED, ADJUDGED AND DECREED** that
7 Defendant Nationwide Life Insurance Company's Motion to Exclude Improper Opinions of
8 John Olsen is **GRANTED IN PART**. Mr. Olsen testimony shall not be considered as it
9 relates to the following:

- 10 • The suitability of the annuity based upon Mr. Waddoups' health and/or life
11 expectancy;
- 12 • The annuity quote, the application, and the annuity contract might lead a
13 consumer to reach conclusions about whether the contract included a death
14 benefit;
- 15 • Conclusions about the evidence based on the absence of documentation
16 provided by Plaintiff.

17 ~~DONE IN OPEN COURT~~ this 4th day of August, 2014.

18
19 
20 HONORABLE CAMERON MITCHELL

21 Presented by:

22 SCHWABE, WILLIAMSON & WYATT, P.C.

23 By: 

24 Matthew Turetsky, WSBA #23611
25 Thomas V. Dulcich, WSBA #13807
26 Virginia R. Nicholson, WSBA #39601
*Attorneys for Defendant
Nationwide Life Insurance Company*

ORDER GRANTING IN PART DEFENDANT NATIONWIDE
LIFE INSURANCE COMPANY'S MOTION TO EXCLUDE
IMPROPER OPINIONS OF JOHN OLSEN - 2

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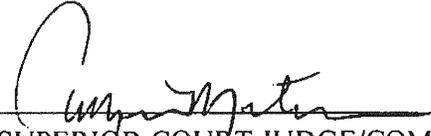
SCHWABE, WILLIAMSON & WYATT, P.C.
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Telephone 208.822.1711 Fax 206

0-00000849

Motion to SNIKI, granting Summary judgment
and judgments in favor of defendants was
correct and should be affirmed

IT IS FURTHER ORDERED that the Court Administrator's Office shall forthwith send copies of this Order to the parties, or attorneys if represented, at their respective addresses of record.

DONE THIS 2nd day of March, 2014 15



SUPERIOR COURT JUDGE/COMMISSIONER

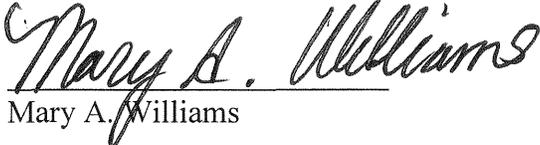
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CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct: That on the 30th day of July, 2015, I arranged for service *via U.S. Mail* of the foregoing RESPONDENTS' JOINT BRIEF to the parties to this action as follows:

Eric B. Eisinger
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Facsimile: (509) 735-7140
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Counsel for Plaintiff
Gary Waddoups, as Personal Representative for
The Estate of H. Marr Waddoups

Michael B. Merchant
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Counsel for Defendants
Financial Management, Inc., Clark L Permann
and Jane Doe Permann


Mary A. Williams

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