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NO. 57068-4-I

**COURT OF APPEALS
OF THE STATE OF WASHINGTON, DIVISION I**

**MICHAEL STEPHENS, on behalf of himself and all
others similarly situated,**

Respondent

v.

**OMNI INSURANCE COMPANY, a foreign insurance
company; and CREDIT CONTROL SERVICES, INC.
d/b/a Credit Collection Services,**

Appellants

**OPENING BRIEF OF
APPELLANT CREDIT CONTROL SERVICES, INC.**

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I. INTRODUCTION

At issue in this case is the applicability of Washington's Consumer Protection Act, RCW 19.86, *et seq.* ("CPA") to a private tort-based dispute between a single non-consumer and his adversary. Under established Washington law, the fundamental predicate for assertion of a violation of the CPA is that the conduct alleged to be a violation must adversely affect those individuals whom the statute was designed to protect, *i.e.*, Washington *consumers* of the goods or services sold or offered for sale by the party charged with a violation of the CPA.

Plaintiff/Respondent Michael Stephens caused an automobile accident that injured Carrine York and damaged her automobile. At the time of the accident, York was insured by Defendant/Appellant Omni Insurance Company ("Omni") and Stephens held himself out as if he were uninsured. Omni therefore paid sums under the uninsured motorist provisions of York's insurance policy to cover York's damages and, by doing so, became subrogated to York's interests. Omni then retained Defendant/Appellant Credit Control Services, Inc. ("CCS") to assist in its subrogation recovery efforts. CCS, in turn, sent letters to Stephens that are the subject of this case.

Stephens is not a consumer and cannot stand in the shoes of a consumer. Nevertheless, he sued CCS and Omni, alleging that the

issuance of these letters violated the CPA. Although the trial court opined that CCS and Omni had violated the CPA, it candidly acknowledged that “there is no case directly on point.” CP 783. This Court accepted discretionary review, identifying “the core issue” as “whether there is a viable claim under the Consumer Protection Act based upon the use of such collection notices for subrogation claims.” Dec. 29, 2005 Commissioner’s Ruling Granting Discretionary Review (Comm. Verellen).

As discussed herein, the trial court defied the purpose of the CPA by permitting a non-consumer to prosecute a CPA claim against his adversary. In this appeal, CCS requests that this Court confirm that the CPA cannot be utilized as a cause of action for injuries allegedly sustained by at-fault uninsured motorists such as Stephens based upon nothing more than the manner in which CCS and Omni pursued their right to recover sums paid. Confirmation that the CPA does not apply to cases such as this is the best way to preserve the well-established rights of the subrogated insurer (Omni) and its agent (CCS) to obtain reimbursement for uninsured motorist claims that were fully and promptly paid by Omni in accordance with Washington’s uninsured motorist laws.

For the reasons discussed herein, this Court must reverse the trial court's partial summary judgment order and dismiss Stephens' CPA claim as a matter of law. Alternatively, this Court must reverse the trial court's order and remand to allow CCS to take discovery on the CPA elements.

II. ASSIGNMENT OF ERROR

The trial court erred by concluding as a matter of law that Defendant/Appellant Credit Control Services, Inc. violated the Consumer Protection Act. (September 19, 2005 Order Granting Partial Summary Judgment, CP 584 & October 11, 2005 Order Denying Reconsideration, CP 715).

III. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

ISSUE ONE: Given that Stephens -- who is not a consumer, nor one who could stand in the shoes of a consumer -- lacks standing to assert a claim against his adversary (CCS) under the CPA, is dismissal of his CPA claim required?

ISSUE TWO: Where Stephens has not presented evidence to support any of the five elements of the CPA so as to establish a *prima facie* case, is dismissal of his CPA claim required?

ISSUE THREE: Where Stephens accepted responsibility for causing the automobile accident at issue in this case and later confirmed

his liability by formally confessing judgment, does the doctrine of *res judicata* prevent him from asserting a CPA claim that disputes his liability?

ISSUE FOUR: *(This issue should only be addressed if this Court concludes that Stephens has standing to sue CCS under the CPA.)*

Where the trial court determined that Stephens was entitled to partial summary judgment based upon nothing more than untested self-serving statements from Stephens himself, is a remand required to allow CCS an opportunity to conduct discovery under CR 56(f) (including but not limited to Stephens' deposition) prior to consideration of Stephens' Motion for Partial Summary Judgment?

IV. STATEMENT OF THE CASE

A. **The Automobile Accident Involving Stephens, Who Represented That He Was Uninsured.**

On June 9, 2003, Carrine York, a policyholder insured by Omni Insurance Company ("Omni"), was rear-ended by Plaintiff/Respondent Michael Stephens in a two-car automobile accident. CP 68, 198. At the time of the accident, Stephens failed to provide proof of liability insurance as required by Washington law. *See* RCW 46.30 (Mandatory Liability Insurance Act); RCW 46.29 (Financial Responsibility Act). CP 68, 199. Omni, using licensed insurance adjusters governed by and

acting within the applicable statutory bounds, determined Stephens to be completely at fault for causing the accident. CP 198-199.

B. Omni Pays for York's Property Damage Under The Uninsured Motorist Provisions of York's Policy, and Stephens Reimburses Omni.

Stephens' collision caused damage to York's vehicle. Because of Stephens' failure to provide proof of insurance, Omni paid sums to York under the uninsured motorist provisions of her insurance policy. After accounting for York's \$100 deductible, Omni paid \$444.09 to York to cover property damage to her vehicle. CP 198-199.

Thereafter, Omni advised Stephens of the amount it had paid on his behalf due to his status as an uninsured motorist. CP 215-232. Omni exercised its subrogation rights¹ by seeking reimbursement from Stephens for the property damage sum paid. CP 216. On November 6, 2003, Stephens remitted full payment of \$444.09 to reimburse Omni for sums it paid to repair York's vehicle. CP 216. Significantly, Stephens did not contest: 1) Omni's determination that Stephens was uninsured at the time of the June 9, 2003 automobile accident; 2) Omni's adjusters'

¹ Subrogation is an equitable right which exists as a matter of law when an insurance company pays its insured for a claim. *See, e.g.,* Allen D. Windt, INSURANCE CLAIMS AND DISPUTES, § 10:5 at 221 (4th ed. 2001). *See Johnny's Seafood Co. v. City of Tacoma*, 73 Wn. App. 415, 422, 869 P.2d 1097 (1994) (explaining that the subrogating insurer "steps 'into the shoes'" of its insured).

determination that Stephens was 100% liable for the accident; or 3) the amount of property damage expense that was owing. CP 215-17.

C. **Omni Pays for York's Medical Expenses Under The Uninsured Motorist Provisions of York's Policy, and Retains CCS to Seek Reimbursement.**

1. **York Receives Medical Treatment for Bodily Injuries Sustained as a Result of the Automobile Accident, and Omni Makes Payment in the Amount of \$6,412.**

Through early 2004, York received medical treatment for bodily injuries she sustained as a result of the June 9, 2003 automobile accident. CP 216. Omni again adjusted the loss using licensed insurance adjusters governed by and acting within the applicable statutory bounds. CP 198-99. After doing so, Omni made payment under the uninsured motorist provisions of York's policy in the amount of \$6,412. CP 216. Of this sum, \$5,112 was to cover York's medical expenses and \$1,300 was to cover her bodily injuries. CP 216.

2. **Omni Retains CCS to Recover in Subrogation; CCS Sends Stephens Two Letters Requesting *Either* Proof of Insurance *Or* Reimbursement of the \$6,412.**

After making the medical expense/bodily injury payment to York on behalf of Stephens, Omni again exercised its subrogation interest. CP 216. To that end, Omni sought reimbursement from Stephens, who had already acknowledged his liability for causing the automobile accident. CP 216. Omni retained CCS, a collection agency, to assist in its recovery efforts. CP 216-17.

On April 16, 2004, and May 7, 2004, CCS sent letters to Stephens advising him of the \$6,412 medical expense/bodily injury payment made by Omni under the uninsured motorist provisions of York's policy. CP 385-86; 388-90. Each of these letters clearly stated that it was an attempt to recover a "Subrogation Claim" regarding Omni Insurance, referencing the "Date of Loss" as "06/09/2003." Each letter requested that Stephens provide *either* proof of insurance coverage that he held on the date of loss *or* payment of \$6,412. CP 388-90.

3. Stephens' Actions in Response to the CCS Letters.

In response to the two CCS letters, Stephens telephoned CCS on April 27, 2004, and, on May 12, 2004, wrote a letter to CCS. CP 386. Stephens contested the \$6,412 amount and requested proof that Omni had made payment in this amount. CP 386. Stephens did not contest: 1) Omni's determination that Stephens was uninsured at the time of the June 9, 2003 automobile accident; or 2) Omni's adjusters' determination that Stephens was 100% liable for the accident. CP 386-90. Significantly, Stephens never paid any money to either Omni or CCS in response to the two letters sent by CCS. CP 385-87.

D. Nearly One Year After the Accident, It Is Discovered That Stephens Actually Had Insurance at the Time of the Accident.

On May 19, 2004, Geico Insurance Company notified CCS that it had insured Stephens on the date of his automobile accident with York.

CP 386. For some unspecified reason, Stephens failed to notify or file a claim with his own liability insurance carrier until after he had received the second CCS letter some *eleven months* following the automobile accident. CP 68, 386. Instead, prior to this date, Stephens elected to hold himself out to be an uninsured motorist in direct violation of Washington's Mandatory Liability Insurance Act and Financial Responsibility Act. *See* RCW 46.29 & 46.30.

After receiving Stephens' insurance information from Geico, CCS did not send any further correspondence to Stephens. CP 386.

E. Stephens Sues CCS and Omni, Asserting an Inapplicable CPA Cause of Action.

On June 29, 2004, just six weeks after he first notified his own insurer of the automobile accident, Stephens filed a lawsuit against Omni and CCS. CP 1-17. Even though Stephens was not a consumer of CCS nor one who could stand in the shoes of a consumer, he sought relief under the CPA.² Specifically, Stephens alleged that his receipt of the CCS letters violated the CPA. *Id.* Although he neither identified nor named any other plaintiff, Stephens styled his lawsuit as a "class action," ostensibly to include one or more of the 134 individuals who received letters that CCS sent on behalf of Omni. CP 1-17, 44.

² Stephens also alleged one count of "unjust enrichment." CP 15. Because that count was not addressed in Stephens' Motion for Partial Summary Judgment, it is not before this Court on appeal.

F. **Stephens Executes a Confession of Judgment and His Insurer Reimburses Omni for the Full \$6,412 Medical Treatment/Bodily Injury Payment Made by Omni.**

On April 19, 2005, Stephens executed a Confession of Judgment, thereby confirming his liability for causing the June 9, 2003 automobile accident with York. CP 32-34; 189-90. On the same date, Geico issued payment to Omni on behalf of Stephens for the full subrogated amount of \$6,412 as related in the CCS letters. CP 192-96, 388-90. Omni filed a Satisfaction of Judgment on May 5, 2005. CP 35-36.

G. **Stephens Files a Motion for Partial Summary Judgment That is Granted Before CCS is Allowed to Depose Stephens.**

On August 19, 2005, Stephens filed a motion for partial summary judgment, seeking a legal determination that CCS and Omni had violated the CPA. CP 48-66. In support of that Motion, Stephens relied only upon his own self-serving declaration. CP 67-83. Stephens claimed he suffered injury to business because he elected to take time away from his landscaping business to respond to the CCS letters. He also claimed that he incurred damages because he purchase his credit report and paid to monitor his credit file based upon his fear that his credit *might* be adversely impacted by the CCS letters. He also asserted damages in the form of costs and expenses he allegedly incurred to consult with an attorney and in attorney fees. In addition, he claimed to have incurred a

variety of expenses, including expenses to travel to visit his attorney in Seattle and use of his business's office supplies. CP 67-83.

CCS opposed Stephens' motion, arguing instead that dismissal of Stephens' CPA claim was required. CP 278-301. Alternatively, CCS asked the trial court to defer ruling on Stephens' motion as authorized by CR 56(f) to allow CCS to conduct discovery, including deposing Stephens. CP 300-01. Even though Stephens' evidence was comprised of only his own declaration, the trial court did not allow CCS to depose Stephens before the trial court handed down its ruling on Stephens' motion. CP 300-01, 584-88.

The trial court awarded partial summary judgment to Stephens, concluding as a matter of law that CCS and Omni had violated the CPA. CP 785-89. Although the trial court made no determination as to an amount of damages to be awarded, it expressly stated that Stephens was entitled to judgment as a matter of law on the CPA elements, including the existence of compensable injury. *Id.* CCS filed a motion for reconsideration, which the trial court denied. CP 663-74, 715-17.

H. The Trial Court Allows Stephens to Amend His Complaint to Greatly Expand the Putative Class Before Class Certification is Determined.

On September 26, 2005 -- after the trial court's ruling on summary judgment and before class certification was sought -- Stephens

sought leave to amend his complaint. CP 598-631. Specifically,

Stephens sought to expand the putative class to include:

all persons who, while residing in the State of Washington, were sent 'collection notices' by CCS that are substantially similar to either the April 14, 2004 Collection Notice and/or May 7, 2004 Collection Notice sent to Stephens, in connection with attempts to collect amounts allegedly owed,

CP 790-804. Despite strong opposition from CCS and Omni, the trial court granted Stephens' motion. CP 675-79, 724-36, 790-91. By doing so, the trial court permitted Stephens to expand the putative class from 134 individuals receiving letters from CCS sent on behalf of Omni to thousands of additional persons who allegedly received similar letters from CCS sent on behalf of unidentified, non-party insurers. CP 44, CP 675-679, CP 724-736, CP 790-791.

I. The Trial Court Certifies its Own Partial Summary Judgment Order for Immediate Appellate Review, and This Court Grants Discretionary Review.

The trial court affirmatively certified its summary judgment order for immediate appeal under RAP 2.3(b)(4). CP 782-84. In doing so, the court candidly admitted that there is no Washington law on point to support its conclusion. CP 783 (“[T]here is no case directly on point.”).

On December 29, 2005, this Court accepted discretionary review. Dec. 29, 2005 Commissioner’s Ruling Granting Discretionary Review

(Comm. Verellen). This Court identified “the core issue” as “whether there is a viable claim under the Consumer Protection Act based upon the use of such collection notices for subrogation claims.” *Id.* at 3. This Court nonetheless explained that its review was not limited to the issue of standing, stating that “the parties may raise any issues arising out of the partial summary judgment.” *Id.* at 4.

V. ARGUMENT

A. Summary of Arguments.

There are three independent legal bases on which Stephens’ CPA claim against CCS must be dismissed. For any one of these reasons, this Court should determine that CCS is entitled to judgment as a matter of law.

First, it is undisputed that Stephens is not a consumer in his relationship with CCS and is unable to stand in the shoes of a consumer with regard to his allegations against CCS. Existing law therefore does not permit him to assert a CPA cause of action. Moreover, public policy does not support extension of the law to allow him to bring such a claim. This Court must therefore dismiss Stephens’ CPA claim as a matter of law.

Second, the record does not contain evidence sufficient to support any of the five elements of the CPA. A review of the record and the law

will confirm that Stephens failed to present sufficient evidence to support any of the CPA elements, let alone all of them as required to survive summary judgment. This Court must therefore dismiss Stephens' CPA claim as a matter of law.

Third, the doctrine of *res judicata* prevents Stephens from asserting a CPA claim that disputes his liability. Because Stephens accepted responsibility for causing the automobile accident at issue in this case, he is precluded from thereafter maintaining a cause of action predicated upon a claim that he disputed that liability. This Court must therefore dismiss Stephens' CPA claim as a matter of law.

Alternatively, the trial court's order granting partial summary judgment to Stephens must be reversed. The trial court refused to allow CCS to take Stephens' deposition, and then granted summary judgment based upon evidence set forth in Stephens' untested declaration. Under these circumstances, this Court must remand to allow CCS to take discovery on the CPA elements.

B. This Court Reviews the Trial Court's Order *De Novo* With No Deference Given to the Trial Court's Commentary.

This Court reviews *de novo* all questions of law, including the trial court's order granting summary judgment. *Hill v. Cox*, 110 Wn. App. 394, 402, 41 P.3d 495 (2002). As this Court is well aware, summary judgment is appropriate if, from all the evidence viewed in the

light most favorable to the nonmoving party, reasonable persons could reach but one conclusion. *Clements v. Travelers Indem. Co.*, 121 Wn.2d 243, 249, 850 P.2d 1298 (1993); CR 56.

When reviewing a summary judgment order, this Court is to consider “evidence and issues” called to the attention of the trial court. RAP 9.12; *see also* RAP 2.5(a). Thus, this Court is to engage in the same inquiry as the trial court with no deference afforded to the trial court’s stated reasons for granting summary judgment. *Huff v. Budbill*, 141 Wn.2d 1, 7, 1 P.3d 1138 (2000). Any oral or written findings of fact and corresponding commentary made by the trial court are superfluous and are not to be considered by the appellate court. *See, e.g., Hubbard v. Spokane County*, 146 Wn.2d 699, 706 n.14, 50 P.3d 602 (2002).

C. Stephens’ CPA Claim Must Be Dismissed Because the CPA Does Not Apply to This Case.

1. The CPA Does Not Apply to Adversaries Who Are Not Consumers and Cannot Stand in the Shoes of Consumers.

The Washington Consumer Protection Act only protects *consumers* of the goods or services sold or offered for sale by the party charged with a violation of the Act. *See, e.g.,* RCW 19.86.010-.020; Laws of 1961, § 20, Ch. 216. It does not protect parties whose only connection with one another is through an automobile accident

where the underlying parties' interests were adverse from the beginning.³

Washington courts have never recognized third party CPA actions brought against an adverse party's insurer or the insurer's agent. *See, e.g., Green v. Holm*, 28 Wn. App. 135, 137, 622 P.2d 869 (1981); *Marsh v. General Adjustment Bureau, Inc.*, 22 Wn. App. 933, 936-37, 592 P.2d 676 (1979). In *Marsh*, the Court expressly confirmed that a consumer relationship was a prerequisite to a CPA action, not the adverse relationship between a subrogating insurer and claimant. *Marsh*, 22 Wn. App. at 936-37. A very similar relationship between the parties found insufficient in *Marsh* is of course the relationship present here (agent for a subrogating insurer and third party tortfeasor).

The Washington Supreme Court's decision in *Washington State Physicians Insurance Exchange & Assn. v. Fisons*, 122 Wn.2d 299, 313, 858 P.2d 1054 (1993), acknowledged that while a plaintiff is not required to show a *direct* consumer relationship with the defendant to have standing to assert a violation of the CPA, the claimant must be able to assert a consumer relationship that was at the minimum *indirect*. In other words, a plaintiff can sue under the CPA if he or she is sufficiently

³ "Because the insurance company is standing in the shoes of the insured consumer, it logically follows that it may pursue the rights of its insured." *First State Ins. Co. v. Kemper Nat. Ins. Co.*, 94 Wn. App. 602, 971 P.2d 953, 958 (1999) (footnote omitted).

ensconced in the chain of commerce between the manufacturer and the “ultimate consumer” such that he or she becomes the “logical person to be the ‘private attorney general’” and “stand[] in the shoes of the ‘ordinary consumer.’” *Id.* at 313. Critical to the *Fisons* analysis was the threshold showing that the consuming public or some consumer of the defendant’s goods or services was injured by the defendant’s conduct. No such injury to the consuming public has been or can be shown here as parties to an accident are not consumers.

Indeed, all published Washington appellate cases interpreting the CPA require a plaintiff to be either a direct consumer or one standing in the shoes of a consumer seeking to protect the consuming public’s interests as a prerequisite to establishment of a CPA cause of action. None of the CPA jurisprudence stands for the proposition that a tortfeasor whose interests are completely adverse to the party to be charged may assert a CPA claim against his adversarial victim, that victim’s subrogating insurer, or its agent.

2. Statutes Analogous to the CPA Confirm That the CPA Does Not Apply to This Case.

The CPA is not a tort-based remedy. *Sing v. John L. Scott, Inc.*, 134 Wn.2d 24, 46, 948 P.2d 816 (1997) (Talmadge, J., dissenting). It is a statutory remedy based on section 5 of the Federal Trade Commission

Act, “the purpose of which is to forestall unfair or deceptive acts or practices in trade or commerce.” *Id.* at 47.

The CPA explicitly directs Washington courts to consider federal decisions construing federal statutes that serve the same purpose as the CPA for assistance in construing the CPA. *See* RCW 19.86.920;⁴ *Boggs v. Whitaker, Lipp & Helea, Inc., P.S.*, 56 Wn. App. 583, 587 n.6, 784 P.2d 1273 (1990) (citing *State v. Black*, 100 Wn.2d 793, 799, 676 P.2d 963 (1984)). Federal consumer protection statutes mirror the CPA’s focus on the requirement of consumer injury. Washington’s CPA mirrors its federal counterpart – the Federal Trade Commission Act, 15 U.S.C. § 45 (“FTCA”). Both statutes were designed to protect consumers from unfair or deceptive acts or practices.

⁴ The legislature hereby declares that the purpose of this act is to complement the body of federal law governing restraints of trade, unfair competition and unfair, deceptive, and fraudulent acts or practices in order to protect the public and foster fair and honest competition. It is the intent of the legislature that, in construing this act, the courts be guided by final decisions of the federal courts and final orders of the federal trade commission interpreting the various federal statutes dealing with the same or similar matters and that in deciding whether conduct restrains or monopolizes trade or commerce or may substantially lessen competition, determination of the relevant market or effective area of competition shall not be limited by the boundaries of the state of Washington. To this end this act shall be liberally construed that its beneficial purposes may be served.

It is, however, the intent of the legislature that this act shall not be construed to prohibit acts or practices which are reasonable in relation to the development and preservation of business or which are not injurious to the public interest, nor be construed to authorize those acts or practices which unreasonably restrain trade or are unreasonable per se.

RCW 19.86.920 (emphasis added).

In *Blake v. Federal Way Cycle Center*, 40 Wn. App. 302, 310, 698 P.2d 578 (1985), this Court recognized that the CPA identifies federal court interpretations of federal statutes dealing with matters similar to those involved in the CPA as persuasive precedent in adjudicating CPA claims on summary judgment. As in *Sing*, the *Blake* court identified section 5 of the FTCA for establishment of three criteria that determine whether a practice or act is unfair:

(1) Whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law or otherwise – whether, in other words, it is within at least the penumbra of some common-law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers (or competitors or other business men).

Id. (citing *Federal Trade Comm'n v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 n.5, 92 S.Ct. 898, 905 n.5, 31 L.Ed.2d 170 (1972)).

According to the Federal Trade Commission, the most important of the above criteria for establishing unfairness is unjustified consumer injury. Before consumer injury can be found to be unjustified or “unfair,” the injury to consumers must be substantial; it must not be outweighed by any countervailing factors; and the injury must be one that consumers reasonably could not have avoided.

Id. (citing FTC letter of December 17, 1980, 5 Trade Reg. Rep. (CCH) § 50,421) (emphasis added).

The U.S. Supreme Court in *Federal Trade Comm'n v. Sperry & Hutchinson Co.*, 405 U.S. at 244, explained:

The amendment added the phrase “unfair or deceptive acts or practices” to the section’s original ban on “unfair methods of competition” and thus made it clear that Congress, through § 5, charged the FTC with protecting consumers as well as competitors. The House Report on the amendment summarized congressional thinking: “[T]his amendment makes the consumer, who may be injured by an unfair trade practice, of equal concern, before the law, with the merchant or manufacturer injured by the unfair methods of a dishonest competitor.” HR Rep No. 1613, 75th Cong, 1st Sess, 3 (1937). *See also* S.Rep No. 1705, 74th Cong, 2d Sess, 2-3 (1936).

Boggs v. Whitaker, Lipp & Helea, Inc., P.S., 56 Wn. App. 583, 587-88, 784 P.2d 1273 (1990) (emphasis added).

Unfair or deceptive conduct subject to the FTCA and RCW 19.86.920 concerns the solicitation or public offering of goods or services, not resolution of an insurer’s subrogation claim against an uninsured motorist. The Washington Supreme Court has opined:

The protection afforded under federal trade regulations is primarily for the public at large, rather than the individual consumer. Under 15 U.S.C. § 45(b) (1970), the Federal Trade Commission Act authorized federal action against violators only if it is in the public interest. A common element running through all the types of conduct found by

the Commission to be unfair or deceptive is solicitation or public offering. It is the unfair or deceptive practice which has a tendency to mislead the consuming public that is the gist of the Federal Trade Commission Act. *See* Comment, Toward Effective Consumer Law Enforcement: The Capacity to Deceive Test Applied to Private Actions, 10 Gonzaga L.Rev. 457 (1975); Leaffer & Lipson, Consumer Actions Against Unfair or Deceptive Acts or Practices: The Private Uses of Federal Trade Commission Jurisprudence, 48 Geo.Wash.L.Rev. 521 (1980).

Eastlake Const. Co., Inc. v. Hess, 102 Wn.2d 30, 54, 686 P.2d 465 (1984) (Rosellini, J., dissenting in part).

Notably, analogous federal law and law from other states confirm the threshold requirement that a consumer relationship is required. *See, e.g., Hawthorne v. Mac Adjustment, Inc.*, 140 F.3d 1367, 1371-72 (11th Cir. 1998) (holding that the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 et seq., was inapplicable to an attempted subrogation recovery against uninsured third party tortfeasor); *see also McCarter v. State Farm Mut. Auto Ins. Co.*, 113, Ill.App.3d 97, 101, 473 N.E.2d 1015, 1018 (Ill. Ct. App. 1985) (motorcyclist who collided with a car driven by State Farm's insured could not bring a consumer protection claim against State Farm for settling the motorcyclist's third-party claim against State Farm's insured; "the transaction complained of ... does not involve a sale of insurance. In fact, the plaintiff is not even a consumer

under these circumstances.... [W]e affirm the trial court's dismissal of Count I.").

If, as here, there is no conduct directed towards the "consuming public," then the FTCA and the CPA do not apply. These statutes mandate protection for the public against unfair or deceptive conduct in the context of consumer transactions, which does not exist in this case.

3. The Attempt by Stephens, a Non-Consumer, to Reap Benefits Intended for Consumers Under the CPA Undermines the Purpose and Scope of the CPA.

As discussed above, a plaintiff is only permitted to assert a violation of the CPA when that plaintiff or the consuming public has suffered unfair or deceptive acts or practices committed by businesses in connection with the consumer side of their business, not when they are protecting their interests from adverse claims. The CPA simply does not apply where, as here, the plaintiff is a non-consumer and tortfeasor seeking to escape a valid obligation to pay on a subrogated claim that arose out of a claimant's tort instead of the requisite consumer-based transaction. The fact that CCS sought to recover this subrogated claim on behalf of an insurance company did not transform Stephens into a consumer of services for purposes of establishing a CPA violation.

The CPA should not be construed to prohibit acts or practices that are reasonably related to the development and preservation of

business, or which are not injurious to the public interest. RCW 19.86.920. Acts which are done in good faith under a reasonable interpretation of the law are not CPA violations. *Perry v. Island Sav. & Loan Assn.*, 101 Wn.2d 795, 810, 684 P.2d 1281 (1984). Acts which bear a reasonable relationship to the development and preservation of business are not CPA violations. *Travis v. Washington Horse Breeders Assn.*, 111 Wn.2d 396, 408, 759 P.2d 418 (1988).

Moreover, public policy confirms that the CPA does not and should not apply to this instant case. At the time of the automobile accident, Stephens affirmatively represented that he was an uninsured motorist in violation of Washington law. The Washington Legislature has expressly recognized “the threat that uninsured drivers are to the people of the state.” RCW 46.30.010. To protect the public from this threat, the Legislature requires all automobile insurers provide coverage for underinsured motorists. RCW 48.22.030. In addition, persons are prohibited from operating a motor vehicle without evidence of adequate liability insurance. RCW 46.30.020. Violators of this rule are subject to monetary penalties, and suspension of license and registration. RCW 46.30.020; RCW 46.29.605-610.

It is undisputed that Stephens was responsible for providing proof of his own liability insurance following the automobile accident.

Stephens' failure to do so shifted the obligation to Omni to promptly compensate its own policyholder under Omni's underinsured motorist coverage. Omni did exactly as it was required to do. Thereafter, Omni (through CCS) requested reimbursement in good faith from the apparently uninsured party, Stephens, based upon contractual and equitable subrogation rights. Thus, the mandatory insurance laws and the whole system of compulsory insurance, adjustment of claims, etc., is well established. Moreover, it recognizes the adversary nature of the relationships and includes considerable protections to avoid overreaching by insurance companies.

Stephens, who was at fault for an automobile accident and held himself out as if he failed to carry the mandatory insurance required by statute, is here seeking to leverage the CPA to cover for his own liability. Uninsured motorists such as Stephens who are responsible for causing property damage and personal injury to others cannot be permitted to obtain protection under the CPA for the reasonable actions taken by the victim's insurance companies and their agents in seeking to recover subrogation claims from the tortfeasor to which they are entitled.

4. Because Stephens is Not a Consumer and Cannot Stand in the Shoes of Consumers, He Has No Standing to Assert a CPA Claim.

In this case, it is undisputed that Stephens is not a consumer and is unable to stand in the shoes of a consumer with regard to his allegations against CCS. Existing law therefore does not permit him to assert a CPA cause of action. Moreover, public policy does not support extension of the law to allow him to bring such a claim. The CPA cannot be utilized to seriously undermine the well-established rights of the subrogated insurer (Omni) and its agent (CCS) to obtain reimbursement for uninsured motorist claims that were fully and promptly paid by Omni in accordance with Washington's uninsured motorist laws.

Because Stephens has no standing to assert a CPA claim, this Court must dismiss Stephens' CPA claim as a matter of law.

D. Stephens' CPA Claim Must Be Dismissed Because There was No Evidence Developed in The Record to Support the Five Required Elements of the CPA.

To prevail in a private CPA action, a plaintiff must establish five distinct elements: (1) unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or her business or property; and (5) causation. *Hangman Ridge v. Safeco Title*, 105 Wn.2d 778, 719 P.2d 531 (1986). A plaintiff's failure to meet

his burden of proof on any one element is fatal to the entire CPA claim.

Id. at 780.

1. Dismissal of Stephens' CPA Claim is Required Because He Failed to Adduce Evidence to Prove and Unfair or Deceptive Practice.

To establish an unfair or deceptive practice, the question is whether “ ‘the action has the capacity to deceive a substantial portion of the purchasing public.’ “ *Burbo v. Harley C. Douglass, Inc.*, 125 Wn. App. 684, 700, 106 P.3d 258 (2005) (citing *Luxon v. Caviezel*, 42 Wn. App. 261, 268, 710 P.2d 809 (1985)).

CCS sent the letters at issue in this case to a motorist who represented that he failed to carry the mandatory liability insurance and thus was uninsured in violation of Washington law. Stephens caused an automobile accident with a motorist who had been insured by Omni. The CCS letters sought *either* proof of insurance *or* reimbursement of amounts paid. The CCS letters identified: (1) CCS as the entity seeking recovery of the subrogation claim; (2) the letter recipient; (3) date of loss; (4) Omni as the subrogated insurer; (5) demand for payment or proof of insurance; (6) alternative legal and subrogation claim recovery options; (7) deadline for a response by the letter recipient; and (8) contact information for CCS. CP 454.

Stephens identified no evidence to indicate that the CCS letters were in any way inaccurate or untruthful. Stephens has never alleged that CCS added charges or fees to the amounts claimed by Omni in subrogation. Moreover, Stephens offered no evidence to indicate that the letters CCS sent to Stephens were forwarded to the public at large. There has thus been no adequate showing of any likelihood of deception. Stephens never claimed that he was deceived by the CCS letters.

Moreover, the assertion of a subrogation claim does not violate public policy, constitute an unfair or deceptive act, or harm consumers. Subrogation is an equitable right which exists as a matter of law when an insurance company pays its insured for a claim:

In general, absent a statute to the contrary, an insurance company will, in making a payment to the insured required under the policy, always be subrogated, either totally or partially . . . to the insured's rights and remedies against the wrongdoer.

Allen D. Windt, INSURANCE CLAIMS AND DISPUTES, § 10:7 at 221 (4th ed. 2001). The doctrine “seeks to impose alternate responsibility for a wrong or loss on the party who, in equity and good conscience, ought to bear it.” *Mahler v. Szucs*, 135 Wn.2d 398, 42, 957 P.2d 632 (1998); *Johnny's Seafood Co. v. City of Tacoma*, 73 Wn. App. 415, 422, 869 P.2d 1097 (1994) (subrogating insurer steps into the shoes of its insured); *Winters v. State Farm Mut. Auto Ins. Co.*, 144 Wn.2d 869, 875, 31 P.3d

1164 (2001) (subrogation is an equitable doctrine that permits a party who has paid benefits to one party to collect from another).

“Subrogation is always liberally allowed in the interests of justice and equity.” *Mahler*, 135 Wn.2d at 412. There is no rule which requires that a subrogee must first sue the third person liable for the loss before seeking to collect his claim, although he has that right. *Id.* at 413.

Thus, the recitation of an accurate subrogation claim for monies that are believed to be owed set forth in the CCS letters does not have the capacity to deceive a substantial portion of the purchasing public. Because Stephens failed to set forth sufficient evidence to support the unfair or deceptive practice CPA element, his CPA cause of action fails as a matter of law. *See Hangman Ridge*, 105 Wn.2d at 780.

2. Dismissal of Stephens’ CPA Claim is Required Because the CCS Letters Did Not Affect A Public Interest Did Not Concern A Private Dispute, And Did Not Involve The Public At Large.

Another required element of a CPA violation is that of a public interest showing. *See Hangman Ridge*, 105 Wn.2d at 787. All private plaintiffs in Washington must make a showing of public interest impact. *Id.* at 789. In *Hangman Ridge*, the Washington Supreme Court revised the public interest test from a three-prong inquiry to a consideration of “several factors, depending upon the context in which the alleged acts were committed.” *Id.* at 789-90. The Court predicated its recitation of

these factors by demarcating two contexts in which the alleged acts could be committed. The first is business acts could arise in the context of a consumer transaction; and the second is business acts could arise in the context of a private dispute, such as in a breach of contract situation.

The “consumer transaction” context involves a transaction including the purchase of goods. *See id.* at 790. The “private dispute” context is where the transaction is a private dispute affecting no one but the parties to the contract or relationship. *Id.* Typically, one party with unequal bargaining power enters into business transactions in the form of advertising and solicitation to exploit one or more members of the consuming public. *Id.* Examples of relationships that fall into this context include an attorney-client, insurer-insured, and realtor-property purchaser. *Id.*

Here, the “context in which these acts occurred was that of an essentially private transaction, rather than a consumer transaction.” *Id.* at 794. The context in which Stephens’ CPA claim arose was out of a private tort-based dispute. No advertising or solicitation or any other business/consumer transaction took place between Stephens and CCS. To the contrary, they have never been in any kind of consumer relationship.

Omni's entitlement to recover payments it made arose out of Stephens' negligent conduct in causing the automobile accident. CCS sent letters to Stephens to obtain proof of insurance or to recover monies. As such, Stephens' CPA claim is not consumer-centric and does not impact any current or future consumer interests held by him or any other Washington resident. By contrast, Stephens and CCS are and have always been adversaries. Any communications originating from Omni or CCS to Stephens cannot transform the parties' adversarial relationship into a consumer transaction..

Thus, under either the "consumer transaction" or the "private dispute" contexts, Stephens cannot meet his burden of proof on the public interest element. Because Stephens failed to set forth sufficient evidence to support this required element, his CPA cause of action fails as a matter of law. *See Hangman Ridge*, 105 Wn.2d at 780.

3. Dismissal of Stephens' CPA Claim is Required Because He Failed to Produce Evidence to Indicate That CCS's Letters Seeking Recovery Of Subrogated Amounts Constitute "Trade" Or "Commerce."

The purpose of the CPA is to deter unfair or deceptive business practices that adversely impact consumers or the consuming public. A prerequisite for establishing a violation of the CPA is a showing that the complained of act or practice occurred in a business's trade or commerce with the consuming public. *See Hangman Ridge*, 105 Wn.2d at 785;

RCW 19.86.010(2). The term “commerce” is defined as: “the exchange of goods, productions, or property of any kind; the buying, selling and exchanging of articles.” *See* BLACK’S LAW DICTIONARY, 6TH ED., at 269.

Under this definition, the issuance of CCS’s letters to recover subrogated amounts does not qualify as “commerce.” Indeed, it is undisputed that the CCS letters did not solicit the public to buy or purchase anything of value, offer to sell or exchange goods or services, or solicit trading or exchanging anything for value. All that CCS sought was compensation for the harm that Stephens had caused.

Here, Stephens offered no evidence to indicate that CCS engaged in trade or commerce. Stephens has offered no evidence to indicate that CCS sold goods or services to the public, solicited the public with advertisements or warranties for the sale of goods or services related to subrogation recoveries, or that the letters were sent to the public at large. Indeed, CCS only sent letters to Stephens after he was identified by Omni’s licensed insurance adjuster as an at-fault driver in order to recover Omni’s legitimate subrogated claim. Stephens and CCS are and have always been adversaries involved in a private dispute. Thus, the consuming public could not have been privy to or derived any benefit or incurred any harm from this adversarial relationship.

Accordingly, Stephens cannot satisfy the “trade” or “commerce” element of the CPA. Because he failed to set forth sufficient evidence to support this CPA element, his CPA cause of action fails as a matter of law. *See Hangman Ridge*, 105 Wn.2d at 780.

4. Dismissal of Stephens’ CPA Claim is Required Because He Failed to Adduce Evidence to Prove: 1) Injury to Business or Property and 2) Actual Damages Causally Related to His Receipt of the CCS Letters.

The CPA requires a plaintiff to prove both injury and damages. Injury is the measure of the adverse effect upon the consumer’s business or property caused by the allegedly unfair/deceptive act. Injury is a prerequisite to suit under the CPA. While the injury does not necessarily have to be monetary, the consumer’s property interest must be diminished because of the unlawful conduct before he will be allowed to sue. *Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d 735, 740-41, 733 P.2d 208 (1987).

Stephens alleges harm or injury to his business and property and seeks reimbursement for lost wages and earning capacity from his personal business. However, he did not claim injury to business reputation or goodwill. Stephens alleges that he incurred expenses to purchase his credit report and monitor his credit file. He, however, did not claim that his credit rating was actually impacted. In addition, Stephens claims that he incurred expenses in the form of driving to and

from his attorney's office, parking, gasoline in traveling to and from his attorney's office, telephone calls to his attorney and attorney fees. As discussed herein, the evidence offered by Stephens is insufficient as a matter of law to establish the injury or damages CPA elements.

a) Personal Injuries are Not Recoverable Under the CPA.

Stephens alleges that he suffered harm or injury to his business and property because he took time away from his business as a self-employed landscaper to inquire about the CCS letters. CP 69-72. He therefore seeks reimbursement for lost wages and earning capacity from his personal business. CP 64-65.

Reimbursement for lost wages and earning capacity do not constitute injury to "business or property" as contemplated by the CPA. *Hiner v. Bridgestone/Firestone, Inc.*, 91 Wn. App. 722, 959 P.2d 1158 (1998), *reversed on other grounds* by 138 Wn.2d 248 (1999); *accord*, *Ass'n of Washington Public Hosp. Districts v. Phillip Morris, Inc.*, 79 F.Supp.2d 1219 (W.D. Wash.), *aff'd*, 241 F.3d 696 (9th Cir. 2001). Personal injuries are not recoverable under the CPA. *Fisons*, 122 Wn.2d at 318.

The mere fact that Stephens happens to be self-employed does not operate to transform a personal injury into an injury to his landscaping business and property. It was Stephens' decision when to

make the telephone call and write the letter to CCS. Whether he elected to take time away from his business or whether he elected to take time away from his lunch hour or weekend is certainly not determinative of the nature of any injury suffered. There is simply no basis on which to elevate the expenses incurred by a self-employed person over identical expenses incurred by an employee. And ironically, none of this would have been necessary had he presented the claim promptly to his own insurance carrier, Geico.

Accordingly, reimbursement for lost wages and earning capacity sought by Stephens do not constitute injury to business or property resulting from his receipt of the CCS letters.

- b) Stephens' Fear That He Might Suffer Injury in the Future is Not Compensable Damage Under the CPA.

The costs and expenses incurred by Stephens to purchase his credit report and monitor his credit file do not constitute evidence of "injury to business or property" under the CPA. The undisputed evidence in the record, however, confirms that Stephens sought a copy of his credit rating because (a) he was in the market to purchase a home and (b) feared that his credit rating might have been affected by the CCS letters. CP 69. Stephens never alleged that he was unable to purchase a

home. Nor did he allege that the CCS letters in any way impaired his credit rating.

Moreover, the CPA does not provide a remedy for anticipatory claims. Plaintiffs who think they might have a claim for harm that may or may not be sustained at some point in the future must wait until harm is actually sustained before bringing suit. Stephens' purported fear that his credit rating might be impaired at some future point is simply not compensable damage under the CPA.

Consequently, expenses incurred by Stephens to purchase his credit report and monitor his credit file do not constitute injury to business or property resulting from his receipt of the CCS letters.

c) Attorney Fees Are Not Compensable Damages Under the CPA.

The costs and expenses incurred by Stephens to consult with an attorney and attorney fees do not constitute evidence of "injury to business or property" under the CPA.

When a plaintiff's CPA claims are based solely on hiring an attorney or bringing suit, Washington courts have found such an alleged injury insufficient to satisfy the injury element of a private CPA claim. *Demopolis v. Galvin*, 57 Wn. App. 47, 54, 786 P.2d 804 (1990), *rev. denied*, 115 Wn.2d 1006, 796 P.2d 1263 (1990); *Sign-O-Lite Signs, Inc. v. DeLaurenti Florists, Inc.*, 64 Wn. App. 553, 564, 825 P.2d 714 (1992).

In *Sign-O-Lite Signs*, this Court held that attorney fees are *not* “actual damages” as contemplated by the CPA, and that actual damages are required *before* attorney’s fees can be awarded. *Sign-O-Lite Signs*, 64 Wn. App. at 565-66 (citing *St. Paul Fire & Marine Ins. Co. v. Updegrave*, 33 Wn. App. 653, 660, 656 P.2d 1130 (1983)). In that case, a florist entered into a contractual relationship with a sign vendor and was charged more than what was agreed for a rented sign that did not work properly. *Id.* at 557-58. This Court commented that “the trial court found no compensable damages but believed that the ‘unique circumstances’ of the case justified a conclusion that the attorney fees were ‘actual damages.’” *Sign-O-Lite Signs*, 64 Wn. App. at 565. This Court went on to find that this belief in a unique basis for damages was erroneous. *Id.* at 566.

Consequently, attorney fees incurred by Stephens are inappropriate to satisfy the “injury” and “damages” CPA elements, particularly given that no extenuating circumstances are present in this case.

5. Stephens’ Inability To Support Any of the CPA Elements Means That His CPA Claim Must Be Dismissed.

As discussed above, Stephens came forward with insufficient evidence to support any of the five elements of the CPA. A review of

the record and the law will confirm that Stephens failed to present sufficient evidence to support any of the CPA elements, let alone all of them as required to survive summary judgment. This Court must therefore dismiss Stephens' CPA claim as a matter of law.

E. **Stephens' CPA Claim Must Be Dismissed Under The Doctrine of *Res Judicata*.**

The doctrine of *res judicata* precludes Stephens from alleging that his receipt of the CCS letters constituted unfair or deceptive conduct under the CPA because he admitted liability for his tortious conduct prior to receiving the CCS letters. Thereafter, he formally confirmed this admission by confessing judgment.

The requirements for showing that a claim is barred under the doctrine of *res judicata* are shown by a concurrence of identity in four respects: (1) persons and parties, (2) cause of action; (3) subject matter; and (4) the quality of the persons for or against whom the claim is made. *See Kuhlman v. Thomas*, 78 Wn. App. 115, 120, 897 P.2d 365 (1995).

Here, all these elements are satisfied. Stephens admitted liability to Omni for the accident by paying the property damage sums incurred. Even when he received the CCS letters regarding the bodily injury/medical expense portion of the same claim (sent on behalf of Omni), Stephens never wavered from his admission of liability for the accident. His only objection to the bodily injury/medical expense

expenses was with regard to the amounts paid, not his liability owing. Indeed, his later formal confession of liability simply confirms that there was never any doubt that Stephens was fully at fault for the rear-end collision with York. Under these circumstances, Stephens cannot be permitted to feign innocence and/or confusion for the sole purpose of seeking recovery from Omni and CCS under a CPA theory.

The application of *res judicata* requires this Court to conclude as a matter of law that Stephens is precluded from contesting the claim of his liability and the validity of the subrogation claim by offering evidence of injury to business or property, damages or causation as those issues are foreclosed by his prior admission of liability. Because Stephens' CPA claim is barred under the doctrine of *res judicata*, this Court must dismiss that claim as a matter of law.

F. Alternatively, This Court Should Reverse the Trial Court's Partial Summary Judgment Order and Remand to Allow CCS To Take Discovery.

This argument should only be addressed if this Court concludes that 1) Stephens has standing to assert a CPA claim against CCS, and 2) that CCS is not entitled to judgment as a matter of law on the CPA elements.

In the event this Court declines to conclude that CCS is entitled to judgment as a matter of law, it must reverse the trial court's order and

remand for further proceedings. Stephens filed his partial summary judgment motion before any depositions had been taken. In CCS's opposition to Stephens' motion, CCS expressly requested that the trial court defer ruling on the motion under Civil Rule 56(f) in order to allow for discovery to be taken, namely the deposition of Stephens. The trial court flatly refused to allow CCS to do so.

As factual support for the CPA elements -- in particular the injury and damages elements -- Stephens offered only his own self-serving declaration. CP 67-83. Stephens baldly stated, *inter alia*, that he incurred a variety of expenses in order to respond to the CCS letters. *Id.* For example, he claimed he incurred expenses to travel to Seattle. CP 70. CCS was never able to inquire as to the circumstances surrounding these alleged trips or the claimed expenses (*e.g.*, wear and tear on his car and motorcycle, and parking expenses). Likewise, CCS was never able to obtain details about the general statements made by Stephens with regard to other claimed expenses (*e.g.*, office supplies) and time he alleges he took away from his personal business as a landscaper. CP 67-83.

Nonetheless, the trial court relied upon the one-sided evidence presented by Stephens to determine that Stephens was entitled to judgment as a matter of law. Even though the trial court was required to

view all the evidence in the light most favorable to CCS (the nonmoving party), here the trial court simply refused to allow CCS to present opposing evidence. *See* CR 56.

Thus, if this Court declines to dismiss Stephens' CPA claim for any one of the bases identified herein, it must reverse the trial court's order granting partial summary judgment to Stephens and remand to allow CCS to conduct discovery and present evidence on the CPA elements.

VI. CONCLUSION

For the reasons discussed herein, this Court must reverse the trial court's partial summary judgment order and dismiss Stephens CPA claim as a matter of law. Alternatively, this Court must reverse the trial court's order and remand to allow CCS to take discovery.

DATED: March 10, 2006

COZEN O'CONNOR

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DECLARATION OF SERVICE

Dava Bowzer states:

I am a citizen of the United States of America and a resident of the State of Washington, I am over the age of 21 years, I am not a party to this action, and I am competent to be a witness herein.

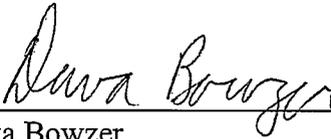
On this 10th day of March, 2006, I caused to be filed with the Court of Appeals of the State of Washington, Division I, the foregoing **OPENING BRIEF OF APPELLANT CREDIT CONTROL SERVICES, INC.** I also served copies of said document on the following parties as indicated below:

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STATE OF WASHINGTON
2006 MAR 19 PM 12:12

Parties Served	Manner of Service
<i>Counsel for Plaintiff:</i>	
Matthew J. Ide	() Via Legal Messenger
Ide Law Offices	() Via Overnight Courier
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Seattle, WA 98104-1500	(X) Via U.S. Mail
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed at Seattle, Washington, this 10th day of March, 2006.



Dava Bowzer

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