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SUPREME COURT  
OF THE STATE OF WASHINGTON

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ISIDORO PEREZ-CRISANTOS,

Appellant,

v.

STATE FARM FIRE & CASUALTY COMPANY,

Respondent.

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BRIEF OF RESPONDENT STATE FARM

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Emmelyn M. Hart, WSBA #28820  
Gregory S. Worden, WSBA #24262  
Lewis Brisbois Bisgaard & Smith LLP  
1111 Third Avenue, Suite 2700  
Seattle, WA 98101  
(206) 436-2020  
Attorneys for Respondent  
State Farm Fire & Casualty Company

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## I. INTRODUCTION

Isidro Perez-Crisantos appeals the trial court's summary dismissal of his claims of bad faith claims practices, violations of the Insurance Fair Conduct Act, Chapter 48.30 RCW ("IFCA"), violations of the Washington Consumer Protection Act, Chapter 1986 RCW ("CPA"), bad faith, and negligence by State Farm Fire & Casualty Company ("State Farm").

Perez-Crisantos was injured in an uncontested liability automobile collision with an underinsured motorist in November 2010. He was insured by State Farm. State Farm paid Perez-Crisantos \$10,400 in personal injury protection ("PIP) benefits; however, it disputed the extent to which the collision caused Perez-Crisantos's alleged injuries and the amount of his damages when it adjusted his subsequent underinsured motorist ("UIM") claim. The parties arbitrated Perez-Crisantos's entitlement to UIM benefits and then litigated his remaining claims. When Perez-Crisantos failed to demonstrate the existence of any genuine issue of material fact warranting a trial, the trial court<sup>1</sup> summarily dismissed his claims at State Farm's request.

Perez-Crisantos now appeals, arguing the trial court erred in

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<sup>1</sup> The Honorable Kathleen O'Connor.

granting summary judgment on his IFCA, CPA, bad faith, and negligence claims because questions of fact remain for trial. He engages on appeal in an obvious attempt to obscure the true nature of the parties' dispute. Contrary to his assertions, this case involves a valuation dispute resolved in arbitration and nothing more.

IFCA does not give Perez-Crisantos the right to sue State Farm solely for a violation of a Washington insurance regulation. His right to sue under IFCA arises only if State Farm unreasonably denied his claim for coverage or payment of benefits. No such denial occurred here. State Farm's investigation of the UIM claim was reasonable and not in bad faith as a matter of law where it reasonably disputed the value and cause of the claim and then paid it after arbitration. In addition, Perez-Crisantos failed to establish that State Farm's allegedly unfair practices proximately caused him a compensable injury under the CPA and ultimately waived his negligence claim. This Court should affirm the trial court in all respects.

**II. COUNTERSTATEMENT OF THE ISSUES RELATING TO APPELLANT'S ASSIGNMENTS OF ERROR**

State Farm acknowledges Perez-Crisantos's assignments of error and statement of the issues, but believes the issues are more appropriately formulated as follows:

1. Did the trial court properly dismiss the insured's IFCA claim where the plain language of the statute does not provide him with a cause of action for the insurer's alleged regulatory violation absent an unreasonable denial of coverage or benefits and he subsequently failed to prove an unreasonable denial of coverage or benefits occurred?

2. Did the trial court properly dismiss the insured's CPA claim on summary judgment where he failed to establish the insurer committed a *per se* violation of the CPA and he thereafter failed to prove all five required elements of the claim?

3. Did the trial court properly dismiss the insured's bad faith claim on summary judgment where there was no evidence the insurer unreasonably evaluated his UIM claim and it instead legitimately disputed both the cause of his injury and the amount of his damages?

4. Did the trial court properly dismiss the insured's negligence claim where he waived the claim and it duplicates his bad faith claim regardless?

### III. COUNTERSTATEMENT OF THE CASE

The vast majority of facts in this case are undisputed. Perez-Crisantos was injured in an uncontested liability automobile collision with an underinsured motorist in November 2010. CP 5, 32, 231-34. He alleges that, as a result of the collision, he suffered injuries to his neck, back, and right arm/shoulder and incurred nearly \$54,000 in special damages. CP 5, 32. State Farm disputes the extent to which Perez-Crisantos's alleged injuries were caused

by the collision and the amount of his damages. CP 232-34, 386.

At the time of the 2010 collision, Perez-Cristanos had an automobile insurance policy with State Farm. CP 4, 31. His policy included UIM coverage with a policy limit of \$50,000 and PIP coverage with a policy limit of \$10,000. CP 4, 31.

State Farm paid Perez-Crisantos \$10,000 in medical expenses and \$400 in lost wages under his PIP coverage. CP 74. Perez-Crisantos concedes that State Farm acted in good faith when adjusting his PIP claim. RP 9.

Perez-Crisantos notified State Farm on January 13, 2012 that he had settled his claim with the tortfeasor for \$25,000, the total available limits under the tortfeasor's insurance policy. CP 79-80. He asked whether State Farm would buy out his liability claim pursuant to *Hamilton v. Farmers Ins. Co.*, 107 Wn.2d 721, 733 P.2d 213 (1987). CP 80. He also formally demanded that State Farm pay his UIM policy limits, stating he had nearly \$54,000 in special damages. CP 6, 80. State Farm declined the *Hamilton* buyout and requested he hold his PIP reimbursement in trust. CP380, 387.

Over the next few months, Perez-Crisantos and State Farm corresponded several times regarding his UIM claim. CP 387. State Farm investigated the claim and valued it at or less than the

\$25,000 settlement he received from the tortfeasor because it did not believe his shoulder injury was causally related to the accident and thought his chiropractic treatment was excessive. CP 232-34, 386-87. State Farm posited that Perez-Crisantos's shoulder surgery may have resulted from one of two other accidents that he reported on his PIP application. CP 234. State Farm notified Perez-Crisantos on February 16, 2012 that it had determined the combination of his settlement with the tortfeasor's insurance company and the payment of his PIP award had fully compensated him for the injuries he sustained in the collision. CP 84, 387.

Perez-Crisantos contested State Farm's findings and requested reconsideration. CP 82. He reiterated his policy limits demand and requested a quick decision given his medical bills for a shoulder surgery he attributed to the accident. CP 82.

State Farm obtained a second opinion from orthopedic surgeon Dr. Scot Youngblood. CP 390-402. Based on Dr. Youngblood's opinion, State Farm reiterated its position that Perez-Crisantos's UIM claim did not exceed the value of the underlying settlement given the lack of causation and the excessive chiropractic care. CP 389. State Farm provided Perez-Crisantos with Dr. Youngblood's report and opinion. CP 389.

Perez-Crisantos filed a complaint against State Farm seeking to recover under his UIM policy for the injuries and damages he allegedly suffered in the collision. CP 3-10. He noted that State Farm denied his UIM claim because it did not believe his shoulder surgery was related to the accident and felt his chiropractic treatment was excessive. CP 7. In other words, he acknowledged the parties disagreed over the value of his UIM claim and the causal relationship between his injuries and the accident. Perez-Crisantos asserted extra-contractual claims for alleged claims handling violations, bad faith, and IFCA and CPA violations. CP 6-8.

The parties agreed to arbitrate the UIM claim and to bifurcate and stay the extra-contractual claims. CP 11-12, 34. They submitted the UIM dispute to arbitration. CP 34, 41-42. The arbitrator issued an award, which he later amended. CP 34, 358-59. In pertinent part, the arbitrator awarded Perez-Crisantos only \$2,392 in chiropractic and physical therapy treatments, \$35,440.61 in hospital charges for the shoulder surgery, \$2,400 in lost wages, and \$10,000 in non-economic damages. CP 41. Essentially, both parties “got something out of the mandatory arbitration process.” RP 26. Taking the applicable offsets for the tortfeasor’s \$25,000

liability limits and the applicable PIP payments, State Farm paid the remainder of the arbitration award and *Winters* fees (totaling \$24,401.86) on July 12, 2013. CP 48. The parties stipulated that the arbitration award had been satisfied. CP 48, 362-64.

After the stay was lifted, Perez-Crisantos filed an amended complaint in December 2013 asserting State Farm violated certain Washington insurance claims handling regulations. CP 30-38. He also alleged State Farm violated the CPA by violating WAC 284-30-330 and WAC 284-30-395 (which pertains to PIP coverage and about which Perez-Crisantos made no allegations), breached its “fiduciary duty” to him, breached its duty of good faith, failed to take reasonable care in the handling of his claims, and committed a *per se* violation of WAC 284-30-330(7). CP 34-37.

Perez-Crisantos moved for partial summary judgment and State Farm moved for summary judgment. CP 51-65, 100-109, 235-46, 280-96, 316-35. During the hearing on the motions, the trial court castigated Perez-Crisantos for continually mischaracterizing State Farm’s offer as a \$0 offer. RP 11-12. As the court recognized, State Farm agreed Perez-Crisantos may have suffered injuries and damages in the collision but believed they

were more than sufficiently recouped by the tortfeasor's \$25,000 policy limits payment and State Farm's \$10,400 PIP payment. RP 11-12. It thus did not value Perez-Crisantos's UIM claim as \$0, but determined the value did not exceed the recovery he had already received. RP 12-13; CP 84. After laying out a cohesive view of the facts and explaining its reasoning, the trial court granted summary judgment in State Farm's favor and denied it to Perez-Crisantos. RP 23-30; CP 348-58. Perez-Crisantos appeals, seeking direct review. CP 348-58.

#### **IV. SUMMARY OF THE ARGUMENT**

Perez-Crisantos failed to demonstrate a genuine issue of material fact to preclude summary judgment dismissal of his IFCA claim.

An alleged WAC violation is not independently actionable under IFCA. A cause of action under IFCA is only available to an insured who has suffered an unreasonable denial of coverage or benefits, not merely to an insured who can show a violation of one of the enumerated WACs. The WAC provisions may highlight when such a denial is unreasonable, but they are not independently actionable under IFCA. Regulatory violations matter only when deciding whether to award attorney fees or to enhance damages.

Washington pattern jury instructions are not the law. If a pattern jury instruction conflicts with statutory language, the jury instruction must track the statute. Use of a jury instruction that misstates the law is reversible error because prejudice is presumed.

State Farm reasonably valued Perez-Crisantos's UIM claim. A disparity in value between an arbitration award and an insurer's initial settlement offer is insufficient to raise a question of fact concerning the insurer's conduct.

Perez-Crisantos likewise failed to demonstrate a genuine issue of material fact to preclude summary judgment dismissal of his CPA claim.

To prove a private CPA claim, an insured must establish the presence of five well-recognized elements. An insured can establish the first and second elements of a CPA claim by establishing the insurer violated one of the standards contained in WAC 284-30-330 through 30-410. When an insured fails to establish a regulatory violation, however, he must demonstrate that his claim satisfies all of the elements of the five-part test. Failure to satisfy even one element is fatal to a CPA claim.

Since Perez-Crisantos did not establish that State Farm

violated WAC 284-30-330(7), he failed to establish a *per se* violation of the CPA on that basis. He was therefore required to satisfy all five elements. He did not.

The parties are free to pursue discovery according to the case schedule; however, there is no rule that prevents a party from noting a dispositive motion before discovery is complete. CR 56(f) permits the trial court to continue a summary judgment proceeding, but only after the moving party shows: (1) a good reason for the delay in obtaining the desired evidence; (2) what evidence would be established through the additional discovery; and (3) that the desired evidence will raise a genuine issue of material fact. Perez-Crisantos did not request a CR 56(f) continuance or make the required showing. The trial court did not err when it ruled on the parties' summary judgment motions based on the evidence before it.

Perez-Crisantos failed to demonstrate a genuine issue of material fact to preclude summary judgment dismissal of his bad faith claim.

Washington courts have concluded that the relationship between insurer and insured is "something less than a true fiduciary relationship" and treated UIM claims differently. The inherently

adversarial nature of the insurer/insured relationship in the UIM context precludes the insurer from acting as a fiduciary even if that duty would generally exist in regard to first party claims.

To succeed on a bad faith claim, the policyholder must show the insurer's breach of the insurance contract was "unreasonable, frivolous, or unfounded." An insurer may breach its broad duty to act in good faith by conduct short of intentional bad faith or fraud, although not by a good faith mistake. An insurer should not be held liable for extra-contractual damages when there is a legitimate controversy as to the amount of benefits due. Moreover, PIP and UIM coverages are distinct policies even if provided by the same insurer. A decision under one does not dictate the outcome under the other.

Here, State Farm and Perez-Crisantos had a legitimate dispute over the value of his UIM claim and the cause of his shoulder injury. The claim was arbitrated and the arbitrator determined the value of that loss. The arbitration award is not the measuring stick for bad faith.

Finally, Perez-Crisantos failed to demonstrate a genuine issue of material fact to preclude summary judgment dismissal of his negligence claim.

Arguments not raised in the trial court generally will not be considered for the first time on appeal. Even assuming *arguendo* the Court can style a debate based on the record below, no grounds exist for bringing separate claims for negligence and bad faith in the UIM context.

Both IFCA and the CPA provide for awards of attorney fees. But IFCA provides attorney fees to a “prevailing party.” RCW 48.30.015(3). And the CPA provides for attorney fees when the plaintiff recovers damages. RCW 19.86.090. A party who does not recover or prevail is not entitled to attorney fees and costs.

## V. ARGUMENT IN SUPPORT OF AFFIRMANCE

### A. Standard of Review

This Court reviews the grant of summary judgment *de novo*, engaging in the same inquiry as the trial court. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 811, 828 P.2d 549 (1992); *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). The Court must consider the facts and all reasonable inferences in the light most favorable to the nonmoving party. *Wilson*, 98 Wn.2d at 437; *Right-Price Recreation, LLC v. Connells Prairie Cmty. Council*, 146 Wn.2d 370, 381, 46 P.3d 789 (2002).

Summary judgment is proper when the record presents no

genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). A trial is only necessary if there is a genuine issue as to any material fact. *LaPlante v. State*, 85 Wn.2d 154, 158, 531 P.2d 299 (1975); *Morris v. McNicol*, 83 Wn.2d 491, 519 P.2d 7 (1974); *Preston v. Duncan*, 55 Wn.2d 678, 681, 349 P.2d 605 (1960).

**B. The Trial Court Properly Granted Summary Judgment To State Farm While Denying It To Perez-Crisantos**

**1. Summary judgment dismissal of the IFCA claim was proper**

Perez-Crisantos first argues the trial court erred by granting summary judgment to State Farm on his IFCA claim. Br. of Appellant at 16-27. He contends State Farm's alleged violation of WAC 284-30-330(7) provides him with an independent cause of action under IFCA that the trial court wrongly dismissed. *Id.* He is mistaken. A cause of action under IFCA is only available to an insured who has suffered an unreasonable denial of coverage or benefits, not merely to an insured who can show a violation of one of the enumerated WACs. The WAC provisions may highlight when such a denial is unreasonable, but they are not independently actionable under IFCA.

Here, State Farm did not unreasonably deny coverage or

payment of benefits. Instead, it reasonably disputed the value of Perez-Crisantos's UIM claim and then paid the claim after arbitration. Perez-Crisantos presented no evidence showing that State Farm unreasonably denied him coverage or benefits. He failed to raise an issue of material fact to support his IFCA claim and the trial court properly dismissed it.

(a) An alleged WAC violation is not independently actionable under IFCA

Perez-Crisantos appears to concede that State Farm has not “denied a claim for coverage or a payment of benefits” in the traditional sense. *See, e.g.*, Br. of Appellant at 1, 29. He contends instead, with little analysis, that State Farm's alleged violation of WAC 284-30-330(7) constitutes a violation of IFCA and that State Farm denied payment of benefits within the meaning of IFCA when it offered an unreasonably low amount to settle his UIM claim. *Id.* Perez-Crisantos misconstrues the plain language of the statute and ignores the vast majority of state and federal opinions rejecting his argument.

Codified at RCW 48.30.015, IFCA provides a cause of action to an insured “who is unreasonably denied a claim for coverage *or* payment of benefits by an insurer[.]” RCW 48.30.015(1) (emphasis added). Subsection (1) thus describes two separate

acts giving rise to an IFCA claim: the insured must show the insurer unreasonably denied a claim for coverage *or* unreasonably denied payment of benefits. If either or both acts are established, then a claim exists under IFCA. *Ainsworth v. Progressive Cas. Ins. Co.*, 180 Wn. App. 52, 79, 322 P.3d 6 (2014).

IFCA also provides for treble damages and attorney fees if the insured can show either an unreasonable denial of coverage or payment or a violation of one of several enumerated WAC provisions. RCW 48.30.015(2), (3).<sup>2</sup> By its plain language, IFCA

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<sup>2</sup> RCW 48.30.015(2) states:

The superior court may, after finding that an insurer has acted unreasonably in denying a claim for coverage or payment of benefits or has violated a rule in subsection (5) of this section, increase the total award of damages to an amount not to exceed three times the actual damages.

RCW 48.30.015(3) provides:

The superior court shall, after a finding of unreasonable denial of a claim for coverage or payment of benefits, or after a finding of a violation of a rule in subsection (5) of this section, award reasonable attorneys' fees and actual and statutory litigation costs, including expert witness fees, to the first party claimant of an insurance contract who is the prevailing party in such an action.

A violation of any of the following WAC provisions is a violation for the purposes of RCW 48.30.015(2) and (3):

- (a) WAC 284-30-330, captioned "specific unfair claims settlement practices defined";
- (b) WAC 284-30-350, captioned "misrepresentation of policy provisions";
- (c) WAC 284-30-360, captioned "failure to acknowledge

gives an insured no right to sue solely for a violation of a Washington insurance regulation. The right to sue arises solely from an unreasonable denial of a claim for coverage or payment of benefits. Regulatory violations matter only when deciding whether to award attorney fees or to enhance damages. As the court in *Lease Crutcher Lewis WA, LLC v. Nat'l Union Fire Ins. Co.*, 2010 U.S. Dist. LEXIS 110866, at \*15 (W.D. Wash. Oct. 15, 2010) succinctly stated: “[a] violation of WAC 284-30-330 may justify the imposition of treble damages under RCW 48.30.015(2) and/or an award of fees and costs under RCW 48.30.015(3), but an underlying denial of coverage is still required.” Perez-Crisantos offers no persuasive argument for interpreting IFCA as he prefers.

The federal courts who have addressed this issue have overwhelmingly interpreted IFCA in accordance with its plain language and held that it gives an insured no right to sue solely for

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pertinent communications”;

(d) WAC 284-30-370, captioned “standards for prompt investigation of claims”;

(e) WAC 284-30-380, captioned “standards for prompt, fair and equitable settlements applicable to all insurers”; or

(f) An unfair claims settlement practice rule adopted under RCW 48.30.010 by the insurance commissioner intending to implement this section. The rule must be codified in chapter 284-30 of the Washington Administrative Code.

RCW 48.30.015(5).

a violation of a Washington insurance regulation. *See, e.g., Seaway Props., LLC v. Fireman's Fund Ins. Co.*, 16 F. Supp. 3d 1240, 1255 (W.D. Wash. 2014). *See also, Morella v. Safeco Ins. Co.*, 2013 U.S. Dist. LEXIS 53255, at \*11-12 n.2 (W.D. Wash. Apr. 12, 2013) (“[A] regulatory violation, standing alone, does not trigger [IFCA].”); *Country Preferred Ins. Co. v. Hurless*, 2012 U.S. Dist. LEXIS 86334, at \*7-8 (W.D. Wash. Jun. 21, 2012); *Hann v. Metro. Cas. Ins. Co.*, 2012 U.S. Dist. LEXIS 111734, at \*4-5 (W.D. Wash. Jul. 30, 2012) (declining to certify question to Washington Supreme Court); *Pinney v. Am. Family Mut. Ins. Co.*, 2012 U.S. Dist. LEXIS 22328, at \*13 (W.D. Wash. Feb. 22, 2012) (recognizing the subject is debated, but following analyses concluding that IFCA claims require an unreasonable denial of coverage); *Polygon NW Co. v. Nat'l Fire & Marine Ins. Co.*, 2011 U.S. Dist. LEXIS 56408, at \*11 n.5 (W.D. Wash. May 24, 2011) (noting violations of Washington’s insurance regulations are only relevant in determining whether an award of treble damages is appropriate because violations of the regulations do not give rise to an independent cause of action under IFCA); *Weinstein & Riley, P.S. v. Westport Ins. Corp.*, 2011 U.S. Dist. LEXIS 26369, at \*80 (W.D. Wash. Mar. 14, 2011) (noting violations of the regulations enumerated in

RCW 48.30.015(5) provide grounds for trebling damages or for awarding attorney's fees, but do not, on their own, provide a cause of action absent an unreasonable denial of coverage or payment of benefits).

Despite the weight of this authority, Perez-Crisantos argues that more recent decisions from the United States District Court for the Eastern District of Washington ("eastern district court") holding that IFCA creates a *per se* cause of action for a violation of a Washington insurance regulation are more authoritative. Br. of Appellant at 22-25 (citing *Langley v. GEICO Gen. Ins. Co.*, 89 F. Supp. 3d 1083 (E.D. Wash. 2015), *Hell Yeah Cycles v. Ohio Sec. Ins. Co.*, 16 F. Supp. 3d 1224 (E.D. Wash. 2014), *Hover v. State Farm Mut. Auto. Ins. Co.*, 2014 U.S. Dist. LEXIS 131406 (E.D. Wash. Sept. 12, 2014), and *Merrill v. Crown Life Ins., Co.*, 2014 U.S. Dist. LEXIS 91905 (E.D. Wash. July 7, 2014)). He manufactures a conflict where none exists.

The eastern district court in fact provides the most current federal pronouncement on the issue confronting this Court and supports the trial court's decision. *Workland v. Witherspoon*, 2015 U.S. Dist. LEXIS 146950 (E.D. Wash. Oct. 27, 2015), involved the defense of professional liability lawsuits brought against a law

firm and its attorney-employee (“plaintiffs”) stemming from the purchase and sale of real estate. When the underlying litigation against the plaintiffs arose, the plaintiffs tendered the defense and indemnity to their insurance company. The insurer assumed the defense of both plaintiffs under a reservation of rights.

In a separate but related case, the insurer filed a declaratory judgment action seeking a judicial determination that it had no duty to defend or to indemnify the plaintiffs in the underlying state action. In the instant case, the plaintiffs filed a complaint against the insurer alleging among other claims an IFCA violation. The insurer moved to dismiss the IFCA count under Fed. R. Civ. P. 12(b)(6), arguing IFCA did not apply to the plaintiff’s as their professional liability insurance policies only provided third-party coverage and the plaintiffs failed to allege a denial of either coverage or benefits as required to successfully plead an IFCA cause of action. *Id.* at 3-5.

Turning first to the coverage issue, the eastern district court concluded that IFCA does not distinguish between first- and third-party coverage and instead creates a cause of action for any entity “asserting a right to payment under an insurance policy.” *Id.* at \*5. As the plaintiffs asserted a right to payment under their policies, they were first-party claimants under IFCA subsection (4). Turning

next to the IFCA cause of action, the court first concluded the plaintiffs failed to allege sufficient facts to make a plausible claim that the insurer actually denied them coverage or benefits. *Id.* at \*7. It then addressed whether an independent cause of action existed under IFCA subsection (5). *Id.* at \*10. Consistent with precedent from Washington’s western district court, the *Workland* court held that the legislative intent behind IFCA and a plain reading of RCW 48.30.015(5) do not support an independent cause of action under subsection (5). *Id.* at \*13-16. The *Workland* court’s 2015 decision clearly undermines the validity of *Langley*, 89 F. Supp. 3d 1083, *Hell Yeah Cycles*, 16 F. Supp. 3d 1224, *Hover*, 2014 U.S. Dist. LEXIS 131406, and *Merrill*, 2014 U.S. Dist. LEXIS 91905. Perez-Crisantos’s reliance upon those cases is thus greatly misplaced. Br. of Appellant at 22-25.

Perez-Crisantos makes only a passing reference to *Ainsworth*, 180 Wn. App. 52, to downplay its significance. Br. of Appellant at 26-27. Like the federal cases before it, *Ainsworth* defines the only two acts giving rise to an IFCA claim: an unreasonable denial of coverage or an unreasonable denial of benefits. 180 Wn. App. at 79.

In *Ainsworth*, Tyler Ainsworth (“Ainsworth”) was injured in a

motor vehicle accident and submitted a claim for wage loss benefits to his insurer, Progressive Casualty Insurance Company (“Progressive”). He claimed lost income from both a full-time and a part-time job due to his accident-related injuries. Progressive calculated and paid wage loss benefits based solely on Ainsworth’s lost wages from his full-time job. The day after Progressive stopped paying wage loss benefits, Ainsworth returned to work at his full-time job. He later claimed 60 hours of work missed for medical appointments with various health care providers for injury-related treatment. He requested additional wage loss benefits for the full-time wages he lost while attending those appointments. Progressive denied the claim, concluding his contractual entitlement to wage loss benefits ended when he returned to work. *Id.* at 57-59.

Ainsworth sued Progressive, alleging among other causes of action breach of contract and violation of IFCA based on the failure to pay wage loss benefits due under the policy. He moved for partial summary judgment, arguing it was undisputed he lost wages from both jobs due to accident-related bodily injuries. He asked the trial court to award unpaid benefits as contract-based damages and attorney fees and costs. He also asked the trial court to enhance

his award under IFCA's treble damages provision, RCW 48.30.015(2).

The trial court granted Ainsworth's motion. As for the IFCA claim, the court found Progressive unreasonably denied Ainsworth benefits without adequate investigation. Citing IFCA's treble damages provision, it then stated: "[s]ince the denial [of income continuation benefits] was not reasonable, the court DOUBLES the amount of actual damages under RCW 48.30.015(2 [.]]" *Id.* at 60. It also awarded attorney fees and costs. *Id.* Progressive appealed. *Id.*

The Court of Appeals, Division I affirmed in a subsequently published opinion. Addressing the IFCA claim specifically, Division I held that a trial court may award treble damages if it finds an insurer acted unreasonably in denying a claim for coverage or payment of benefits:

[IFCA] describes two separate acts giving rise to an IFCA claim. The insured must show the insurer unreasonably denied a claim for coverage or that the insurer unreasonably denied payment of benefits. If either or both acts are established, a claim exists under IFCA.

*Ainsworth*, 180 Wn. App. at 79.

In other words, a cause of action under IFCA must be based on a denial of coverage or payment of benefits and not merely on a

WAC violation. *Id.* See also, *Seaway Props.*, 16 F. Supp. 3d at 1254. Violations of the standards for unfair claims settlement practices are subject to the *enforcement* provisions of IFCA. WAC 284-30-400. See also, *Country Preferred*, 2012 U.S. Dist. LEXIS 86334 at \*10. Private causes of action for violations of the insurance regulations must instead be brought under the CPA. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780, 719 P.2d 531 (1986).

(b) Pattern jury instructions are not the law

Perez-Crisantos invokes WPI 320.06.01, the IFCA jury instruction, to support his IFCA claim. Br. of Appellant at 27-28. At best, his instructional argument is deeply flawed and insupportable. At worst, it is nonexistent. *Id.*

The IFCA jury instruction is not authoritative and is inconsistent with the plain language of RCW 48.30.015. Washington pattern instructions are not the law. *State v. Hayward*, 152 Wn. App. 632, 645-646, 217 P.3d 354, 361 (2009) (citations omitted). Pattern jury instructions can and have misinterpreted the law. See, e.g., *State v. Brush*, 183 Wn.2d 550, 557, 353 P.3d 213 (2015) (holding jury instruction on domestic violence aggravating factor misinterpreted the law); *State v.*

*McCreven*, 170 Wn. App. 444, 471, 284 P.3d 793 (2012) (holding jury instruction misstated the law because it impermissibly lowered state's burden to disprove defendants acted in self-defense to second degree assault charge, the predicate felony necessary to establish second degree murder). If a pattern jury instruction conflicts with statutory language, the jury instruction must track the statute. *Brush*, 183 Wn.2d at 557.

The IFCA pattern jury instruction is, as Perez-Crisantos admits, not authoritative. Br. of Appellant at 27. But more importantly, it is an incorrect statement of the law. As such, its use would be reversible error if the error was prejudicial. *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 860, 281 P.3d 289 (2012). Prejudice would be presumed. *See Keller v. City of Spokane*, 146 Wn.2d 237, 249-50, 44 P.3d 845 (2002).

(c) State Farm reasonably valued the UIM claim

Perez-Cristanos next argues that State Farm unreasonably valued his UIM claim, forcing him to litigate to recover substantially more benefits than what State Farm initially offered in violation of WAC 284-30-330(7).<sup>3</sup> Br. of Appellant at 29-34. His argument is

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<sup>3</sup> WAC 284-30-330 defines the following as unfair methods of competition and unfair or deceptive acts or practices of the insurer in the business of insurance, specifically applicable to the settlement of claims:

unavailing. As noted above, IFCA does not provide Perez-Crisantos with an independent right to sue solely for a violation of WAC 284-30-330(7). *See, e.g., Ainsworth*, 180 Wn. App. 79; *Seaway Props.*, 16 F. Supp. 3d at 1255. It only provides him with a cause of action if State Farm unreasonably denied coverage or unreasonably denied payment of benefits. *Id.*; RCW 48.30.015(1). Nothing of the sort occurred here. State Farm did not unreasonably deny coverage or refuse to pay Perez-Crisantos's claim. Rather, State Farm and Perez-Crisantos disagreed on the amount that should be paid under the claim and whether the collision caused the alleged injury based on the records available. CP 84, 387. When the arbitrator resolved their disagreement, State Farm promptly paid the arbitration award minus the applicable offsets. CP 48.

To overcome State Farm's summary judgment motion, Perez-Crisantos needed to establish the existence of a question of fact as to whether State Farm acted reasonably. *Am. Mfrs. Mut. Ins. Co. v. Osborn*, 104 Wn. App. 686, 700, 17 P.3d 1229 (2001). He failed to meet this burden.

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(7) Compelling a first party claimant to initiate or submit to litigation, arbitration, or appraisal to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in such actions or proceedings.

Perez-Crisantos relies on the disparity in values between the arbitration award and State Farm's settlement offer as evidence of a material question of fact as to whether State Farm compelled him into litigation. Br. of Appellant at 29, 32. Washington courts have already rejected this line of reasoning. In *Osborn*, the Court of Appeals, Division II held that in comparing a settlement offer to the ultimate award received through alternative dispute resolution, the court must consider the circumstances and reasoning underlying the original offer. 104 Wn. App. at 700-01. In concluding that Osborn had failed to raise an issue of material fact to support her claim of bad faith, Division II explained "the disparity between the offer and the subsequent arbitration award was the only evidence that the insured provided to support her allegation of an unreasonably low offer. That evidence alone provides no basis to evaluate the insurer's conduct." *Id.* at 701.

Beyond the disparity between State Farm's offer and the arbitration award, Perez-Crisantos offers his medical records as additional evidence to support his allegation of an unreasonably low offer. Br. of Appellant at 29-30. His argument that State Farm ignored those medical records is belied by the evidence. State Farm reviewed the medical records provided and concluded his

should injury was not causally related to the collision for which he sought benefits and his chiropractic treatment was excessive. CP 84, 232. As a result, State Farm determined Perez-Crisantos was fully compensated for his UIM claim based on the combined \$35,400 he had already recovered from the tortfeasor and in PIP benefits. CP 84, 234. When Perez-Crisantos disagreed, State Farm obtained a second opinion. CP 389. State Farm's expert, Dr. Scot Youngblood, issued a medical opinion consistent with State Farm's position. CP 395-98. As the trial court correctly perceived, State Farm did not value Perez-Crisantos's UIM claim as \$0. RP 11-11. State Farm instead agreed that Perez-Crisantos suffered damages, but believed he recouped those damages when he recovered \$25,000 from the tortfeasor and \$10,400 in PIP benefits from State Farm. CP 84, 233-34.

Perez-Crisantos made the same offer of evidence rejected in *Osborn* and failed to raise an issue of material fact to support his claim that State Farm violated WAC 284-30-330(7). He presented no evidence showing that State Farm's investigation was unreasonable. He thus failed to raise a genuine issue of material fact precluding summary judgment on his IFCA claim. The trial court properly dismissed it.

2. **Summary judgment dismissal of the CPA claim was proper**

Perez-Crisantos next contends the trial court erred by dismissing his CPA claim as a matter of law. Br. of Appellant at 34-35. According to Perez-Crisantos, State Farm's unreasonable handling of his UIM claim resulted in a violation of WAC 284-30-330(7) and constituted a *per se* unfair or deceptive trade practice under the CPA resulting in monetary injuries for which he was entitled to recover. *Id.* at 35. He asserts the only issue ripe for determination at the time of the summary judgment proceedings was the amount of his damages, which should have been determined when discovery was completed. *Id.* Perez-Crisantos misapprehends the CPA and refuses to acknowledge the ramifications of his decision not to seek a continuance of the summary judgment motions under CR 56(f).

Washington's CPA prohibits "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." RCW 19.86.020. Its purpose is to "complement the body of federal law governing restraints of trade, unfair competition and unfair, deceptive, and fraudulent acts and practices in order to protect the public and foster fair and honest competition." RCW 19.86.920; *Haberman v. Wash. Pub. Power Supply Sys.*,

109 Wn.2d 107, 169, 744 P.2d 1032, 750 P.2d 254 (1987). To prove a private CPA claim, a plaintiff must establish: (1) that the defendant engaged in an unfair or deceptive act or practice, (2) that the act occurred in trade or commerce, (3) that the act impacts the public interest, (4) that the plaintiff suffered injury to his or her business or property, and (5) that the injury was causally related to the unfair or deceptive act. *Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 37, 204 P.3d 885 (2009). Failure to satisfy even one element is fatal to a CPA claim. *Hangman Ridge*, 105 Wn.2d at 793.

An insured can establish the first and second elements of a CPA claim by establishing the insurer violated one of the standards contained in WAC 284-30-330 through 30-410. *Anderson v. State Farm Mut. Ins. Co.*, 101 Wn. App. 323, 329, 2 P.3d 1029 (2000). But here, Perez-Crisantos did not establish that State Farm violated WAC 284-30-330(7), *supra*, and thus did not establish a *per se* violation of the CPA on that basis. He was therefore required to show that his claim satisfied all of the elements of the five-part test. He did not satisfy that burden because he did not demonstrate an injury or resulting damage. His claim failed.

Perez-Crisantos alleges only that he incurred damage in the

form of increased attorney's fees and costs related to litigating his UIM claim. Br. of Appellant at 9, 35. But attorney fees and costs do not constitute property damage under the CPA. *See Sign-O-Lite Signs, Inc. v. DeLaurenti Florists, Inc.*, 64 Wn. App. 553, 565-566, 825 P.2d 714 (1992) (holding that attorney's fees from the underlying, non-CPA litigation were not actual damages under the CPA). More to the point, Perez-Crisantos was made whole following the arbitration because State Farm paid the arbitration award minus the permitted offsets. CP 48. He suffered no injury.

Perez-Crisantos continually complains throughout his brief that the trial court did not continue the summary judgment proceedings to give him more time to conduct discovery. *See, e.g.*, Br. of Appellant at 34-35, 40. He forgets two important points. First, while Perez-Crisantos was free to pursue discovery according to the case schedule there is no rule that prevented State Farm from noting its dispositive motion when it did. Second, Perez-Crisantos never moved under CR 56(f)<sup>4</sup> to continue the summary judgment proceedings to conduct additional discovery and never made the showing required to delay summary judgment for

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<sup>4</sup> CR 56(f) allows the trial court to continue a summary judgment hearing "if the nonmoving party shows a need for additional time to obtain additional affidavits, take depositions, or conduct discovery." *Building Indus. Ass'n of Wash. v. McCarthy*, 152 Wn. App. 720, 742, 218 P.3d 196 (2009).

purposes of that discovery. It was his burden to show: (1) a good reason for the delay in obtaining the desired evidence; (2) what evidence would be established through the additional discovery; and (3) that the desired evidence will raise a genuine issue of material fact. *Vant Leven v. Kretzler*, 56 Wn. App. 349, 352-353, 783 P.2d 611, 613 (1989). He never made that showing.

Where Perez-Cristanos did not request a continuance, the trial court did not err in deciding his summary judgment motion based on the evidence before it. *See, e.g., Turner v. Kohler*, 54 Wn. App. 688, 695, 775 P.2d 474 (1989) (trial court acted properly in hearing the motion on the basis of the showing before it); *Guile v. Ballard Cmty. Hosp.*, 70 Wn. App. 18, 24-25, 851 P.2d 689 (1993) (if plaintiff “needed additional time, the proper remedy would have been to request another continuance from the trial court” and “[b]ecause she failed to do this, . . . she is precluded from raising this issue on appeal” since to “hold otherwise would constitute an unwarranted encroachment on the trial court’s discretion to dismiss cases which fail to raise genuine issues for trial”).

Here, Perez-Crisantos failed to put forth evidence demonstrating a compensable injury and failed to request a continuance under CR 56(f). As a result, the trial court correctly

determined that his CPA claim failed as a matter of law.

3. Summary judgment dismissal of the bad faith claim was appropriate

Perez-Crisantos' also argues the trial court erred by dismissing his bad faith claim because it ignored the fiduciary duty State Farm owed to him, improperly discounted his evidence, and did not allow him to complete discovery. Br. of Appellant at 35-40. Not so. The trial court properly recognized the adversarial nature of his relationship with State Farm and the extent of his UIM claim. The court then considered the evidence in the light most favorable to Perez-Crisantos and ultimately found it lacking.<sup>5</sup>

Contrary to Perez-Crisantos's insinuation, State Farm does not owe him a fiduciary duty. Br. of Appellant at 35. Washington courts have concluded that the relationship between insurer and insured is "something less than a true fiduciary relationship" and treated UIM claims differently. *Safeco Ins. Co. v. Butler*, 118 Wn.2d 383, 389, 823 P.2d 499 (1992); *Barry v. USAA*, 98 Wn. App. 199, 204-205, 989 P.2d 1172 (1999). The inherently adversarial nature of the insurer/insured relationship in the UIM context precludes the insurer from acting as a fiduciary even if that duty would generally

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<sup>5</sup> Having already responded to Perez-Crisantos's argument that the trial court should have granted him more time to conduct discovery, State Farm does not repeat that response here. It incorporates its earlier response as though fully set forth herein.

exist in regard to first party claims. *Id.* Accordingly, State Farm did not owe Perez-Crisantos anything other than a duty of good faith when it evaluated his UIM claim.

To succeed on a bad faith claim, the policyholder must show the insurer's breach of the insurance contract was "unreasonable, frivolous, or unfounded." *Overton v. Consol. Ins. Co.*, 145 Wn.2d 417, 433, 38 P.3d 322 (2002). An insurer may breach its broad duty to act in good faith by conduct short of intentional bad faith or fraud, although not by a good faith mistake. *Sharbono v. Universal Underwriters Ins. Co.*, 139 Wn. App. 383, 410-11, 161 P.3d 406 (2007). Whether an insurer acted in bad faith is a question of fact. *Van Noy v. State Farm Mut. Auto. Ins. Co.*, 142 Wn.2d 784, 796, 16 P.3d 574 (2001). Accordingly, an insurer is entitled to a dismissal of its insured's bad faith claim on summary judgment only if there are no disputed material facts pertaining to the reasonableness of the insurer's conduct under the circumstances or the insurance company is entitled to prevail as a matter of law on the facts construed most favorably to the nonmoving party. *Indus. Indem. Co. of the NW, Inc. v. Kallevig*, 114 Wn.2d 907, 920, 792 P.2d 520 (1990).

Perez-Crisantos's chief complaint boils down to a disagreement with State Farm over the value of his UIM claim, which he shrouds in a dispute over the evidence. Br. of Appellant at 38-39. That Perez-Crisantos and State Farm disagreed on the value of his UIM claim following State Farm's investigation did not compel a determination that it acted in bad faith. An insurer should not be held liable for extra-contractual damages when there is a legitimate controversy as to the amount of benefits due. *Keller v. Allstate Ins. Co.*, 81 Wn. App. 624, 633, 915 P.2d 1140 (1996) (quoting 15A GEORGE J. COUCH *ET AL.*, COUCH ON INSURANCE 2D (rev. ed.) § 58:1 (1983) (footnotes omitted)). *See also, Rizzuti v. Basin Travel Serv. of Othello, Inc.*, 125 Wn. App. 602, 617, 105 P.3d 1012 (2005) (stating an insurer that makes mistakes in investigating coverage or communicating with an insured is not guilty of bad faith); *Transcon. Ins. Co. v. Wash. Pub. Utils. Dists. Util. Sys.*, 111 Wn.2d 452, 470, 760 P.2d 337 (1988) (noting bona fide disputes over coverage do not make an insurer guilty of bad faith).

Here, as in *Keller*, there was a legitimate controversy over the value of Perez-Crisantos's UIM claim and whether the collision caused his shoulder injury. The claim was arbitrated and the

arbitrator determined the value of his loss. CP 41. That award, however, is not the measuring stick for bad faith. The circumstances underlying State Farm's original offer confirm it did not act in bad faith. The arbitrator's award reflects that the parties had a good faith dispute in that the arbitrator awarded Perez-Crisantos the value of his shoulder surgery but awarded him only minimal chiropractic treatment (in fact, less than State Farm's evaluation) and minimal general damages. CP 41. State Farm's evaluation was reasonable and reasonable minds could and did disagree on the scope of Perez-Crisantos's injuries and treatment, as evidenced by the arbitration award. Perez-Crisantos produced no evidence that State Farm acted in bad faith when it evaluated and ultimately paid his claim.

In the end, Perez-Crisantos seems to forget that State Farm was entitled to separately investigate his UIM claim and to conclude it differently than his PIP claim. PIP and UIM coverages are distinct policies, even if provided by the same insurer. *Matsyuk v. State Farm Fire & Cas. Co. of Ill.*, 173 Wn.2d 643, 655-656, 272 P.3d 802 (2012). Perez-Crisantos has cited no authority holding that a decision on PIP benefits binds a UIM insurer. Other jurisdictions have addressed the issue and held that a UIM insurer

is not bound by the determinations of a PIP insurer. *See, e.g., State Farm Mut. Auto. Ins. Co. v. Swindoll*, 89 So. 3d 246 (Fla. Ct. App. 2011); *USAA Cas. Ins. Co. v. Shelton*, 932 So. 2d 605 (Fla. Ct. App. 2006). *See also Foraker v. USAA Cas. Ins. Co.*, 2015 U.S. Dist. LEXIS 63104 (D. Or. May 14, 2015). This is the correct conclusion. To bind a UIM insurer to payments made under a PIP policy would be irrational where the nature of the coverages is different. PIP is no-fault coverage for an insured. In contrast, under the UIM coverage, the insurance company steps into the shoes of the tortfeasor. The tortfeasor would not be bound to accept a PIP insurer's determination on what treatment was reasonable and necessary so a UIM insurer should not be similarly bound, especially where the coverages are noted to be separate and distinct.<sup>6</sup> State Farm cannot be said to have acted in bad faith by investigating Perez-Crisantos's UIM claim subject to the terms and conditions of that policy.

That an arbitrator awarded Perez-Crisantos more at arbitration than what State Farm offered him in settlement does not

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<sup>6</sup> In fact, in calculating the offset from the arbitration award, State Farm did not receive an offset for those chiropractic PIP payments the arbitrator determined were not reasonable or necessary. Thus, Perez-Crisantos obtained that benefit under his PIP coverage. When the arbitrator determined in the UIM proceeding that those expenses were not covered under his UIM coverage, State Farm did not receive an offset under the UIM coverage.

alone establish that it acted unreasonably or in bad faith. Perez-Crisantos presented no evidence showing that State Farm's investigation was unreasonable. Perez-Crisantos failed to raise and issue of material fact to support his bad faith claim and the trial court properly dismissed it.

4. **Summary judgment dismissal of the negligence claim was proper**

Perez-Crisantos's last argument is that the trial court erred by dismissing his negligence claim as a matter of law where questions of fact remained for trial. Br. of Appellant at 40-41. His argument is unavailing. He did not dispute State Farm's argument with respect to his negligence claim in the trial court. But even if he did, he provided no basis for such a claim in the UIM context.

Perez-Crisantos raises his negligence argument for the first time on appeal. Arguments not raised in the trial court generally will not be considered for the first time on appeal. RAP 2.5(a); *Van Vonno v. Hertz Corp.*, 120 Wn.2d 416, 427, 841 P.2d 1244 (1992).

Even assuming *arguendo* the Court can fashion some sort of a debate based on the record below, Perez-Crisantos had no grounds for a negligence claim based on the adjustment of his UIM claim independent of his bad faith claim. Federal courts

considering the issue have held that no grounds exist for bringing separate claims for negligence and bad faith. As the western district court explained in *Taylor v. Sentry Group of Cos.*, 2007 U.S. Dist. LEXIS 84666 (W.D. Wash. Nov. 15, 2007):

Negligence is actionable only if public policy imposes a duty, the duty is breached, and the breach proximately causes damage to the claimant . . . . The existence of a duty may be predicated upon statutory provisions or on common law principles. When no duty of care exists, a defendant cannot be subject to liability for negligent conduct. An insurer has a duty of good faith to its policyholder and violation of that duty may give rise to a tort action for bad faith. This is the same duty addressed in the cause of action for breach of the duty of good faith (bad faith). Accordingly, no separate action for negligence exists outside the context of the bad faith claim.

(Citations omitted).

The western district court likewise treated claims for bad faith and negligence as a single cause of action in *Beasley v. State Farm Mut. Auto Ins. Co.*, 2014 U.S. Dist. LEXIS 53205 (2014), at \*20 n.3, stating:

Although Plaintiff's complaint appears to allege separate causes of action for negligence and breach of the duty of good faith . . . . these claims arise out of the same conduct, are not distinguishable, and are analyzed applying the same principles of any other tort. Therefore, the Court considers them as a single cause of action.

While those federal cases are merely persuasive authority,

the Court should observe their holdings to prevent the confusion and duplication that will arise from allowing both bad faith and negligence claims to be brought in cases involving UIM value disputes. State Farm is aware of no authority stating that an insurer has a separate duty to avoid adjusting a UIM claim in a negligent manner.

As Perez-Crisantos raises this argument regarding negligence for the first time on appeal, the Court should decline to consider it. Regardless, the trial court properly dismissed the negligence claim where Perez-Crisantos provided no authority for it to survive independently of his bad faith claim.

C. **Perez-Crisantos Is Not Entitled To Attorney Fees On Appeal**

Perez-Crisantos argues he is entitled to an award of attorney fees and costs on appeal. Br. of Appellant at 41-42. He fails to present any basis for such an award. His request should be denied.

Both IFCA and the CPA provide for awards of attorney fees. But IFCA provides attorney fees to a “prevailing party.” RCW 48.30.015(3). And the CPA provides for attorney fees when the plaintiff recovers damages. RCW 19.86.090. Here, Perez-Crisantos has not prevailed. Accordingly, a fee award is

unwarranted.

**VI. CONCLUSION**

Considering all of the facts and taking all reasonable inference in the light most favorable to Perez-Crisantos, Perez-Crisantos failed to raise genuine issues of material fact concerning his IFCA, CPA, bad faith, and negligence claims. The trial court thus properly granted summary judgment in State Farm's favor. This Court should affirm and award costs on appeal to State Farm.

RAP 14.2

DATED this 16th day of February, 2016.

Respectfully submitted,

/s/ Emmelyn Hart

Emmelyn M. Hart, WSBA #28820  
Gregory S. Worden, WSBA #24262  
Lewis Brisbois Bisgaard & Smith LLP  
Attorneys for Respondent

DECLARATION OF SERVICE

The undersigned declares and states that on the date listed below I deposited with the U.S. Postal Service, postage prepaid, a true and accurate copy of the **Brief of Respondent State Farm** for service on the following parties:

Mark J. King, IV	<input checked="" type="checkbox"/> via U.S. Mail
Craig Swapp & Associates	<input type="checkbox"/> via Legal Messenger
16201 E. Indiana Ave., Suite 1900	<input type="checkbox"/> via Overnight Mail
Spokane Valley, WA 99216	<input type="checkbox"/> via Facsimile
Phone: (509) 252-5037	<input checked="" type="checkbox"/> via Electronic Mail
<a href="mailto:mark.king@craigswapp.com">mark.king@craigswapp.com</a>	(courtesy copy)

Original emailed for-filing with:

Washington State Supreme Court  
Clerk's Office  
Temple of Justice  
P.O. Box 40929  
Olympia, WA  
E-mail: [supreme@courts.wa.gov](mailto:supreme@courts.wa.gov)

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed in Seattle, Washington this 16th day of February, 2016.

*/s/ Julie J. Johnson*  
Julie J. Johnson