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CERTIFICATION FROM THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON  
IN

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(CONSOLIDATED CASES)

Case No. C18-1173RSL

KRISTA PEOPLES,  
*Appellee/Plaintiff,*

v.

UNITED SERVICES AUTOMOBILE ASSOCIATION, ET AL.  
*Appellants/Defendants*

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Case No. C18-1254RSL

JOEL STEDMAN, ET AL.  
*Appellees/Plaintiffs,*

v.

PROGRESSIVE DIRECT INSURANCE COMPANY,  
*Appellant/Defendant.*

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RESPONSE OF APPELLANTS/DEFENDANTS UNITED SERVICES  
AUTOMOBILE ASSOCIATION AND USAA CASUALTY  
INSURANCE COMPANY TO AMICUS BRIEF OF WASHINGTON  
STATE ASSOCIATION FOR JUSTICE FOUNDATION

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## **INTRODUCTION**

The position of amicus curiae Washington State Association for Justice Foundation (“WSAJF”) would read the “business or property” requirement out of the Washington Consumer Protection Act, and the “personal injury” standard out of an unbroken line of three decades of Washington CPA jurisprudence.

Like Plaintiffs, WSAJF devotes the majority of its brief to a discussion of Defendants’ alleged violations of the CPA. But this argument addresses only the first element of a CPA claim—an alleged unfair or deceptive act that constitutes a CPA violation. It does not address the requirement that the consumer sustain an injury to “business or property”—which, as this Court has held, cannot be a “personal injury” or the “financial consequence” of a personal injury. There is no dispute that the injuries Plaintiffs claim here—medical bills incurred for injuries sustained in an auto accident—are the financial consequences of a personal injury.

No Washington appellate court has sustained CPA claims like the ones Plaintiffs bring here. Indeed, the federal courts which have squarely addressed this issue uniformly have held that claims against PIP insurers for reimbursement of medical expenses are for personal injuries and therefore do not satisfy the CPA’s “injury to business or property” requirement.

At bottom, WSAJF’s argument is a call to invalidate thirty years of Washington precedent. And while WSAJF suggests that a ruling for Defendants would grant PIP insurers a special exemption from CPA claims,

in fact, under WSAJF's position PIP insurers would be treated differently from all other CPA defendants, and PIP insureds would be relieved of the obligation of every other CPA plaintiff to prove a key element of a CPA claim.

Defendants respectfully request that the Court answer both Certified Questions in the negative.

### **ARGUMENT**

#### **I. WSAJF's Position Would Require Reversal of Three Decades of Washington Precedent.**

##### **A. Courts Uniformly Have Held that Personal Injuries and Their Financial Consequences Are Not Injuries to "Business or Property" Within the Meaning of the CPA.**

This Court consistently has held that "personal injuries," and the "financial consequences" of those personal injuries, are not cognizable injuries to "business or property" within the meaning of the CPA. *Ambach v. French*, 167 Wn.2d 167, 175, 216 P.3d 405 (2009); *Frias v. Asset Foreclosure Servs., Inc.*, 181 Wn.2d 412, 431, 334 P.3d 529 (2014); *Washington St. Physicians Ins. Exch. & Assocs. v. Fisons Corp.*, 122 Wn.2d 299, 317, 858 P.2d 1054 (1993); see USAA's Open. Br. at 12-15 (citing additional cases). If the plaintiff's claim "depend[s] on proof that she sustained a personal injury," the plaintiff does not have a valid CPA claim. *Williams v. Lifestyle Life Holdings, Inc.*, 175 Wn. App. 62, 69, 720-74, 302 P.3d 523 (2013).<sup>1</sup> Thus, medical expenses and other damages "commonly

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<sup>1</sup> Indeed, the district court correctly characterized this Court's decisions as standing for the proposition that "[d]amages arising from personal injury, including medical expenses, pain and suffering, and reimbursement for lost

awarded in personal injury actions” are not “injuries to ‘business or property’ as contemplated by the CPA.” *Hiner v. Bridgestone/Firestone, Inc.*, 91 Wn. App. 722, 730, 959 P.2d 1158 (1998), *rev’d in part on other grounds*, 138 Wn.2d 248, 978 P.2d 1158 (1999).

Furthermore, federal district courts specifically addressing the issue presented in these consolidated cases uniformly have rejected CPA claims against PIP insurers for reimbursement of unpaid medical expenses. *See, e.g., Dees v. Allstate Ins. Co.*, 933 F. Supp. 2d 1299, 1310 (W.D. Wash. 2013) (medical expenses are “derivative of [the insured’s] personal injuries” and therefore not cognizable under CPA); *Coppinger v. Allstate Ins. Co.*, No. 17-cv-1756-JCC, 2018 WL 278646, at \*2 (W.D. Wash. Jan. 3, 2018) (plaintiff cannot base CPA claim “on his or her insurer’s failure to pay medical bills because those injuries are derivative of her personal injuries”); USAA’s Open. Br. at 18-20 (citing additional cases). These federal cases relied on the decisions of this Court and the Court of Appeals, as well as that of the Ninth Circuit in *Association of Washington Public Hospital Districts v. Philip Morris Inc.*, 241 F.3d 696 (9th Cir. 2001), which held that “the mere fact that a third party pays for their medical treatment should not transform such medical expenses into business or property harm recoverable under the CPA.” *Id.* at 705. In *Ambach* this Court cited with approval the Ninth Circuit’s ruling, holding that “payment for medical

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wages, are not injuries to business or property and are therefore not recoverable under the CPA.” (Dkt. 50 at 3 (emphasis added).)

treatment, like Ambach’s payment for surgery, does not transform medical expenses into business or property harm.” 167 Wn.2d at 175.<sup>2</sup>

There is no dispute that the alleged injuries on which Plaintiffs predicate their CPA claims are medical expenses that arise from, are a direct financial consequence of, and depend on proof of the personal injuries they sustained in an auto accident. Under the decisions of this Court, the Court of Appeals, and the federal courts, Plaintiffs have no valid CPA injury.

**B. WSAJF’s Attempt to Distinguish This Precedent Is Without Merit.**

Accepting WSAJF’s argument would require reversal of thirty years of precedent. WSAJF does not attempt to address the standards for what constitutes a “personal injury” articulated above. (Indeed, it does not even cite this Court’s decision in *Frias*.) Instead, WSAJF asserts that these authorities are distinguishable, but the bases for WSAJF’s proposed distinctions have no legal relevance.

For example, WSAJF contends that *Ambach* and *Fisons* articulate an ironclad “one act” rule, under which the “personal injury” standard applies only when the plaintiff sustained personal injuries as a result of one act by the same defendant. (See WSAJF’s Br. at 17.) WSAJF cites one sentence from *Ambach* to make this point: “Where plaintiffs are both physically and economically injured by one act, courts *generally* refuse to

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<sup>2</sup> WSAJF attempts to distinguish these federal cases on the grounds that they allegedly did not consider the insurance statutes. (WSAJF’s Br. at 18 n.5.) Defendants address this issue *infra* pp. 8-10.

find injury to ‘business or property’ as used in the consumer protection laws.” *Ambach*, 167 Wn. 2d at 173 (emphasis added).

As Defendants have demonstrated, this view of *Ambach* is incorrect. (See USAA’s Reply Br. at 13-15.) The statement in *Ambach* is simply illustrative of one situation in which there is no injury to business or property. This Court did not limit its reasoning to claims involving “one act.” Indeed, as this Court’s decision in *Frias* makes clear, the *Ambach* principle applies not only to personal injuries, but to the “financial consequences” of personal injuries.

Furthermore, WSAJF’s contention that this Court must consider Defendants’ conduct “in relation to” Plaintiffs’ alleged injuries in order to determine whether Plaintiffs sustained a personal injury (see WSAJF’s Br. at 10-15) is similarly contrary to precedent. A defendant’s “conduct” and a plaintiff’s alleged “injury” are two separate elements of a CPA claim. Courts consistently have focused on the nature of the *plaintiff’s injury*, not the conduct or identity of the defendant, in determining whether the plaintiff sustained a “personal injury.” (See USAA’s Open. Br. at 20-22 (discussing cases); USAA’s Reply Br. at 8-13 (discussing cases).) For example, in *Ambach* and *Fisons*, this Court considered the possibility of a second source of the plaintiff’s alleged injuries, yet when analyzing whether the plaintiff had sustained an injury to “business or property,” the Court focused on the nature of the plaintiff’s injury, not on the CPA defendant. (See USAA’s Open. Br. at 20-21; USAA’s Reply Br. at 9-11.)

WSAJF's reliance on *Williams* is similarly misplaced. In fact, *Williams* supports Defendants' position. There, the plaintiff alleged that she was injured by a cosmetic procedure and brought a CPA claim against the surgical practice and the licensor of the procedure's trademark. The plaintiff sought \$4,600 representing what she paid for the allegedly deceptively marketed surgery, along with alleged pain and suffering resulting from the surgery. 175 Wn. App. at 69, 72. The court limited her CPA claim to the \$4,600—the cost of the deceptively marketed surgery—because that part of her CPA claim “does not depend on proof that she sustained a personal injury as a result of the surgery” and would have survived even if the surgery had not injured her. *Id.* at 73-74. The CPA claim that survived, therefore, was *not* for medical expenses resulting from personal injury or the financial consequences of personal injury. By contrast, there is no dispute that all of Plaintiffs' claimed damages here “depend on proof that [they] sustained a personal injury.” Without a personal injury to Plaintiffs caused by a covered automobile accident, Defendants would have no obligation to pay Plaintiffs anything.

Finally, WSAJF argues that Plaintiffs sustained an injury to “business or property” because they allegedly had a “property right” in reimbursement of their medical bills under their insurance policies. (WSAJF's Br. at 12.) This argument proves too much. Under WSAJF's theory, the plaintiffs in the cases rejecting CPA claims also had alleged a “property right” in obtaining payment for their medical expenses. Yet in

*Ambach* this Court rejected the plaintiff’s attempt to “focus on her loss of money as a qualifying injury.” 167 Wn.2d at 175. This Court held that “payment for medical treatment, like *Ambach*’s payment for surgery, does not transform medical expenses into business or property harm. . . . [Plaintiff] really seeks . . . redress for her personal injuries, not injury to her business or property.” *Ambach*, 167 Wn.2d at 175, 178-79 (citing with approval *Wash. Pub. Hosp.*, 241 F.3d at 705 (“[T]he mere fact that a third party pays for their medical treatment should not transform such medical expenses into business or property harm recoverable under the CPA.”)). Thus, the plaintiff’s claimed damages of “medical expenses, wage loss, loss of earning capacity, and out-of-pocket expenses” were the types of personal-injury-related injuries that were not compensable under the CPA. *Ambach*, 167 Wn.2d at 174.<sup>3</sup>

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<sup>3</sup> WSAJF’s reliance on *Panag v. Farmers Insurance Co.*, 166 Wn.2d 27, 204 P.3d 885 (2009), for the proposition that Plaintiffs’ alleged loss of property or money constitutes a CPA injury is similarly misplaced. (See WSAJF’s Br. at 13.) WSAJF misstates *Panag* and ignores the limitations imposed by this Court’s subsequent decisions in *Ambach* and *Frias*, which plainly state that economic losses arising from personal injury are not injury to property under the CPA. In fact, *Panag* did not involve issues of personal injury; rather, the plaintiffs there sued a collections agency that had tried to enforce an insurer’s subrogation interest against them and sought expenses for investigating the legal status of the alleged debt. *Panag* itself recognized that certain economic losses may not be viable CPA injuries. See 166 Wn.2d at 62, 65 (costs incurred in “consulting an attorney to institute a CPA claim” are not viable CPA injuries; “other expenses incurred as a result of the deceptive practice may satisfy the injury element”) (emphasis added). *Ambach*, which was decided six months after *Panag*, rejected CPA claims for economic losses arising from personal injuries. See *Ambach*, 167 Wn.2d at 174.

Federal courts have rejected WSAJF's argument in the context of the federal RICO statute's "business or property" requirement—to which, pursuant to RCW 19.86.920, Washington courts should look for guidance in interpreting the CPA. (See USAA's Open. Br. at 22-24; USAA's Reply Br. at 11-12; Progressive's Open. Br. at 18-24; Progressive's Reply Br. at 8-9.) For example, in *Jackson v. Sedgwick Claims Management Services, Inc.*, the Sixth Circuit considered whether personal injuries become "property" injuries when "filtered through" insurance. 731 F.3d 556, 566 (6th Cir. 2013) (en banc). The plaintiffs there argued that they had a "property" right in the promise of post-injury benefits under the workers' compensation statutes (which, like PIP, are no-fault statutes). The court held that conduct "leading to a loss or diminution of benefits the plaintiff expects to receive under a workers' compensation scheme does not constitute an injury to 'business or property' under RICO." *Id.* The court emphasized "the underlying reality that an award of benefits under a workers' compensation system and any dispute over those benefits are inextricably intertwined with a personal injury giving rise to the benefits." *Id.* The fact that the insurance benefits may be "pecuniary" did not change the analysis: "those [insurance] benefits merely reflect the pecuniary losses associated with the personal injury." *Id.*<sup>4</sup>

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<sup>4</sup> WSAJF's attempt to distinguish federal courts' analysis of the "business or property" requirement in federal statutes (*see* WSAJF's Br. at 19-20) misinterprets those cases. As Defendants have demonstrated, those cases analyzed the same "business or property" language and ruled that personal injuries—even in the context of insurance claims—are not cognizable

Plaintiffs' alleged injury to their "property rights" in their insurance contracts can be addressed through the appropriate remedy: a claim for breach of contract, which is precisely what Plaintiff Peoples is now doing. (*See* USAA's Open. Br. at 28-29.) The restrictive nature of the "business or property" requirement in the CPA demonstrates that the legislature intended that claims arising from personal injuries be addressed through other causes of action. (*See* USAA's Open. Br. at 28-29; USAA's Reply Br. at 16-17; APCIA's Amicus Curiae Br. at 2-6.)

## **II. WSAJF's Reliance on Insurance Statutes and Regulations Is Unavailing.**

WSAJF also argues that the "*all* insurance transactions" necessarily are within the purview of the CPA's "business or property" requirement. (WSAJF's Br. at 4 (emphasis in original).) This argument rests upon a misreading of the applicable laws.

First, WSAJF's position—once again—would read the "personal injury" test right out of this Court's jurisprudence. Nothing in the CPA, the insurance laws, or this Court's decisions suggests that insurers should be subject to a different standard under the CPA. If an insured's injuries are "personal injuries"—as Plaintiffs' certainly are—they do not qualify as

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injuries to business or property. (*See* USAA's Open. Br. at 22-24; USAA's Reply Br. at 11-12.) The federal cases did not depend on any "federalism" concerns, as WSAJF contends. As the quotation in WSAJF's brief makes clear (*see* WSAJF's Br. at 19), the federalism concerns merely "confirmed" the courts' ruling that the alleged injuries were not injuries to business or property.

injuries to business or property, and therefore are not cognizable under the CPA.

Second, WSAJF argues that RCW 19.86.170 confirms the legislative intent that “*all* insurance transactions” be subject to the CPA. (WSAJF’s Br. at 4-5 (emphasis in original).) That provision, however, sets out the “[e]xempted actions or transactions” under the CPA (including laws administered by the insurance commissioner), and goes on to state that this exemption does not apply to the declaration in RCW 19.86.020 that unfair or deceptive practices are declared unlawful. Thus, far from evincing a legislative intent to bring “all insurance transactions” within the “*business or property*” requirement of a CPA claim, RCW 19.86.020 merely clarifies that its exemption does not apply to the *first* of five prongs of a CPA claim—an unfair or deceptive act or practice. *See Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780, 719 P.2d 531 (1986) (elements of CPA claim are (1) unfair or deceptive act of practice that (2) occurs in trade or commerce, (3) a public interest impact, (4) injury to the plaintiff in its business or property, and (5) a causal link between the unfair or deceptive act and the injury suffered).

Finally, WSAJF cites to various insurance statutes and regulations declaring it an “unfair practice” for an auto insurer to improperly deny payment of reasonable healthcare bills. (*See* WSAJF’s Br. at 6-15.) Again, even if violation of the statutes or regulations were a *per se* “unfair practice” under the CPA, that would address only the first element of a CPA claim—

a CPA violation. That alleged violation would not address the other elements of a CPA claim, including an injury to “business or property,” which is the focus of this proceeding. Accordingly, a “no” answer to the Certified Questions would not disturb precedent regarding what constitutes unfair or deceptive acts. It would merely set out the circumstances under which a plaintiff can or cannot satisfy the separate requirement of an injury to business or property.

**III. A Ruling in Defendants’ Favor Would Not Deprive Plaintiffs of a Meaningful Remedy.**

WSAJF also suggests that PIP insureds would have no effective remedy without a CPA claim. (WSAJF’s Br. at 16.) WSAJF provides no support for this assertion. Insureds have a variety of potential claims—including for breach of contract, torts, and administrative actions—to redress any alleged wrongdoing. The amicus brief of the American Property Casualty Insurance Association aptly summarizes the potential avenues for relief and highlights the importance of preserving the distinctions among the various causes of action. (*See* APCIA’s Amicus Br. at 2-7.)

Moreover, courts have denied CPA claims—including those based on the lack of an injury to “business or property”—notwithstanding that such a denial would “deprive” the plaintiff of the full panoply of CPA remedies. *See, e.g., Short v. Demopolis*, 103 Wn.2d 52, 61-62, 691 P.2d 163 (1984) (discussing limited remedies for professional negligence relative to CPA remedies, but nevertheless rejecting claims that “amount to

allegations of negligence or malpractice and are exempt from the CPA”). Indeed, in *Ambach* the plaintiff’s alternative remedy was a “professional negligence” claim, which did not provide for a potential award of attorneys’ fees and treble damages, as does the CPA. 167 Wn.2d at 169 & n.2. This Court, nevertheless, still rejected Ambach’s CPA claim.

The restrictive nature of the CPA’s requirement of injury to “business or property” demonstrates that the legislature did not intend to redress every possible consumer grievance through the CPA. The legislature could have provided that any consumer “injury” qualify for CPA relief, as other states have done. But the legislature determined to limit CPA claims to injuries to “business or property.” As this Court has held, “had our Legislature intended to include actions for personal injury within the coverage of the CPA, it would have used a less restrictive phrase than injured in his or her ‘business or property.’ ” *Fisons*, 122 Wn.2d at 318.

### **CONCLUSION**

Defendants respectfully submit that the Court should answer Certified Question 1 in the negative, and either decline to address Certified Question 2 or answer it in the negative.

RESPECTFULLY SUBMITTED THIS 3<sup>rd</sup> day of September, 2019

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