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NO. 74736-3-I

King County Cause No. 15-2-08509-3 SEA

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION I

GEICO INDEMNITY COMPANY,

Appellant,

v.

UNIVERSITY OF WASHINGTON,

Respondent.

RECEIVED
COURT OF APPEALS
DIVISION ONE

OCT 26 2016

REPLY BRIEF OF APPELLANT

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I. ARGUMENT AND AUTHORITY

This Court should find that the Appellant, GEICO Indemnity Co. (“GEICO”) did not violate the Consumer Protection Act (“CPA”) as a matter of law. The Trial Court ruled contrary to long standing law and created third party bad faith liability in the State of Washington. For over 30 years, a third party claimant has had no right of action against an insurer under *Tank v. State Farm Fire & Casualty Co.* and its progeny. This Court should abide by the binding precedent and find that it was an error of law to permit the University of Washington (“the University”) to bring a cause of action against GEICO for violation of the CPA. Additionally, the University did not prove an unfair or deceptive act or practice was committed by GEICO and failed to prove proximate damages under the CPA. Further, GEICO requests that this Court vacate the order awarding the University attorneys’ fees and costs. In the alternative, this Court should grant a new trial.

A. There is No Third Party Bad Faith in Washington

The settled law of Washington is that third party claimants may not sue an insurance company directly for alleged breach of duty of good faith under a liability policy. *Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 391, 715 P.2d 1133 (1986). Only insureds may bring a private action

against their insurers for breach of duty of good faith under the CPA. *Id.* at 394. Under the authority of RCW 48.30.010 the Insurance Commissioner may take regulatory action against insurers that commit unfair practices in violation of that statute. RCW 48.30.010(6). Unfair insurance practice regulations are codified in WAC 284-30 *et seq.* setting forth minimum standards for business practices. However, nothing in the language of WAC 284-30 *et seq.* gives third party claimants the right to enforce any of those regulations, leaving enforcement action as the sole province of the Insurance Commissioner. *Tank*, 105 Wn.2d at 393.

The petitioners in *Tank* brought a cause of action under the CPA, however, the Court held that *only an insured* may bring a private cause of action against their insurer for a violation under that statute. *Id.* at 394. In foreclosing the right of the third party claimants to sue insurers for bad faith, the Court reasoned that, “we are persuaded that the public as a whole would not benefit from allowing such suits. The goal of the insurance regulations is a well regulated insurance industry. To this end, the Insurance Commissioner, not a third party claimant, should have the primary enforcement right.” *Id.* at 395. The holding of *Tank*, and the reasoning in which it is grounded, have been repeatedly affirmed by the courts of Washington, leading to a well-established line of jurisprudence

that was not followed by the Trial Court. *See also, Trinity Universal Ins. Co. of Kansas v. Ohio Cas. Ins. Co.*, 176 Wn. App. 185, 312 P.3d 976 (2013); *Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 50, 204 P.3d 885 (2009); *Dussault v. Am. Int'l Group, Inc.*, 123 Wn. App. 863, 867, 99 P.3d 1256 (2004); *Planet Insurance v. Wong*, 74 Wn. App. 905, (1994).

According to *Tank* and its progeny, the University was prohibited from bringing a cause of action against GEICO under the CPA.

1. Stare Decisis Requires a Finding in Favor of GEICO

Stare decisis is a doctrine developed by courts to accomplish stability in court-made law. *In re Rights to Waters of Stranger Creek*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970). This Court will only reject its prior holdings upon “a clear showing that an established rule is incorrect and harmful.” *Id.* There are also “‘relatively rare’ occasions when a court should eschew prior precedent in deference to intervening authority” where “the legal underpinnings of our precedent have changed or disappeared altogether.” *State v. Otton*, 185 Wn.2d 673, 374 P.3d 1108 (2016). When a party asks this Court to reject its prior decision, it “is an invitation we do not take lightly.” *State v. Barber*, 170 Wn.2d 854, 863, 248 P.3d 494 (2011). The question is not whether the Court would make the same decision if the issue presented were a matter of first impression. Instead,

the question is whether the prior decision is so problematic that it must be rejected, despite the many benefits of adhering to precedent-“promot[ing] the evenhanded, predictable, and consistent development of legal principles, foster[ing] reliance on judicial decisions, and contribut[ing] to the actual and perceived integrity of the judicial process.” *Keene v. Edie*, 131 Wn.2d 822, 831, 935 P.2d 588 (1997) (quoting *Payne v. Tennessee*, 501 U.S. 808, 827, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991)).

The University does even not acknowledge that they are inviting this Court to reject longstanding precedent on the issue of third party bad faith and create new law properly devised by the legislature. This Court has made clear repeatedly, in a longstanding line of published case law, that third party claimants may not sue an insurance company directly for an alleged breach of the duty of good faith under a liability policy. *Dussault*, 123 Wn. App. at 867. An action for breach of good faith against an insurer is limited to the insured. *Id.* Third party claimants are not the intended beneficiaries of liability policies and are owed no direct contractual obligation by insurers. *Id.* In each decade that has passed since the holding of *Tank* in 1986, Washington Courts have consistently affirmed its line of reasoning and continue to apply it in context.

Most recently in *Trinity Universal*, one insurer sued another under

the CPA over a subrogation dispute wherein the policy at issue did not assign the CPA claims of the insured to the insurer. *Trinity Universal Ins. Co. of Kansas v. Ohio Cas. Ins. Co.*, 176 Wn. App. 185, 312 P.3d 976 (2013). In affirmation of well-established case law, the Court there held that without assignment, a third party claimant has no right of action against an insurance company and nothing in the statutory or regulatory language of the CPA gives third party claimants a right to sue. *Id.* at 200-201. Here, the facts are substantially similar to the facts in *Trinity Universal*. Both parties, GEICO and the University, are insuring entities in this context because the University is self-insured and as such is subject to the same statutes and regulations governing the business of handling insurance claims. Like the parties in *Trinity Universal*, GEICO and the University were engaged in a liability dispute—the reimbursement of the \$9,750.00 from the *Lawrence* claim. VRP 11/10/2015 p. 270, ll. 12-14.

Further, indistinguishable from the parties in *Trinity Universal* the language of the insurance policy of GEICO's insured, Kyle Murphy, did not express assignment of statutory claims under the CPA to any entity. CP 3082-3116. The doctrine of stare decisis applies and the holding of *Trinity Universal* controls the outcome of the instant case. Without an assignment, third party claimants are precluded from bringing claims under

the CPA against insurers as a matter of law. *Trinity Universal*, 176 Wn. App. at 203. Accordingly, the University possessed no valid cause of action against GEICO under the CPA and that claim should have been properly disposed of prior to the conclusion of trial.

2. The University Had No Right to Bring a Private Action under the CPA as a Matter of Law

There is no private right of action the University may bring against GEICO under the CPA. Nevertheless, the University took the position that GEICO's conduct of breaching the 50%/50% agreement to apportion liability constituted violation of the Washington Administrative Code 284-30 *et seq.* CP 5688-5689; VRP 11/16/2015, p. 523, ll. 16-20. This assertion by the University was never a proper basis for the CPA claim because enforcement of those code provisions are the exclusive province of the Insurance Commissioner under the legislative authority and the progeny of *Tank*. *Tank*, 105 Wn.2d at 393.

Notwithstanding this, the University argued "*Trinity* and *Dussault*, they don't speak to the State. They do not speak to what the State can do and what the State has standing to do under the CPA." VRP 11/16/2015 at p. 516, ll. 12-14. "*Trinity* specifically talks about third party claimants which—we're a little different than that." VRP 11/16/2015 at p. 516, ll. 18-20. This line of argument is unsupported by the law. In this case, the

University was a third party claimant. The University never provided the Trial Court with any binding authority to support its arguments that a claimant, other than a first party insured, may establish an unfair or deceptive act or practice by showing an insurer violated its duty of good faith. Rather, it relied upon *In re Charter First Mortgage*, 42 B.R. 380, a Federal Bankruptcy Court case from Oregon, in asserting that even though the University is in the position of a non-insured third party plaintiff, as a creature of the State, it has standing to bring claims under the CPA to vindicate the rights of the State. VRP 11/16/2015, p. 515, 11. 16-20.

This is not the law of Washington. *In re Charter* is distinguishable. There, the Court found “it is totally appropriate for Washington to proceed in state court to attempt to obtain an injunction, civil penalties and attorney fees and costs against *debtor* for alleged violation of its CPA.” *In re Charter First Mortgage*, 42 B.R. 380, 384 (1984) (emphasis added). Not only do the holdings in *In re Charter* pre-date that of *Tank*, but the debtor there was mortgage lender, not an insurance company. *Id.* Accordingly, because the cited case law has nothing to do with insurer defendants there is no binding precedent holding that the University, as a political subdivision of the State, is permitted a special allowance under the CPA to step into the position of a third party plaintiff and sue an insurer for its alleged conduct.

Washington's unfair claims settlement practice regulations do not create a cause of actions against insurers for third party claimants. *Dussault v. Am. Int'l Group, Inc.*, 123 Wn. App. 863 at 867 (2004). Nothing in the language of the regulations gives third party claimants the right to enforce the rules or indicates an intent by the Insurance Commissioner to create such a right. *Id.* The enforcement of the regulations on behalf of the third parties should be the Insurance Commissioner, not individual third party claimants. *Id.* This Court should reject the University's proposal to create a new a category of private action under the CPA that allows insurers to be held liable to third party claimants. The established precedent on this issue holds that a third party claiming injury has no right of action against an insurance company for bad faith. *Planet Ins. Co. v. Wong*, 74 Wn. App. 905 at 909.

B. The Evidence Presented by the University Does Not Prove an Unfair or Deceptive Act or Practice Under the CPA

At trial, the University presented two separate theories regarding the alleged unfair or deceptive act or practice committed by GEICO: 1) the breach of contract through its repudiation of the 50%/50% agreement to split liability; and 2) GEICO's April 12, 2011, letter with the inverted percentages of 60%/40%. Neither of these theories qualifies as an unfair or deceptive act or practice.

1. Breach of Contract is Not an Unfair or Deceptive Act or Practice as a Matter of Law

Evidence of breach of contract is not evidence of an unfair or deceptive act or practice under the CPA. A finding that a defendant in a CPA case did or did not engage in certain conduct is reviewable under the substantial evidence test. *Keyes v. Bollinger*, 31 Wn. App. 286, 289, 640 P.2d 1077 (1982). Consequently, the question of whether particular actions gave rise to a violation of the CPA is reviewable as a question of law. *Id.* The right to recover damages under the CPA is independent of any underlying contract. *Id.* at 293. Thus, evidence that GEICO breached a contract with the University is independent of any showing that it committed an unfair or deceptive act as a matter of law.

The CPA should not be construed to prohibit acts or practices which are reasonably related to the development and preservation of business, or which are not injurious to the public interest under RCW 19.86.920. *Cox v. Lewiston Grain Growers*, 86 Wn. App. 357, 374, 936 P.2d 1191 (1997). Acts which are done in good faith under an arguable interpretation of the law are not CPA violations. *Id.* Acts which bear a reasonable relationship to the development and preservation of business are not CPA violations. *Id.* In determining if an act should be deemed a violation, a court must weigh public interest against a business' right to conduct its

trade. *Id.* Here, GEICO acted in good faith under an arguable interpretation of the law in its dealings with the University over the liability split dispute. The acts attributable to GEICO were done in a reasonable relationship to the preservation of its business and in furtherance of its right to conduct its trade. The facts unearthed during GEICO's investigation of the collision indicated that its insured, Mr. Murphy, was not at fault, much less 50% at fault. CP 6160. The facts and law fully supported GEICO's decision to conclude that the University's employee was 100% at fault and change the agreement regarding a 50%/50% liability split. GEICO explained to the University the reason it was refusing to abide by the 50%/50% agreement. VRP 11/10/2015, p. 204, 1. 1-8. Furthermore, GEICO owed a duty to Mr. Murphy to fully protect his liability defense once the facts showed that he was not at fault.

The University was privy to the conclusions reached in the Seattle Police Investigation Report as early as July 15, 2011, but willfully concealed the dispositive findings from GEICO, refusing to disclose the full report in discovery. VRP 11/9/2015, p. 89, 11. 6-20. Consequently, GEICO's decision to rescind its liability agreement with the University was in no way unfair or deceptive. On the contrary, it was the University that acted in an unfair or deceptive manner, as is evidenced by the full

investigation report, released to GEICO following a Freedom of Information Act request days just days before trial. *Id.* Accordingly, GEICO's repudiation of the contract to split liability with the University cannot be considered evidence of an unfair or deceptive act or practice under the CPA as a matter of law.

2. The University's Theory of the 60%/40% Liability Split Inversion is Not an Unfair or Deceptive Act or Practice

As long as an insurer acts with honesty, bases its decision on adequate information, and does not overemphasize its own interests, an insured is not entitled to bring a CPA claim against its insurer on the basis of good faith mistake. *Coventry v. American State Ins. Co.*, 136 Wn.2d 269, 280, 961 P.2d 933 (1998). Here, at best, there was an honest mistake regarding the 40%/60%-60%/40% split inversion, which was remedied within two days. CP 6228. Accordingly, the University's CPA claim, based upon the good faith mistake of Ms. Kravitz's April 12, 2011 letter, was not a cause of action properly sent to the Jury.

The theory relied upon by the University, that GEICO's accidental transposition of the 60%/40% agreement to split liability properly provides a foundation for an unfair or deceptive act or practice, is entirely indefensible. Questions of fact may be determined on dispositive motion as a matter of law where reasonable minds could reach but one conclusion.

Smith v. Safeco Ins. Co., 150 Wn.2d 478, 485, 78 P.3d 1274 (2003). Here, reasonable minds could reach but one conclusion: that Ms. Kravitz made a typographical error that was remedied less than two days later on April 14, 2011, when the University received a follow up letter from GEICO, displaying the liability allocation consistent with the correspondence sent out to all other involved parties. VRP 11/17/2015, p. 668, l. 19 – p. 669, l. 2. The only conclusion supported by the evidence is that GEICO made a scrivener’s error regarding the apportionment of liability and that the University realized it as such. GEICO’s position is further bolstered by the testimony of Ms. Winslow-Nason that she “would have taken the better deal” of 40% rather than 50% of liability and described her statements as communicated “facetiously.” VRP 11/10/2015, p. 280, ll. 2-11.

Granting a motion for judgment as a matter of law is appropriate when, viewing the evidence most favorable to the nonmoving party, the court can say, as a matter of law, there is no substantial evidence or reasonable inference to sustain a verdict for the nonmoving party. *Sing v. John L. Scott, Inc.*, 134 Wn.2d 24, 29, 948 P.2d 816 (1997). A verdict cannot be founded on mere theory or speculation. *Hojem v. Kelly*, 93 Wn.2d 143, 145, 606 P.2d 275 (1980). With a record devoid of any evidence or reasonable inference sufficient upon which to support the

University's claim of a deceptive act or practice committed by GEICO, the Trial Court erred by allowing the CPA claim to be considered by the Jury.

3. The University's Position that the Evidence Relied Upon to Prove its CPA Claim was Withheld by GEICO is Unsupported by the Record

The University's contention that evidence in support of its CPA claim in the form of internal documents, correspondence, employee/witness deposition testimony and the track record of GEICO's adjuster was withheld in discovery is utterly spurious. Resp. Br. at 17-18. First, the only documentation relied upon by the University in attempting to prove the element of an unfair or deceptive act or practice under the CPA was the April 12, 2011, letter sent by Ms. Kravitz to Ms. Winslow-Nason, which was in its possession since the date it was received on April 20, 2011. CP 6227. Also in the University's possession was the payment recovery notice sent by GEICO on April 14, 2011, stating the intended apportionment of liability assigning 60% liability to GEICO and 40% to the University. CP 6228. Second, the Trial Court granted the University's Motion to Compel, with which GEICO complied on September 11, 2015. CP 1976-1977. Conversely, it was GEICO's Motion to Compel that was denied, along with the University's Cross-Motion on October 30, 2015, the eve of trial, at which time the Trial Court declined to compel GEICO to

disclose the settlement from the *Ross v. GEICO* case in which Joshua Kipp was involved. CP 4031-4032. Further, GEICO was in no way deceptive regarding its repudiation of the 50%/50% split liability agreement, as is demonstrated by the June 30, 2011 fax sent to the University by Zachary Kozma. VRP 11/10/2015, p. 202, 1. 3-5. Under either theory espoused by the University under the CPA, no contention made that GEICO withheld evidence is supported by the record.

The University argues that testimony given by GEICO employee Joshua Kipp at his deposition had some bearing on the Trial Court granting the Motion to Amend Complaint to add the CPA claim. Resp. Br. at 12. However, there is no allegation by the University of such conduct in its Motion to Amend, which was submitted on September 28, 2015 prior to the completion of Mr. Kipp's deposition on October 19, 2015, two weeks before trial and after the discovery cutoff. CP 2222-2228. In addition, no claims are made in the University's Amended Complaint in reference to the withholding of evidence as its basis for a cause of action. CP 3064-3139. Furthermore, this line of argument is hollow given that the University does not refute its own wrongful withholding of discovery critical to the evaluation of the claims central to this dispute. The University received the complete report issued by the Seattle Police Department concluding

Ofc. Sattarov was responsible for the collision on July 15, 2011. VRP 11/9/2015, p. 89, ll. 11-20. The evidence concealed by the University supported GEICO's position that the its insured was not at fault. CP 6127-6160.

The University presented no substantive evidence that it was injured in its business or property as a result of GEICO withholding any discovery. At most, the University presented evidence that Ms. Winslow-Nason performed the professional duties of her position by working to settle the claims arising from the collision. Furthermore, in regard to proving the element of damages, it is entirely illogical how any evidence of the University's own damages could have been wrongfully withheld by GEICO; it is the University's own business or property that is at issue, not that which was in GEICO's possession. As such, the University was unable to reference any substantive evidence probative of the elements of injury or causation of damages at closing arguments. VRP 11/17/2015, pp. 663-665, ll. 21-15. Thus, the University's contention that GEICO's withholding of evidence in discovery served as a basis for its claim under the CPA is both specious and unsupported by the record.

C. The University Did Not Demonstrate an Injury Suffered or Damages Proximately Caused under the CPA

The University failed to present adequate factual support to prove

injury to its business or property and proximate causation of damages. The University presented two separate theories to the Court regarding the alleged unfair or deceptive act or practice committed by GEICO, the breach of contract and the inverted percentages of 60%/40% in correspondence delivered to Ms. Winslow-Nason. However, the University failed to demonstrate how either of these allegedly unfair or deceptive acts proximately caused an injury to its business or property such that damages were sustained.

To establish the causation element of a CPA claim a plaintiff must show that, but for a defendant's unfair or deceptive act or practice, the plaintiff would not have suffered an injury. *Carlile v. Harbour Homes*, 147 Wn. App. 193, 194 P.3d 280 (2008). Here, the University's supporting contention that it suffered an injury as a result of the time spent by Ms. Winslow-Nason addressing the settlement of the underlying claims is insufficient as a matter of law. Whether a particular action gives rise to a violation of the CPA is reviewable as a question of law. *Sign-O-Lite Signs v. Delaurenti Florists*, 64 Wn. App. 553, 560, 825 P.2d 714 (1992). In contrast, whether a party commits a particular act is reviewable under the substantial evidence test. *Id.* at 561. Substantial evidence exists if the evidence is sufficient to persuade a fair-minded, rational person of the truth

of the declared premise. *Id.* An issue is properly kept from the Jury if there is no evidence or reasonable inferences therefrom which would sustain a jury verdict in favor of the nonmoving party. *Id.* Before a CPA violation may be found, an injury to the plaintiff's business or property must be established. *Id.* at 563. The distinction between "damage" and "injury" provides that non-quantifiable injuries are sufficient to establish this element. *Id.* The injury element is met if a property interest or money is diminished because of the unlawful conduct. *Id.*

The legislature's use of the phrase "business or property" in the CPA is restrictive of other categories of injury and is used in the ordinary sense to denote a commercial venture or enterprise. *Ambach v. French*, 167 Wn.2d 167, 173, 216 P.3d 405 (2009). To state a valid claim under the CPA, a plaintiff must prove that the injury, separate from any monetary loss, is to business or property. *Id.* at 175. Because damages are strictly limited to those in "business or property," lost wages are not compensable under the CPA. *Meyer v. U.S. Bank Nat'l Ass'n*, 530 B.R. 767 (2015) (citing *Ambach*, 167 Wn.2d 167).

Here, the University's position that time spent by Ms. Winslow-Nason performing work investigating, evaluating and settling claims related to the March 5, 2011, loss is not evidence of an injury caused

by GEICO. Resp. Br. at 31. As Ms. Winslow-Nason testified at trial, handling the investigation, evaluation and settlement of liability for auto claims are the basic responsibilities of her position as a senior claims specialist at the University. VRP 11/10/2015, p. 212, ll. 2-12. The instant case stands in stark contrast to the tenuous analogy the University attempts to draw between the position and responsibilities of Ms. Winslow-Nason and that of the claimant in *Sign-O-Lite Signs* wherein the plaintiff was a self-employed sole proprietor and the deceptive acts alleged significantly interfered with her ability to tend to her store. *Sign-O-Lite Signs*, 64 Wn. App. at 564. The assertion made by the University is essentially that it suffered an unquantifiable injury through the mechanism of Ms. Winslow-Nason performing the assigned duties of her position in regard to claims handling. This theory of injury-causation is even more dubious in light of the fact that Ms. Winslow-Nason withheld material facts from GEICO and misrepresented the conclusions of the City of Seattle investigation regarding fault. VRP 11/9/2015, p. 90, ll. 6-19. Had Ms. Winslow-Nason honestly performed her job she would have accepted that the University was 100% at fault and the case would have resolved quickly.

The theory that the University suffered an injury that resulted in damages due to Ms. Winslow-Nason's time spent settling claims, her job, is

not proof of a damage element under the CPA. There was no evidence that Ms. Winslow-Nason actually had to work more hours or that her other cases suffered. In short, there was no evidence of damage.

D. GEICO Was Entitled to a Trial Continuance

GEICO was prejudiced by unfair surprise when the Trial Court allowed the addition of the CPA claim shortly before trial. GEICO was unable to conduct any discovery regarding the CPA claim. The case law cited by the University attempting to justify the denial of GEICO's request for the continuance is not applicable. The University's reliance on the *Kirkham* case is misplaced. Resp. Br. at 19. The disparate nature of the claims brought for breach of contract and violation of the CPA in the instant case are distinct from the interrelated claims in *Kirkham*.

In *Kirkham*, a misrepresentation claim under Franchise Investment Protection Act ("FIPA"), was properly evaluated under a preponderance of the evidence standard, as opposed to the more stringent clear, cogent, and convincing evidence standard required for proof of common law fraud. *Kirkham v. Smith*, 106 Wn. App. 177, 183, 23 P.3d 10 (2001). Thus, that court held that since the evidentiary standard of the FIPA claim added via amendment was lower than the previously pled cause of action for common law fraud there was no prejudice to the non-moving party. *Id.* Here, the

elements of the CPA claim are entirely distinct and unrelated to any of the elements necessary to be proven under a claim for breach of contract. In order to demonstrate breach of contract all that need be proven was that the University entered into a contract with GEICO and that it was damaged as a result of GEICO's failure to perform. CP 5717. Causes of action brought under the CPA are extra-contractual claims by definition. The elements of the two sets of claims are distinct and thus, without time to conduct discovery, GEICO was unduly prejudiced by unfair surprise, unknowing of what conduct the University intended to allege it committed and the factual support for any subsequent injury and damages.

Similarly, the instant case is distinguishable from *Raffensperger*, wherein the Trial Court permitted the plaintiff to amend its pleadings to when the defendant had previously amended its own pleadings to include an affirmative defense. Resp. Br. at 19; *Raffensperger v. Towne*, 59 Wn.2d 731, 737, 370 P.2d 593 (1962). Here, GEICO did not amend its Answer to add any additional affirmative defenses, it declined to do so, and thus the University should not have been granted leave to amend its Complaint to add a new claim for which it did not provide any factual support. CP 2384. Accordingly, the analogy the University attempts to draw between the parties in *Raffensperger* and the instant case is ineffective. GEICO was

prejudiced by the late amendment and thus allowing the addition of the CPA claim was an abuse of discretion.

E. The University Mischaracterizes *Panag v. Farmers* and Ignores the Holdings of *Tank v. State Farm* and its Progeny

The University misstates the holding in *Panag*, by opining that the Court held “that an insurer could be liable in a private CPA action to someone other than its insured” for an unfair or deceptive act or practice under the CPA citing page 65, paragraph 80.¹ Resp. Br. at 23. The University’s summarization of the Court’s holding in that case is far afield. More on point, is the Court’s analysis of *Green v. Holm*, wherein the Court stated that the insurance code imposes a statutory duty of good faith on the insurer, the insured, their providers, and their representatives, under RCW 48.01.030. *Panag*, 166 Wn.2d at 43 citing *Green v. Holm*, 28 Wn. App. 135, 622 P.2d 869 (1981). Because the plaintiff was not the “insured,” the *Green* court concluded the plaintiff lacked standing to allege a CPA violation. *Id.* Only an insured may bring a CPA claim for an insurer’s breach of its statutory duty of good faith. *Tank*, 105 Wn.2d at 385; *Litho*

¹ “We hold that the plaintiffs’ standing is properly analyzed in the context of applying the five-part *Hangman Ridge* test. We hold that a CPA claim may be predicated on the deceptive characterization of an adjudicated insurance subrogation claim as a liquidated debt that must be immediately paid. We further hold that a CPA plaintiff alleging deceptive collection methods need not remand payment to establish injury: other expenses incurred as a result of the deceptive practice may satisfy the injury element.” *Panag*, 166 Wn.2d 27 at 65.

Color, Inc. v. Pac. Employers Ins. Co., 98 Wn. App. 286, 991 P.2d 638 (1999).

Moreover, the legislature authorized only two categories of causes of action that may be brought against GEICO as an insurer under RCW 19.86 *et seq.* and neither permits the University to sue: 1) a per se violation of the WAC claims handling regulations enumerated in WAC 284-30 *et seq.* which may only be brought by the Insurance Commissioner on behalf of the State; and 2) a private cause of action brought by an insured against its insurer for violation of its duty of good faith. Neither category entitles the University to any relief. As such, the legislature has already determined that it will not allow third party bad faith claims. Additionally, the University's position is contrary to long standing public policy. Insurers have a quasi-fiduciary duty to defend and indemnify their insureds. *United Servs. Auto Ass'n v. Speed*, 179 Wn. App. 184, 195, 317 P.3d 532 (2014) (citing *Am. Best Food Inc. v. Alea London, Ltd.*, 168 Wn.2d 398, 229 P.3d 693 (2010)). It is illogical to assert that GEICO owes a quasi-fiduciary duty to insureds while also having another, undefined duty to third parties because having a dual-duty is inconsistent with a quasi-fiduciary duty.

Furthermore, a third party bad faith claim based upon litigation

conduct would undermine the right to contest questionable claims and to defend the insured. Creating a new private cause of action under the Washington CPA would likely result in a chilling effect on defending insureds by inhibiting the zealous and effective representation of insureds. This Court should decline the University's invitation to create third party bad faith directly contrary to the legislative scheme. Public policy is to be declared by the legislature. *Cazzanigi v. General Elect. Credit Corp.*, 132 Wn.2d 433, 449, 938 P.2d 819 (1997). Accordingly, the Court should find that the University's CPA claim was incorrectly decided as a matter of law.

F. The Attorneys' Fees Awarded to the University Should be Vacated or Substantially Reduced as a Matter of Law

GEICO made an assignment of error within the opening Brief of Appellant arguing the Trial Court abused its discretion in ordering the award of attorney fees, thus, the merits of its arguments are properly considered here. App. Br. at 40. A Trial Court abuses its discretion when its exercise of discretion is manifestly unreasonable or based upon untenable grounds or reasons. *Allard v. First Interstate Bank of Washington, N.A.*, 112 Wn.2d 145, 148-149, 768 P.2d 998 (1989). Also, an abuse of discretion exists only where no reasonable person would take the position adopted by the Trial Court. *Id.*

The University brought its fee petition on the CPA claim pursuant to

RCW 19.86.090 and RCW 4.84.250. CP 6971-6980. The Trial Court granted attorney fees in the entirely inordinate sum of \$495,033.75, the full amount requested. *Id.* First of all, there was no statutory authority for an award of reasonable attorney fees under RCW 4.84.250. Secondly, the University should have been precluded from recovering the majority of the attorney fees for work related to non-CPA claims performed prior to the filing of its Amended Complaint. Third, the multiplier applied by the Trial Court was errant as a matter of law. Finally, the University was not entitled to recover attorney fees as a result of litigating its contractual claims. Attorney fees may be awarded when authorized by private agreement. *Deep Water Brewing, LLC v. Fairway Res. Ltd.*, 152 Wn. App. 229, 277, 215 P.3d 990 (2009). A contractual attorney fees clause will not support an award of attorney fees for a claim not based on the contract. *Id.* at 279. In a multi-claim case, courts may limit a party's award of attorney fees to only those fees attributable to the claims on which the party prevailed if the claims are separable. There is no contract provision granting attorney fees in this case. 11/9/2015, p. 25, 11. 8-15. Accordingly, this Court should revise the amount of attorneys' fees awarded to the University to \$0.00 should the CPA claim be dismissed.

In the event the Court affirms the entry of judgment as to the CPA,

attorney fees should be substantially reduced based on the segregation of claims, or the issue should be remanded for consideration by the Trial Court. If GEICO is found to be the prevailing party, it is entitled to a reasonable award of attorneys' fees under RCW 4.84.250. In closing, GEICO asks this Court to award its recovery of reasonable attorney fees and expenses for review of this matter under RAP 18.1.

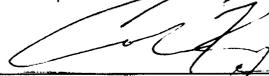
II. CONCLUSION

For the reasons stated above GEICO requests that this Court dismiss the CPA claim with prejudice. If the CPA claim is not dismissed, this Court should remand this action for a new trial based on the above stated reasons.

DATED this 26th day of October, 2016.

Respectfully Submitted,

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PROOF OF SERVICE

I, Sarah Gunderson, the undersigned, certify and declare under penalty of perjury under the laws of the State of Washington that the following statements are true and correct.

I certify that on October 26, 2016, I submitted the Reply Brief of the Appellant to the Court of Appeals Division One via legal messenger; and a copy of the same was e-mailed and sent out for service by U.S.

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RESPECTFULLY SUBMITTED this 26th day of October, 2016.



Sarah Gunderson
Legal Assistant