

No. 74736-3

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

GEICO INDEMNITY COMPANY,

Appellant,

v.

UNIVERSITY OF WASHINGTON,

Respondent.

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Court of Appeals
Division I
State of Washington

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE JULIE A. SPECTOR

BRIEF OF RESPONDENT

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I. INTRODUCTION

This case arises out of GEICO's repudiation of an agreement to split liability following an automobile accident involving the University of Washington Police Department ("UWPD") and a motorist insured by GEICO. GEICO's insured and a UWPD employee were involved in a two-car accident that sent a car through the window of the American Apparel store in the U-District. Their respective adjusters contracted to resolve all resulting claims, including those of the injured pedestrians, by equally sharing liability for property damage and personal injury. After settling three property damage claims at the 50/50 apportionment, GEICO repudiated the agreement, claiming that the personal injury claims could exceed its insured's limits.

In a decision that is not challenged on appeal and is therefore the law of the case, a jury found that GEICO breached the contract, awarding the University \$9,750 in damages when GEICO refused to pay 50% of a personal injury settlement. The jury also found under unchallenged instructions that GEICO violated the Consumer Protection Act by committing an unfair or deceptive act when it repudiated the agreement, thus requiring the University to either settle on its own or defend against liability in the remaining

claimants' ensuing lawsuits. Having stipulated that its actions affected the "public interest" in this private (not per se) CPA action, GEICO's challenge to the University's standing to assert a CPA claim is without merit, and the jury's award was supported by ample evidence, introduced primarily by GEICO. This Court should affirm the trial court's judgment on the jury's verdict and its discretionary attorney fee award and award the University its fees on appeal.

II. RESTATEMENT OF ISSUES

1. Did the trial court abuse its discretion in allowing amendment to a breach of contract complaint to add a Consumer Protection Act claim, after GEICO withheld from discovery evidence that GEICO had repudiated similar agreements and could identify no prejudice from the amendment?

2. Does the fact that only an insured may sue its insurer on a per se Consumer Protection Act for violating claims handling regulations limit the ability of a non-insured party to sue an insurer in a private CPA action for unfair or deceptive acts in repudiating its contract with that party, where the insurer has stipulated that its actions affect the public interest?

3. Does substantial evidence support the jury's verdict that GEICO committed unfair or deceptive acts under the CPA,

where it is undisputed that GEICO (1) repudiated its contract with the University to share liability for an auto accident caused by their respective insureds, (2) caused the University monetary loss in settling or defending those claims, and (3) stipulated its actions affected the public interest?

4. Did the trial court abuse its discretion in (a) rejecting GEICO's motion for a new trial in the absence of any request for punitive damages by the University, and (b) finding that the University's fees in pursuing breach of contract and CPA claims could not be reasonably segregated and adding a 1.5 multiplier on the grounds that the case was "substantively complex" and "very risky"?

III. RESTATEMENT OF THE CASE

A. Restatement of Facts.

As GEICO challenges the sufficiency of the evidence, the facts supporting the jury's verdict are presented in the light most favorable to the University. *See Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 108, 864 P.2d 937 (1994); *Gorman v. Pierce County*, 176 Wn. App. 63, 87, ¶57, 307 P.3d 795 (2013), *rev. denied*, 179 Wn.2d 1010 (2014).

- 1. The University and GEICO agreed to a 50/50 split of their respective liability for an automobile accident involving their insureds.**

In the early morning hours of March 5, 2011, while responding to a report of disturbance involving a gun, a police car operated by UWPD Officer Ruslan Sattarov collided with a car driven by Kyle Murphy on NE 45th St. in Seattle. (RP 28; Ex. 202 at 57)¹ The collision damaged both vehicles, sent the police car through the glass storefront of American Apparel, and caused personal injuries to Mr. Murphy's passenger, Tyler Lennier, and to pedestrians Jim Howard and Megatron Lawrence. (RP 14; Ex. 209, 253, 255) Mr. Lawrence was knocked to the ground and the impact sent Mr. Howard through the glass storefront. (CP 6153)

Mr. Murphy was insured by GEICO with policy limits of \$50,000 for property damage, \$100,000 for bodily injury per person, up to \$300,000 per occurrence. (Ex. 1 at 2) On March 7, 2011, GEICO assigned Andrea Kravitz as the primary adjuster to handle the claims arising from the accident. (11/5 RP 118) The University, which is self-insured, assigned Wendy Winslow-Nason as its lead adjuster of the accident. (RP 212-13)

¹ The verbatim report of proceedings is sequentially numbered beginning with the VRP for November 9, 2015. Previous days are cited by date as well as page number.

Both adjusters conducted independent investigations of the accident. (RP 311) Ms. Kravitz and Ms. Winslow-Nason first spoke on March 7, 2011, agreeing to share information following their respective investigations. (RP 311; Ex. 202 at 86) On April 6, 2011, Ms. Kravitz informed Ms. Winslow-Nason that GEICO had made a “preliminary determination” that the accident was a “comparative [fault] situation.” (Ex. 203 at 3-4)

One week later, in letters to potential claimants Mr. Lennier, Mr. Lawrence, Mr. Howard, and American Apparel, Ms. Kravitz asserted that GEICO had determined Mr. Murphy bore 60% of the fault for the accident and the University 40%:

We have investigated the circumstances of the above referenced loss [the March 5, 2011 car accident]. Our obligation as an insurer is to pay damages for which our insured is legally liable. According to the information available to us to date . . . the percent of negligence apportion[ed] to our insured is 60% and the percent of negligence apportioned to the University of Washington is 40%.

(Exs. 250-51, 253).

Ms. Kravitz also sent UWPD a letter, identical to those sent to the other claimants except, crucially, the 60/40 numbers were inverted. (Ex. 252) As a result, the University believed GEICO’s investigation concluded that the University bore 60% liability. (RP 221, 223) Ms. Kravitz did not inform Ms. Winslow-Nason of this

error. (RP 221, 223) On April 28, 2011, still believing that GEICO had determined that the University bore 60% of the fault, Ms. Winslow-Nason negotiated a 50/50 split with Ms. Kravitz, agreeing that each driver would bear 50% of the liability. (11/5 RP 54; RP 17, 223; Ex. 202 at 51; Ex. 203 at 4)

Such agreements among insurers are common and binding in the insurance industry, as they significantly reduce defense costs. (11/5 RP 63; RP 376-77, 411) Ms. Kravitz and Ms. Winslow-Nason understood that the 50/50 agreement would apply to all personal injury and property damage claims arising from the accident. (RP 78-79, 223) Both sides saw the agreement as beneficial, as they both believed that each of their insureds was 60% liable. (RP 22, 223) Ms. Winslow-Nason would have negotiated a more favorable allocation had she known that GEICO only apportioned 40% liability to the University. (RP 223)

Ms. Winslow-Nason memorialized the agreement in an email to Ms. Kravitz on April 28, 2011: “This confirms that we have agreed to apportion liability 50/50 in regard to this loss.” (RP 25, 158; Ex. 265) The April 28 agreement did not contain any limits on time or scope, nor did it have any ambiguous terms, as both parties knew that the term “loss” meant the March 5, 2011 accident. (See Ex. 255; RP 7-

8, 247) Ms. Kravitz acknowledged the email and agreement in her claim file. (Ex. 202 at 49, 51 (“I agree to 50/50”))

Critically, for purposes of this appeal, GEICO has not challenged the jury’s finding that “the University . . . and GEICO enter[ed] into a contract.” (CP 5706)

2. The parties settled three property damage claims pursuant to their 50/50 agreement, which GEICO continued to acknowledge while evaluating the personal injury claims.

On April 29, 2011, Ms. Kravitz sent letters to various claimants to notify them of the 50/50 liability agreement. (Exs. 268-70) Both the University and GEICO then performed their agreement, settling three property damage claims pursuant to the 50/50 apportionment in May and August 2011. They paid Mr. Murphy \$12,196.77 for property damage to his vehicle, with each bearing 50% of the damages. (RP 245-48; Ex. 285) On May 12, 2011, Ms. Winslow-Nason sent a check to GEICO for 50% of the total, which GEICO deposited. (Exs. 4, 285; RP 248)

The University and GEICO funded a second property damage settlement with American Apparel for \$9,147.32 in damages, again splitting that amount 50/50. (RP 250; Ex. 299) Because GEICO had previously paid \$5,180.07 (60% of the total damages) to American Apparel, the University paid \$3,967.25 to American Apparel and sent

a separate \$606.41 check to GEICO to ensure that both parties paid one half of the total damages. (Exs. 5, 202 at 32; Ex. 299) GEICO accepted the reimbursement check. (Ex. 202 at 32; FF 22, CP 6960)

The third 50/50 settlement took place on August 18, 2011, when a different GEICO adjuster, Zachary Kozma, remitted a reimbursement check for \$6,135.00 to the University, representing 50% of the damages to the UWPD vehicle. (Ex. 311; RP 181) The memo line of the check included the notation "50/50 LIABILITY." (Ex. 311)

Ms. Winslow-Nason continued to evaluate the Lawrence, Lennier and Howard personal injury claims, budgeting the University's reserves according to the 50/50 split with GEICO. (11/5 RP 94; RP 242) On March 7, 2013, Ms. Winslow-Nason informed GEICO's new adjuster Nathan Broderick that she valued Mr. Lennier's claims up to \$20,000 in total damages and that she would "seek 50% reimbursement from GEICO" if the claim settled. (Ex. 203 at 23; RP 465-66) Reflecting GEICO's consent to the University settling the claim on behalf of GEICO's insured, Mr. Broderick called Ms. Winslow-Nason to make sure that Mr. Murphy was released as a condition of reimbursing the University for the Lennier settlement. (Ex. 202 at 23-24; Ex. 203 at 11; RP 466)

On March 11, 2013, Ms. Winslow-Nason confirmed that the University would obtain a release of GEICO's insured, Mr. Murphy, as part of the Lennier settlement. (Ex. 203 at 11) On April 26, 2013, Mr. Broderick told Ms. Winslow-Nason that he was "ok with [her] evaluation amount" for Lennier's claim. (Ex. 203 at 12)

On August 5, 2013, the next in a succession of GEICO adjusters, Joshua Kipp, noted in the claim file that he needed to confirm that UW "Will Be Handling All Claims And Obtaining Releases And Then Seeking A 50% Recovery Against Geico For The Settlements]" of the outstanding Lawrence, Howard and Lennier personal injury claims. (Ex. 202 at 21; RP 263-65) Mr. Kipp called Ms. Winslow-Nason on September 3 to "Confirm[] All Parties In Agreement They Will Handle Settlement And Subrogate Geico For The 50%." (Ex. 202 at 20) Ms. Winslow-Nason confirmed the next day that the University would handle the primary settlement and seek 50% reimbursement from GEICO. (Ex. 203 at 12; Ex. 202 at 20)

On February 26, 2014, Mr. Kipp noted that the University had just been notified that Howard had filed a lawsuit. (Ex. 202 at 19) He and Ms. Winslow-Nason discussed the possibility of engaging in a joint defense of damages in the Howard action pursuant to their agreement to split liability 50/50. (Ex. 202 at 20; Ex. 203 at 13) Mr.

Kipp advised Ms. Winslow-Nason that he would need to research whether or not GEICO and the University could have joint counsel. (Ex. 202 at 20) On February 27, 2014, Mr. Kipp told Ms. Winslow-Nason that GEICO wanted to defend with its in-house counsel, but that they “will work together on damages at 50/50.” (Ex. 203 at 13) Mr. Kipp and Ms. Winslow-Nason “discussed trying to settle quickly if possible since this is a damages only matter.” (Ex. 203 at 13)

3. GEICO repudiated the 50/50 agreement.

After repeatedly performing the 50/50 agreement with the University with respect to property damage claims and acknowledging its application to the Lennier personal injury claim, GEICO repudiated the agreement, but only after other claimants commenced litigation and asserted higher value personal injury claims. GEICO does not challenge the jury’s finding that “GEICO breach[ed] the contract.” (CP 5706)

On September 2, 2014, Ms. Winslow-Nason settled Lawrence’s claim for \$19,500, which the University paid in full. (Ex. 203 at 17; Ex. 338) However, GEICO refused to honor the 50/50 agreement and did not contribute its 50% (\$9,750) of the settlement. (RP 270, 272-74, 437-38)

GEICO then refused to cooperate with the University to resolve the Howard and Lennier claims at the 50/50 ratio. (RP 272-73) On October 31, 2014, Ms. Winslow-Nason first learned from Mr. Murphy's defense lawyer that GEICO was now "taking [the] position that they are not liable at all." (Ex. 203 at 20) The trial court found that GEICO's repudiation forced the University "to engage in unnecessary litigation with Mr. Howard and Mr. Lennier." (FF 29, CP 6961-62) (unchallenged)

B. Procedural History.

On April 7, 2015, the University sued GEICO in King County Superior Court to enforce their agreement to equally share liability for damages resulting from the accident. (CP 1-13) The University initially brought claims for declaratory judgment, breach of contract, equitable indemnity, contribution, unjust enrichment, equitable estoppel, and the ABC rule. (CP 1-13) Both Judge Ron Kessler (presiding over *Lennier*) and Judge Timothy Bradshaw (presiding over *Howard*) stayed their respective cases to avoid wasting resources by unnecessarily litigating issues of liability that may have been definitively resolved by agreement. (FF 31-32, CP 6962; CP 7012-13)

- 1. The trial court granted the University leave to amend its complaint to add a Consumer Protection Act claim after compelling GEICO to reveal previously withheld discovery.**

Throughout discovery, GEICO withheld evidence from the University. (See FF 8, CP 6974: listing evidence that “was initially withheld” by GEICO) In his August 4, 2015, deposition, GEICO’s adjuster Kipp testified that he had also been involved in *Ross v. GEICO*, a case alleging GEICO’s repudiation of a “no limits” agreement with its insured. (CP 1681-1700) After GEICO’s counsel instructed Mr. Kipp not to answer any questions related to the *Ross* case, Judge Bradshaw granted the University’s motion to compel. (CP 1666-76, 1976-77)

Following the completion of Mr. Kipp’s deposition on October 14, 2015, Judge Bradshaw granted the University’s motion to amend its complaint to add a Consumer Protection Act claim. (CP 2222-25, 3011-12) The CPA claim alleged that GEICO’s repudiation of its agreement constituted an unfair or deceptive act in trade or commerce that affected the public interest. (CP 3076)

2. The jury found that GEICO breached its contract with the University and violated the Consumer Protection Act. The trial court awarded the University its fees under the CPA.

Judge Julie Spector (“the trial court”) presided over a jury trial on the University’s breach of contract and CPA claims from November 5 to 17, 2015 (CP 7172-89), ordering that she would decide the University’s equitable claims post-verdict. (11/4 RP 28-29)² GEICO stipulated that its act or practice of repudiating a liability allocation agreement occurred in trade or commerce and affected the public interest. (11/4 RP 79) The trial court denied GEICO’s motions under CR 50 for judgment as a matter of law on the CPA claim, but refused to allow the University to base its CPA action on GEICO’s alleged breach of insurance claims handling regulations. (RP 527)

The trial court submitted the contract and CPA claims to the jury under instructions that are not challenged on appeal. In a special verdict, the jury awarded the University \$9,750, which was 50% of the Lawrence settlement, for GEICO’s breach of contract. (CP 6952; FF 28, CP 6961)

The jury also found that GEICO violated the Consumer Protection Act, awarding the University an additional \$300,000 in

² The University voluntarily dismissed its unjust enrichment claim. (RP 425, 499; CP 5700)

damages. (CP 6953) The trial court denied GEICO's motions for judgment notwithstanding the verdict as well as its motion for a new trial or remittitur, which were directed to the CPA award. (CP 6731-36) In its appeal, GEICO does not challenge the existence of the contract, its breach, or the award of contract damages.

Citing the evidence before the jury, in post-trial findings of fact and conclusions of law, the trial court also found in the University's favor on its equitable claims for promissory estoppel and a declaratory judgment. (CP 6737-52) Those findings are also unchallenged on appeal.

The trial court also made findings under the lodestar method to support an award of attorney fees to the University as a prevailing party under the Consumer Protection Act. GEICO has not assigned error to those findings. The trial court determined that the time spent on the case by the University's counsel in pursuing both the CPA and breach of contract claims was reasonable and could not be segregated. (CP 6977-80) The trial court found the hourly market rates of \$375 for partners, \$295 for senior associates, and \$140 for paralegals and staff to be reasonable. (FF 5, CP 6977) The trial court then applied a 1.5 multiplier, finding that the case was "very risky," "substantively complex," and the University's counsel took on the

case “at reduced rates and to the detriment of more lucrative work.” The trial court also cited the public interest furthered by CPA litigation, awarding a total of \$495,033.75 in attorney fees. (FF 10, 12, CP 6979-80)

IV. ARGUMENT

A. The trial court did not abuse its discretion in granting the University leave to amend its complaint to add a Consumer Protection Act claim because GEICO was not prejudiced by the amendment.

The trial court did not abuse its discretion in authorizing the University to pursue a Consumer Protection Act claim. “[W]hen reviewing the court's decision to grant or deny leave to amend, we apply a manifest abuse of discretion test.” *Wilson v. Horsley*, 137 Wn.2d 500, 505, 974 P.2d 316 (1999) (App. Br. 11, 13)

Under CR 15(a), once a responsive pleading is served, “a party may amend the party's pleading only by leave of court,” but “leave shall be freely given when justice so requires.” CR 15 “was designed to facilitate the amendment of pleadings except where prejudice to the opposing party would result.” *Caruso v. Local Union No. 690 of Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am.*, 100 Wn.2d 343, 349, 670 P.2d 240 (1983) (quoting *United States v. Hougham*, 364 U.S. 310, 316, 81 S. Ct. 13, 5 L. Ed. 2d 8 (1960)) (internal quotation marks omitted).

GEICO does not cite any case holding that a trial court abused its discretion in granting an amendment under CR 15(a). In *Wilson*, 137 Wn.2d 500, and in *Estate of Lowe*, 191 Wn. App. 216, 361 P.3d 789 (2015), *rev. denied*, 185 Wn.2d 1019 (2016) (App. Br. 11-13), the courts *affirmed* the trial court's exercise of discretion under CR 15 in denying a motion to amend. Moreover, *Lowe* highlighted the differences between CR 15(a), which provides that "leave shall be freely given" for a party to amend its pleading, and CR 15(d), which allows a party to move to supplement the pleadings where events have occurred "since the date of the pleadings sought to be supplemented," but contains no directive to the trial judge that leave to supplement be "freely given." 191 Wn. App. at 226, ¶20 (quoting CR 15(d)) Here the University was amending, not supplementing, its complaint by adding a new cause of action based on the same underlying facts as the existing claims.

In responding to the University's motion to amend, GEICO argued that the CPA claim was "unsupported by facts or law" (CP 2388), without explaining how or why it would be prejudiced, or what discovery it needed to defend the claim. (CP 2390-91, 2396) GEICO's failure then or now to articulate any prejudice from the trial court's grant of the motion to amend is fatal to its claim of error. "The

touchstone for denial of an amendment is the prejudice such amendment would cause the nonmoving party.” *Caruso*, 100 Wn.2d at 350 “In determining whether prejudice would result, a court can consider potential delay, unfair surprise, or the introduction of remote issues.” *Kirkham v. Smith*, 106 Wn. App. 177, 181, 23 P.3d 10 (2001). But “[t]he fact that the amendment may introduce a new issue is not alone grounds for denying it.” *Bowers v. Good*, 52 Wash. 384, 386, 100 Pac. 848 (1909).

Similarly, “delay, excusable or not, in and of itself is not sufficient reason to deny the motion.” *Caruso*, 100 Wn.2d at 349. The true test is whether “the opposing party [is] prepared to meet the new issue.” *Bowers*, 52 Wash. at 386; *Quackenbush v. State*, 72 Wn.2d 670, 672, 434 P.2d 736 (1967) (no abuse of discretion where “trial court held that in considering all of the circumstances the defendants could meet the new issue without undue prejudice or surprise”). Indeed, GEICO was granted leave to amend its answer only 17 days before the University filed its motion to amend. (CP 1978-79)

GEICO ignores that the CPA claim was based on evidence that GEICO *itself* possessed and had withheld from the University. The evidence supporting the University’s CPA claim “came in the form of internal GEICO documents and correspondence, GEICO

employees'/witness' deposition testimony, and the renegeing adjustor's track record of comparable conduct.” (FF 8, CP 6974) (unchallenged) “[A]ll of this was initially withheld from the University” in discovery. (FF 8, CP 6974; *see also* unchallenged FF 6, CP 6973) (“the evidence was largely held by GEICO”); and CL 10, CP 6979) (“GEICO was less than transparent about the evidence in its possession.”)) GEICO cannot claim “unfair surprise.”

Even had GEICO not been in control of the evidence, the test is whether GEICO would be prepared to meet the testimony at trial. *Bowers*, 52 Wash. at 386-87. The CPA claim relied on the same proof as the allegations in the existing breach of contract claim. (FF 8, CP 6974: “the contract and CPA theories were supported by nearly-identical evidence and testimony”). *See Kirkham*, 106 Wn. App. at 181 (amendment did not prejudice plaintiffs where there was a “similarity between the essential elements” of the defendants’ preexisting counterclaims and the added claim); *Raffensperger v. Towne*, 59 Wn.2d 731, 737, 370 P.2d 593 (1962) (trial court properly granted plaintiff leave to amend and denied defendant’s motion to continue because defendant “did not show any element of surprise to justify a continuance” where the added theory “did not add to or alter the facts which were to be proved at the trial”). The only difference

was that the University had the additional burden of proving under the CPA that GEICO acted unfairly or deceptively by entering into the contract, settling smaller claims pursuant to its terms, and then repudiating the contract when high-value claimants came forward, causing injury to the University, and that its actions affected the public interest. (Arg. §B, *infra*)

The fact that GEICO stipulated to the public interest element of the Consumer Protection Act claim further undermines any potential of prejudice, as GEICO could have contested that element at trial by showing that its repudiation of its agreement was an isolated event that lacked a “real and substantial potential for repetition.” *Mason v. Mortgage Am., Inc.*, 114 Wn.2d 842, 853, 792 P.2d 142 (1990). Just as in *Kirkham* and *Raffensperger*, the trial court did not abuse its discretion in allowing the University to amend its complaint where the added claim shared similar elements to existing claims and “did not add to or alter the facts which were to be proved at the trial.” 59 Wn.2d at 737.

B. The jury properly found GEICO liable for its unfair or deceptive acts under the Consumer Protection Act.

The trial court declined to allow the University to proceed with a per se CPA action for breach of insurance claims handling regulations (RP 527) and the University does not cross-appeal that

decision. Rather, the trial court required the University to prove all five elements of a private Consumer Protection Act claim: (1) that GEICO committed an unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) impacting the public interest; (4) injury to the plaintiff's business or property; and (5) causation. Inst. No. 16, CP 5728; *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780, 719 P.2d 531 (1986).

Any plaintiff who can establish all five elements of a private CPA claim, as the University did below, is the proper party to bring a private CPA citizen suit. *See Panag v. Farmer Ins. Co. of Wash.*, 166 Wn.2d 27, 44, ¶30, 204 P.3d 885 (2009). GEICO's repudiation of its contract with the University is a textbook unfair or deceptive practice in trade affecting the public interest under the CPA. And since it is undisputed that GEICO's repudiation caused the University to pay more than 50% of its share of the \$19,500 *Lawrence* settlement, and required the University to litigate bodily injury claims that GEICO itself asserted could well exceed its \$300,000 policy limits, substantial evidence supports the jury's verdict.

1. Standard of review.

The Consumer Protection Act prohibits "unfair or deceptive acts or practices in the conduct of any trade or commerce." RCW

19.86.020. “[W]hether an act or practice is actionable under the Consumer Protection Act is a question of law.” *State Farm Fire & Cas. Co. v. Huynh*, 92 Wn. App. 454, 458, 962 P.2d 854 (1998). Once the Court disposes of GEICO’s misguided legal argument – that because it is not GEICO’s insured the CPA provides no remedy to the University for GEICO’s unfair or deceptive acts (App. Br. 13-15, 27) – this Court reviews the factual basis for the jury’s CPA verdict by looking at all evidence and reasonable inferences in the light most favorable to the University. *See Industrial Indem. Co. of the Northwest, Inc. v. Kallevig*, 114 Wn.2d 907, 915-16, 792 P.2d 520 (1990); *Mears v. Bethel School Dist. No. 403*, 182 Wn. App. 919, 926, ¶15, 332 P.3d 1077 (2014), *rev. denied*, 182 Wn.2d 1021 (2015). The trial court properly denied GEICO’s CR 50 motion.

GEICO conceded prior to trial that its act or conduct occurred in the course of trade or commerce and that it impacted the public interest.³ (11/4 RP 79) The trial court instructed the jury that the

³ Because GEICO stipulated to the public interest element prior to trial, GEICO’s argument that the University “failed to demonstrate that any act by GEICO affected the public interest” (App. Br. 18) is meritless. *See Hoover v. Warner*, 189 Wn. App. 509, 531, ¶65, 358 P.3d 1174 (2015) (stipulation to order waived right to challenge it on appeal), *rev. denied*, 185 Wn.2d 1004 (2016); *see also Washington State Physicians Ins. Exch. & Ass’n v. Fisons Corp.*, 122 Wn.2d 299, 314, 858 P.2d 1054 (1993) (upholding CPA claim based on stipulation to public interest element).

University had the burden of proving that GEICO engaged in an unfair or deceptive act or practice that caused injury to the University's business or property. (CP 5728-32) These unchallenged instructions are the law of the case. *Noland v. Dep't of Labor & Indus.*, 43 Wn.2d 588, 590, 262 P.2d 765 (1953). This Court now determines only whether there is sufficient evidence to sustain the verdict under the given instructions. *Noland*, 43 Wn.2d at 590.

2. The University had standing to bring a private CPA claim against GEICO for repudiating its agreement to share liability.

The University did not have to be insured by GEICO in order to sue GEICO under RCW 19.86.020 for unlawful “[u]nfair or deceptive acts or practices in the conduct of any trade or commerce.” Washington courts have never held that “only an insured may bring a CPA claim against an insurer,” as GEICO asserts. (App. Br. 14) To the contrary, the “CPA allows *any person* who is injured in his or her business or property by a violation of the act to bring a CPA claim.” *Panag*, 166 Wn.2d at 39, ¶19 (internal quotation marks and alternations omitted) (emphasis in original). Under RCW 19.86.090, “any person” includes “all political subdivisions of this state,” including the University.

The *Panag* Court refused to “address standing as a separate requirement” under the CPA, 166 Wn.2d at 38, ¶16, holding that an insurer could be liable in a *private* CPA action to someone other than its insured for making false and deceptive demands in attempting to collect under a subrogation claim. 166 Wn.2d at 65, ¶80. The Supreme Court in *Transamerica Title Ins. Co. v. Johnson*, 103 Wn.2d 409, 418, 693 P.2d 697 (1985), predicted the holding of *Panag*, by “suggest[ing] in dicta that *non per se* actions may be maintainable by third parties” and that third parties with a “direct contractual obligation” that they “could sue to enforce” can bring a Consumer Protection Act claim. *Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 394-95, 715 P.2d 1133 (1986) (discussing *Transamerica*).

The Supreme Court’s broad interpretation furthers the purpose of the CPA, “to protect the public and foster fair and honest competition.” RCW 19.86.920. To that end, the “act shall be liberally construed that its beneficial purposes may be served.” *Id.* As the *Panag* Court stated, “a private CPA action may be brought by one who is not in a consumer or other business relationship with the actor against whom the suit is brought,” and that by requiring a “special relationship” “would . . . unduly restrict the intended broad scope of

the [Consumer Protection Act] and conflict with both its language and its purpose.” *Panag*, 166 Wn.2d at 43-44 & 47, ¶¶30 & 38.

GEICO misstates *Panag*’s holding and relies on cases holding that only an insured may sue an insurer for a per se CPA violation based upon a breach of the statutory duties imposed by the Insurance Code, but those cases are inapposite.⁴ Significantly, the trial court prohibited the University from arguing a per se violation based on GEICO’s violation of Insurance Commissioner’s claims settlement regulations. (RP 527)⁵ Rather, the trial court required the University to prove all five elements of a private Consumer Protection Act under *Hangman Ridge*, 105 Wn.2d. at 780. (Inst. No. 16, CP 5728)

Here, GEICO stipulated that its acts or practices affected the public interest and occurred in trade or commerce. (11/4 RP 76) As

⁴ See, e.g., *Rice v. Life Ins. Co. of N. America*, 25 Wn. App. 479, 609 P.2d 1387, rev. denied, 93 Wn.2d 1027 (1980); *Green v. Holm*, 28 Wn. App. 135, 622 P.2d 869 (1981) (App. Br. 14).

⁵ Because this was not a per se claim under the Insurance Code, GEICO’s related argument that the University failed to “raise an inference that GEICO was liable for damages under the Consumer Protection Act due to claims handling procedures alleged to be in violation of the WAC” (App. Br. 28) is without merit. The University did not have to prove, as GEICO contends, that GEICO’s “decision to amend its liability determination violated any statute, regulation or other state law.” (App. Br. 22)

discussed below, the University established the remaining elements of the CPA claim.

3. GEICO’s repudiation of the agreement to share liability was an “unfair or deceptive act in trade or commerce” under the Consumer Protection Act.

GEICO’s assertion that its repudiation of its agreement with the University was not an “unfair or deceptive act or practice” under RCW 19.86.020 fails as a matter of law. “Proof of a defendant’s intent or design to engage in unfair or deceptive practices is not required; the acts or practices need have only a tendency or capacity to deceive a substantial portion of the purchasing public.” *Keyes v. Bollinger*, 31 Wn. App. 286, 292, 640 P.2d 1077 (1982). “The purpose of the capacity-to-deceive test is to deter deceptive conduct before it occurs.” *Dwyer v. J.I. Kislak Mortg. Corp.*, 103 Wn. App. 542, 547, 13 P.3d 240 (2000), *rev. denied*, 143 Wn.2d 1024 (2001). “Neither intent to deceive nor actual deception is required.” *Dwyer*, 103 Wn. App. at 547; *see also* CP 5729 (unchallenged instruction)

GEICO incorrectly contends that “the mere act of disclaiming a contract cannot, in and of itself, be grounds for the finding that doing so was unfair or deceptive” because the Consumer Protection Act “simply does not contemplate relief for business disputes over

the enforceability of agreements.” (App. Br. 22) GEICO ignores that “[t]he express public policy of this state strongly encourages settlement.” *Martin v. Johnson*, 141 Wn. App. 611, 622, ¶27, 170 P.3d 1198 (2007). Moreover, in *Hangman Ridge*, the Court held that the CPA may be implicated in “a breach of a private contract” where there is a “likelihood that additional plaintiffs have been or will be injured in exactly the same fashion,” as it then becomes a matter of public interest. 105 Wn.2d at 790. *See also Travis v. Washington Horse Breeders Ass’n, Inc.*, 111 Wn.2d 396, 406, 759 P.2d 418 (1988).

The jury rejected argument that GEICO’s “acts or practices ... are reasonable in relation to the development and presentation of its business.” (CP 5730; *See* App. Br. 19-20) GEICO also cites to the comments of WPI 310.08 (given at CP 5729) to argue that an act is unfair or deceptive only if “it is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.” (App. Br. 20) But even under this test, GEICO’s repudiation of an agreement with another insurer or self-insured entity to split liability is likely to deceive not just the parties to the contract, but others, including claimants and its

insured.⁶ Its conduct is likely to cause substantial injury not just to those who are unjustly forced to litigate liability, but ultimately will increase the cost of insurance for all insureds.

While agreements between insurers on resolving liability issues are common in the industry (RP 377), GEICO took the position that it could unilaterally determine whether it was bound by such an agreement. Its adjuster John Stevens claimed that in 17 years, “I have never entered in an agreement that wasn’t alterable.” (RP 127) Adjuster Nathan Broderick claimed the “50 percent agreement [w]as an *idea*.” (RP 468) (emphasis added) At *no* time prior to disclaiming the contract did any GEICO agent tell the University that the agreement was “fluid,” or that the University could not rely on it in adjusting claims, leading the University to reasonably believe that the contract would apply to all claims arising from the accident, regardless of type or size. (FF 14, CP 6958; *see* RP 78, 223, 377) Because GEICO repudiated the type of agreement upon which those involved in the business of insurance routinely rely, GEICO’s claim

⁶ GEICO relies on *Blake v. Federal Way Cycle Center*, 40 Wn. App. 302, 312, 698 P.2d 578, *rev. denied*, 104 Wn.2d 1005 (1985), to assert that events between litigation adversaries that occur after a lawsuit is commenced are not “unfair” within the meaning of the Consumer Protection Act. (App. Br. 23) However, the University never alleged that GEICO’s conduct during *this* litigation was an unfair or deceptive act under the CPA.

that its repudiation could not be an unfair or deceptive act is without merit.

4. Substantial evidence supports the jury's verdict.

a. GEICO engaged in unfair or deceptive acts.

The jury had substantial evidence to find that GEICO engaged in an unfair or deceptive act as defined by the Consumer Protection Act, by entering into a now unchallenged contract with the University only to repudiate it the instant claimants with high-value claims filed suit. (FF 26, 28-29, CP 6961-62; RP 223, 270, 272-73; Ex. 203 at 20). The jury was entitled to find that, regardless of whether GEICO *intended* to deceive the University when entering into the contract, its actions nevertheless had the *capability* of deceiving a substantial portion of the public.

GEICO ignores the jury's finding that it breached a contract, arguing that it is "untenable" that what it characterizes as "Ms. Kravitz's typographical mistake of transposing the 60%/40% liability apportionment" constitutes an unfair or deceptive act because it was a "two-day mistake." (App. Br. 28-29) Even if the Court disregards GEICO's repudiation, the jury could find, as the trial court did, in its equitable findings, that GEICO took advantage of Ms. Winslow-

Nason's ignorance of that typographical error when she and Ms. Kravitz entered into the 50/50 contract on April 28 and that, even if not intentional, the error had the *capacity* to – and in fact did – deceive the University. (FF 12, CP 6957; RP 223) The jury was entitled to find that GEICO's repudiation of its agreement had the capacity to deceive a substantial portion of the public.

b. GEICO caused injury to the University's business or property.

That GEICO caused injury to the University's business or property is undisputed. Again, GEICO has not challenged the jury's determination that its conduct cost the University almost \$10,000, by unfairly forcing the University to pay GEICO's 50% share of the Lawrence settlement.

GEICO concedes that an "injury to business or property" under the Consumer Protection Act exists "even if the expenses caused by the statutory violation are minimal." (App. Br. 30) "The scope of injury to 'property' is . . . quite broad and is not restricted to commercial or business injury." *Keyes*, 31 Wn. App. at 296. "The injury element will be met if the consumer's property interest or money is diminished because of the unlawful conduct even if the expenses caused by the statutory violation are minimal." *Mason v. Mortgage America, Inc.*, 114 Wn.2d 842, 854, 792 P.2d 142 (1990).

The unchallenged special verdict for breach of contract establishes definitive proof of injury and disposes of GEICO's argument that the University failed to establish injury to its business or property.

In addition, the costs incurred in investigating an unfair or deceptive act are sufficient to establish injury, as is time spent away from business. *Huynh*, 92 Wn. App. at 470 (insurer injured by expenses incurred in investigating physician's falsified reports and billing); *Sign-O-Lite Signs, Inc. v. DeLaurenti Florists, Inc.*, 64 Wn. App. 553, 563-64, 825 P.2d 714, *rev. denied*, 120 Wn.2d 1002 (1992) (evidence that claimant, who was self-employed and the sole owner of her business, was unable to tend to her store because of her involvement with Sign-O-Lite was sufficient to support an inference that there was some injury to her business, even though that injury was not quantifiable). Ms. Winslow-Nason set the University's reserves in light of the agreement. (11/5 RP 94, 242) As a result of GEICO's breach, the University faced the additional burden and expense of having to defend against its own liability and prove that GEICO was a party at fault in the *Howard* and *Lennier* cases, in which, according to GEICO, personal injuries could well exceed GEICO's \$300,000 limits. (RP 403-04) In addition, Ms. Winslow-Nason "would have sought better settlement terms in resolving the

[property damage] claims” had she known that GEICO would not honor the agreement. (RP 223; *see* CP 2263) Just like the insurer in *Huynh*, the University spent time and money in dealing with the aftermath of GEICO’s repudiation of its contract.

GEICO mistakenly argues that the additional time that Ms. Winslow-Nason spent on the claims following GEICO’s breach, at the expense of the rest of her caseload, does not constitute “injury to business of property.” (App. Br. 29) To the contrary, just as the claimant was indispensable to her business in *Sign-O-Lite*, Ms. Winslow-Nason is a highly valuable “jack of all trades” adjuster in a claims office that has only six employees, only one of whom handles these types of claims, for an institution that self-insures 35,000 employees. (11/5 RP 47-48, 50; RP 209, 212-13) The University proved that GEICO’s unfair or deceptive acts caused injury to its business of property.

C. The trial court did not abuse its discretion in denying GEICO’s motion for a new trial or remittitur because the Consumer Protection Act damages were within the range of evidence.

While the fact of damage is undisputed, the amount of damages is also well within the evidence, much of it presented by GEICO, itself, and untainted by improper argument. GEICO fails to

identify passion or prejudice. The trial court correctly denied GEICO's post-trial motion under CR 59.

1. Standard of review.

This Court gives deference and weight to the trial court's discretion in denying a new trial on a claim of excessive damages. *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 330, 858 P.2d 1054 (1993). "The verdict is strengthened by denial of a new trial by the trial court." *Fisons*, 122 Wn.2d at 330. "[A]ppellate review is most narrow and restrained and the appellate court rarely exercises [its] power" to reduce a jury award. *Fisons*, 122 Wn.2d at 330 (quoted source omitted). "The jury is the appropriate assessor of damages, and its determination should be overturned only in the most extraordinary circumstances." *Miller v. Yates*, 67 Wn. App. 120, 124, 834 P.2d 36 (1992). "An appellate court will not disturb an award of damages made by a jury unless it is outside the range of substantial evidence in the record, or shocks the conscience of the court, or appears to have been arrived at as the result of passion or prejudice." *Washburn v. Beatt Equipment Co.*, 120 Wn.2d 246, 268, 840 P.2d 860 (1992) (quoting source omitted). "Before passion or prejudice can justify reduction of a jury verdict, it must be of such manifest clarity as to make it unmistakable."

Bingaman v. Grays Harbor Community Hosp., 103 Wn.2d 831, 836, 699 P.2d 1230 (1985).

2. The Consumer Protection Act damages were supported by substantial evidence and not the result of passion or prejudice.

a. The jury award is supported by substantial evidence that GEICO itself introduced at trial.

GEICO provided the evidence from which the jury could find that University suffered \$300,000 in CPA damages, including the likelihood the University would incur substantial future liability and its increased costs to defend against the underlying claims, as a result of GEICO's repudiation.

The jury was entitled to rely on GEICO's contention that the claims in this case could well exceed GEICO's \$300,000 limits. (RP 403, 418) GEICO's adjuster Kozma characterized "[t]his as a serious accident," as "four persons were injured." (RP 197-98) Ms. Winslow-Nason agreed there were "a lot of different claims, lot of different people injured, physical damage." (RP 227) Her supervisor, Shari Spung, also viewed this as a "big claim." (11/5 RP 94)

GEICO also presented evidence that GEICO's repudiation of its agreement would result in substantial defense fees and costs. GEICO's adjuster, John Stevens, who "specialize[d] in bodily injury,"

(RP 143) expected there to be a further “full-blown investigation,” as is customary when there is “a serious accident” that results in “a lot of serious injuries.” (RP 143, 151)

As instructed, the jury gave “each party . . . the benefit of all of the evidence, whether or not that party introduced it.” (CP 5711) The jury was entitled to find that the pending “catastrophic” claims would exceed Mr. Murphy’s \$300,000 policy limits and value the University’s exposure on the *Howard* and *Lennier* claims accordingly. GEICO cannot now take exception to the jury basing its award on the evidence that GEICO itself introduced at trial.

b. The University did not request punitive damages nor prejudice the jury.

GEICO fails to identify any argument that resulted in an award of damages that was “the product of punitive passion.” (App. Br. 39) The University did not request punitive damages during its closing argument. With no objection from GEICO, its counsel properly asked the jury to consider the effect that its verdict would have on protecting the public interest:

[I]f you believe that commitments matter, especially within the . . . insurance industry, that entities like GEICO cannot make promises to people . . . or institutions like the University of Washington, make commitments to them and then break them, if you think that's wrong, then I ask you to find for the University of Washington. Your decision is important.

(RP 625) GEICO's failure to contemporaneously object or move to strike counsel's statement disposes of its argument on appeal. *See Fisons*, 122 Wn.2d at 333-34.

Moreover, this was not an improper argument. "Appeals for a jury to act as a conscience of the community are not impermissible unless specifically designed to inflame the jury." *Miller v. Kenny*, 180 Wn. App. 772, 816, ¶106, 325 P.3d 278 (2014). Nothing in the University's argument asked the jury to consider deterrence or to "make sure this never happens again." *Compare Wuth ex rel. Kessler v. Lab. Corp. of Am.*, 189 Wn. App. 660, 709, ¶105, 359 P.3d 841 (2015), *rev. denied*, 185 Wn.2d 1007 (2016).

Here, the University merely reminded the jury that "[w]hatever your verdict is, . . . GEICO will listen." (RP 624) (*See App. Br. 39*)⁷ Because the Consumer Protection Act is designed to "protect the public and foster fair and honest competition," RCW 19.86.920, telling the jury that its decision in a CPA case matters and that it is important for an insurer keep its promises does not rise to the level of a request for punitive damages. *Miller*, 180 Wn. App. at

⁷ GEICO adjuster, Fiona Hunt was present in the courtroom throughout the entire trial. (*See RP 138-39*)

816, ¶106 (not misconduct to argue in CPA case that “the local jury reflects the ‘conscience of the community’ and serves as a protector and guardian for the community”). The trial court did not abuse its discretion in denying GEICO’s motion for a new trial or remittitur.

D. The trial court properly awarded the University its reasonable attorney fees under the Consumer Protection Act.

As a threshold matter, GEICO waived any challenge to the trial court’s award of fees by not assigning error to the attorney fee award or to any of the trial court’s findings, which are now verities on appeal. (App. Br. 1-2); see *Polygon Northwest Co. v. American Nat. Fire Ins. Co.*, 143 Wn. App. 753, 795, ¶71, 189 P.3d 777 (court may not reverse even an erroneous attorney fee award where appellant “has not assigned error to or otherwise appealed from this order of the trial court”), *rev. denied*, 164 Wn.2d 1033 (2008); RAP 10.3.

If this Court decides to address the merits of GEICO’s argument, it reviews the trial court’s ruling on an award of attorney fees for an abuse of discretion. *Miller*, 180 Wn. App. at 820, ¶120. An abuse of discretion exists only where no reasonable person would take the position adopted by the trial court. *Allard v. First Interstate Bank of Washington, N.A.*, 112 Wn.2d 145, 148-49, 768 P.2d 998, 773 P.2d 420 (1989) (quoted source omitted).

- 1. The trial court's lodestar award was proper because the Consumer Protection Act and breach of contract claims could not be reasonably segregated.**

RCW 19.86.090 provides for recovery of “the costs of the suit, including a reasonable attorney's fee,” for the prevailing party on a Consumer Protection Act claim. The trial court properly found that, apart from the two claims it voluntarily dismissed, the University “prevailed on all of its liability theories, equitable and non-equitable.” (FF 9, CL 6974-75) The University was thus entitled to its reasonable attorney fees under RCW 19.86.090. Even if this Court reduces the \$300,000 Consumer Protection Act award, or remands for a new trial on damages only, the University is entitled to its reasonable attorney fees as the prevailing party because it has successfully established GEICO's liability under the CPA.

“A determination of reasonable attorney fees begins with a calculation of the ‘lodestar,’ which is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate.” *Miller*, 180 Wn. App. at 820, ¶121. Here, the trial court used a reasonable hourly market rate of \$375 for partners, \$295 for senior associates, and \$140 for paralegals and staff. (CL 5, CP 6977) In unchallenged findings, the trial court found reasonable the number of hours (1,228.8) spent by the University's counsel, including

paralegals and staff because the Consumer Protection Act and breach of contract claims could not be segregated. (CP 6764, CL 8, CP 6978)

While GEICO cites to *Berryman v. Metcalf*, 177 Wn. App. 644, 312 P.3d 745 (2013), *rev. denied*, 179 Wn.2d 1026 (2014), where this Court reduced fee award in a “run of the mill” “ordinary negligence claim,” it does not argue that there was “duplicated effort,” 177 Wn. App. at 663, ¶43, it does not object to the University counsel’s hourly rates or to the number of hours reasonably expended on the case. GEICO limits its challenge to the trial court’s discretionary determination that time on the CPA claim should not be segregated. (App. Br. 44-48) “[W]here the trial court finds the claims to be so related that no reasonable segregation of successful and unsuccessful claims can be made, there need be no segregation of attorney fees.” *Mayer v. Sto Industries, Inc.*, 156 Wn.2d 677, 693, ¶26, 132 P.3d 115 (2006) (quoting *Hume v. American Disposal Co.*, 124 Wn.2d 656, 673, 880 P.2d 988 (1994)) (internal quotation marks omitted), *cert. denied*, 513 U.S. 1112 (1995).

In its unchallenged findings, the trial court noted that “[t]ime spent developing the breach of contract claim certainly assisted the development of the CPA claim.” (CL 8, CP 6978) “[A]ll of the insurance adjusters . . . provided testimony related to the

University's damages, GEICO's treatment and policies regarding such contracts, and the applicable industry standards," which not only went to the breach of contract claims, but also "was plainly relevant to the alleged deceptive acts." (CL 8, CP 6978) The trial court found this to be true of documentary evidence, as well: "Having considered the record as a whole and assessed the live testimony, the Court would be hard-pressed to cite any particular piece of admitted evidence that was not at least marginally helpful to its CPA theory (and vice versa)." (CL 8, CP 6978)

These unchallenged and extensively detailed findings are a far cry from the "conclusory" findings at issue in *Berryman*. 177 Wn. App. at 658, ¶29. The findings are instead similar to *Mayer*, where the Supreme Court "conclude[d] that, given the trial court's clear explanation that the CPA work could not be segregated from [work on other claims], the trial court's award of attorney fees under the CPA was not an abuse of discretion." 156 Wn.2d at 693, ¶26. Here, the trial court clearly explained why the CPA work could not be segregated from the breach of contract work. Its award of attorney fees under the CPA was not an abuse of discretion.

2. The trial court was well within its discretion in adding a multiplier given the risks and complexities of this case.

The trial court also did not abuse its discretion in applying a multiplier of 1.5 to the lodestar award. “After the lodestar has been calculated, the court may consider the necessity of adjusting it to reflect factors not considered up to this point.” “Adjustments to the lodestar are considered under two broad categories: the contingent nature of success and the quality of work performed.” *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 598, 675 P.2d 193 (1983). “In adjusting the lodestar to account for this risk factor, the trial court must assess the likelihood of success at the outset of the litigation. This is necessarily an imprecise calculation and must largely be a matter of the trial court's discretion.” *Bowers*, 100 Wn.2d at 598. A multiplier is appropriate where a case is risky and/or “require[s] a high level of skill in the specialized area of insurance bad faith, assignments, contract and CPA, as well as a high level of skill in trial preparation and presentation.” *Miller*, 180 Wn. App. at 821, ¶123 (quoting trial court findings of fact and conclusions of law).

The trial court here appropriately awarded a multiplier after finding that the case was both “very risky” (CL 10, CP 697) and that

the quality of representation was “superb.” (FF 9, CP 6974) Just as in *Miller*, the trial court considered the risk and complexity of the case and concluded that litigation was “a risky decision.” (FF 6, CP 6973) In finding the case to be “very risky,” the trial court noted that “[a]t the time the case was undertaken, it appeared as though very little was in controversy, which, for many would not justify the time and expense of taking on a large national insurer.” (CL 10, CP 6979) In addition, “the evidence was largely held by GEICO” (FF 6, CP 6973), and “GEICO was less than transparent about the evidence in its possession, leading the University . . . to believe that the case would not be very strong.” (CL 10, CP 6979)

Another reason that the trial court found litigation to be “a risky decision” is because it “was substantively complex.” (FF 6, CP 6973) It involved negligence principles, contract principles, equitable principles, and insurance principles. (FF 6, CP 6973) As the trial court noted, “[m]any attorneys work their entire career to develop competence in one of the above-areas”; here, counsel for the University “had to address all . . . in different degrees, simultaneously.” (FF 6, CP 6973) Additionally, because “GEICO zealously defended the case and denied all liability,” “[t]here was extensive discovery, motions to compel, several rounds of dispositive

briefing, . . . disputed procedural issues, and hotly contested disputes on various points of law.” (FF 6, CP 6973) “Even the manner and mechanism for addressing the parties' dispute was subject to several motions.” (FF 6, CP 6973) “Many parties and attorneys would lack the wherewithal to see such a dispute through to the end.” (FF 6, CP 6973) Despite all of this, “counsel for the University did take this on, at reduced rates and to the detriment of more lucrative work, and developed strong evidence supporting their client's position.” (CL 10, CP 6979)

The trial court's discretionary 1.5 multiplier furthered the substantial public policy goals of the Consumer Protection Act. “When litigation under the Consumer Protection Act produces protection for everyone who might in the future be injured by a specific violation, then it follows that the reasonableness of the attorney's fee should be governed by substantially more than the import of the case to the plaintiff alone.” *Miller*, 180 Wn. App. at 826, ¶138 (quoted source omitted). *See Berryman*, 177 Wn. App. at 674-75, ¶¶72-73 (noting that multiplier of up to 1.5 justified in “under remedial statutes instilled with public interest”). This Court “will not overturn a large attorney fee award in civil litigation merely because the amount at stake in the case is small.” *Mahler v. Szucs*, 135 Wn.2d

398, 433, 957 P.2d 632, 966 P.2d 305 (1998). *See also Evon v. Law Offices of Sidney Mickell*, 688 F.3d 1015, 1033 (9th Cir. 2012) (rejecting proportionality for attorney fees in consumer protection litigation).

Given all of these factors, which the trial court carefully considered and clearly explained in its findings of fact and conclusions of law, the 1.5 multiplier was appropriate. The trial court did not abuse its discretion.

- 3. If this Court reverses on the Consumer Protection Act claim, the University is entitled to attorney fees under RCW 4.84.250 for the breach of contract claim.**

Because the University was entitled to its fees under the Consumer Protection Act, this Court need not address GEICO's challenge to the trial court's fee award under RCW 4.84.250. (App. Br. 41-43, 46-49) In the unlikely event that this Court reverses the CPA judgment, the University would nonetheless be entitled to fees under RCW 4.84.250 for the sole remaining breach of contract claim, for which the University sought \$9,750 in a pretrial settlement offer. (FF 7, CP 6974; CP 6822) GEICO was on notice that the University's contract claim was less than \$10,000 for purposes of RCW 4.84.250. *See Beckman v. Spokane Transit Auth.*, 107 Wn.2d 785, 788-90, 733

P.2d 960 (1987). If this Court dismisses the CPA claim, it should remand to determine reasonable attorney fees under RCW 4.84.250.

4. The Court should award the University fees on appeal.

“Attorneys’ fees on appeal are recoverable under the Consumer Protection Act.” *Wash. State Physicians Ins. Exch. & Ass’n v. Fisons Corp.*, 122 Wn.2d 299, 336, 858 P.2d 1054 (1993). The University is entitled to attorney fees on appeal in defending the judgment against GEICO under the CPA. RAP 18.1.

V. CONCLUSION

This Court should affirm and award the University its attorney fees on appeal.

Dated this 26th day of August, 2016

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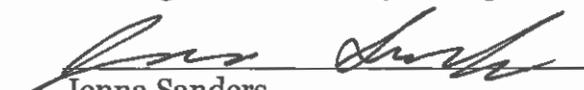
DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on August 26, 2016, I arranged for service of the foregoing Brief of Respondent, to the court and to counsel for the parties to this action as follows:

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