Mullen v. Physicians Ins.

Court of Appeals of Washington, Division One

November 21, 2005, Filed

No. 56021-2-I

Reporter
2005 Wash . App. LEXIS 2928 *

ANTHONY MULLEN, Petitioner, and PHILIP ZYLSTRA, M.D., and BARBARA ZYLSTRA, husband and wife, Plaintiffs, v. PHYSICIANS INSURANCE, WASHINGTON STATE PHYSICIANS INSURANCE EXCHANGE and WASHINGTON STATE PHYSICIANS INSURANCE ASSOCIATION, INC., Respondents, and WEST H. CAMPBELL, Defendant.

Notice: [*1] RULES OF THE WASHINGTON COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE WASHINGTON RULES OF COURT.

Subsequent History: Reported at *Mullen v. Physicians Ins., 130 Wn. App. 1031, 2005 Wash. App. LEXIS 3378 (2005)*

Prior History: Appeal from Superior Court of Snohomish County. Docket No: 00-2-00986-9. Judgment or order under review. Date filed: 02/24/2004. Judge signing: Hon. Gerald L Knight.

Counsel: For Appellant(s): Cheryl Ann Dickerhoof, Wiggins & Masters PLLC, Bainbridge Island, WA; Kenneth Wendell Masters, Wiggins & Masters PLLC, Bainbridge Island, WA; Christopher Cyrus Pence, Pence Law Office PLLC, Seattle, WA; Charles Kenneth Wiggins, Wiggins & Masters PLLC, Bainbridge Island, WA.

For Respondent(s): Peter D. Byrnes, Attorney at Law, Seattle, WA; Bradley S. Keller, Attorney at Law, Seattle, WA; Mary H. Spillane, William Kastner & Gibbs, Seattle, WA; Joel Evans Wright, Lee Smart Cook et al, Seattle, WA.

Judges: Authored by Ann Schindler. Concurring: C. Kenneth Grosse, Faye Kennedy.

Opinion by: SCHINDLER

Opinion

SCHINDLER, J. - When an insured physician relied on incomplete disclosure by his insurer to adamantly refuse to pursue settlement of a malpractice claim, material issues of fact exist about whether the insurer's alleged bad faith is a cause-in-fact of injury to the physician. **[*2]** Equivocal deposition answers by the physician about whether he would have authorized any settlement offer before the verdict do not preclude the physician from asserting in a subsequent declaration that he would have consented to settle if he had been fully advised of the risks he faced. We also conclude the Consumer Protection Act claim that the insurer's protocols: improperly limited the information provided to the physician; restricted cross-claims; limited the decision to mediate; and restricted the ability of defense counsel to engage in settlement presents interrelated material issues of fact on causation and injury. We reverse and remand for trial.

FACTS

Anthony Mullen suffered a laceration and tooth injury in a logging accident in 1991. Mullen received care for the injuries from Dr. Philip Zylstra, Dr. Bruce Pederson and dentist Dr. Matthew Maynard. None of the doctors prescribed antibiotics despite Mullen's risk of bacterial endocarditis as a consequence of childhood surgery for a heart defect. When Dr. Zylstra treated Mullen for flu-like symptoms a month after the accident, he did not diagnose the bacterial endocarditis Mullen had developed. Mullen subsequently required **[*3]** surgery to replace his infected aortic heart valve. After the surgery, Mullen was unable to work for an extended period and he has a reduced life expectancy.

Mullen v. Dr. Zylstra

In 1994, Mullen sued Drs. Zylstra, Pederson, and Maynard for malpractice. Dr. Zylstra was insured by Washington State Physicians Insurance Exchange (WSPIE). The WSPIE claims representative assigned to Mullen's case was Ted Rattray. WSPIE retained attorney West Campbell to defend Dr. Zylstra. Dr. Zylstra's policy provided coverage of one million dollars and required WSPIE to "obtain the consent of the named insured to settle all covered claims."

Campbell provided Dr. Zylstra with some but not all reports prepared for WSPIE in the case. Dr. Zylstra contends he did not receive reports that some experts retained by WSPIE questioned whether he met the standard of care.

Several meetings occurred between Campbell, Dr. Zylstra and Rattray prior to trial including a December 11, 1997 meeting 10 weeks before trial. Campbell recalls they discussed various subjects at that meeting including "[m]ediation, consent to settlement, trial possibilities, issues related to the trial, need for [Dr. Zylstra] to consider **[*4]** the possibility of personal counsel," as well as exposure to

liability and the possibility co-defendants might settle making the case more difficult to defend. Campbell told Dr. Zylstra that he thought that the defense would win at trial. Rattray recalls that the December 11 meeting included a discussion of the substantive issues for trial. Rattray told Dr. Zylstra there was a 70 percent chance of a defense verdict, and that any verdict for Mullen would probably not exceed $750,000 but a "run away" verdict was possible. Dr. Zylstra acknowledges Rattray said that a "run away" verdict was possible, but contends he did not understand what Rattray meant.

Dr. Zylstra recalls that Campbell told him at the December 11 meeting that a mediation session had been scheduled but that they would not be attending. Dr. Zylstra denies that he instructed Rattray and Campbell not to attend the mediation. Neither Drs. Zylstra, Campbell nor Rattray attended the mediation. At the mediation, Mullen's attorney provided a packet of materials outlining the details of Mullen's evidence of liability and damages to Drs. Pederson and Maynard. The mediator discussed liability and told Drs. Pederson and Maynard **[*5]** that if liability was established, Mullen's damages would likely be three to four million dollars. Dr. Zylstra did not receive the materials from the mediation or learn of the mediator's assessment until after trial.

Mullen settled with Drs. Maynard and Pederson shortly before trial. Just prior to the start of the trial, the court granted Mullen's motion to prevent Dr. Zylstra from asserting contributory negligence or an "empty chair" defense, ruling that any allocation of fault to Drs. Maynard and Pederson had been waived by Dr. Zylstra in discovery responses.

Without the other two doctors in the case, Campbell concluded that the likelihood of a defense verdict was reduced from 70 percent to 50/50. Dr. Zylstra denies Campbell or Rattray ever told him of this changed assessment. Dr. Zylstra also denies that Campbell ever discussed what would happen if he lost at trial, or whether he should sign a consent-to-settle form. According to Dr. Zylstra, Rattray told him that there was a 70 percent chance of a defense verdict, that the case had a "value" of $300,000 to $400,000 and that it could be settled between $75,000 and $100,000.

The trial began on February 23, 1998, and ended on March 6, 1998. On **[*6]** the fourth day of trial, in Dr. Zylstra's presence, Mullen's attorney handed Campbell a letter offering to settle for the one million dollar policy limit. The next day, Rattray sent a letter declining the offer. Dr. Zylstra contends that neither Rattray nor Campbell discussed Mullen's offer with him before rejecting it.

Rattray and Campbell told Dr. Zylstra that he needed to seek independent counsel, but Dr. Zylstra contends they did not tell him why he needed to do so. Campbell arranged for attorney J. Robert Leach to act as Dr. Zylstra's independent counsel. On Dr. Zylstra's behalf, Leach prepared a letter dated March 4, 1998 to WSPIE demanding that Mullen's malpractice claim be settled within the policy million dollar limit. Dr. Zylstra signed the letter. After the trial Dr.

Zylstra acknowledged that the letter clearly demands settlement, but he states he did not understand the significance of the letter when he signed it. Dr. Zylstra also recalls talking to Rattray after he signed the March 4 letter and Rattray asking him if he wanted to settle. Dr. Zylstra asked Rattray whether he would win the case. When Rattray said "yes," Dr. Zylstra decided not to pursue settlement.

Rattray **[*7]** and Campbell dispute most of Dr. Zylstra's version of events. Rattray also contends he told Dr. Zylstra during the trial that he had an increased risk as the only remaining defendant and, although there was a 70 percent chance of a defense verdict, they could lose.

On March 6, 1998 the jury returned a verdict against Dr. Zylstra awarding Mullen just over three million dollars.

Post Verdict

After the verdict, Rattray requested a letter from Leach to be used at a mediation between Mullen and WSPIE. On May 5, 1998, Leach sent a letter to WSPIE stating that as of his last meeting with Dr. Zylstra on April 2, 1998, Dr. Zylstra was "adamant that he did not and would not have authorized Physicians Insurance to make any offer to Mr. Mullen before the announcement of the jury's verdict." At the time he sent this letter Leach had not seen any of Campbell's or WSPIE's files.

Two weeks later, on May 20, 1998, Leach sent another letter to Rattray on Dr. Zylstra's behalf. In the May 20 letter, Leach stated that Dr. Zylstra had recently received the mediation materials given to Drs. Maynard and Pederson, and a published interview with Mullen's attorney, and that Dr. Zylstra was surprised **[*8]** by the information and now believed he had not been adequately informed before and during trial. Leach asserted that, among other things, Dr. Zylstra was never told: of the mediator's assessment that potential damages were three to four million dollars; about the risk of an excess verdict and the personal consequences to him and his family; or of increased risk because he had become the sole defendant and was unable to assert contributory negligence or an "empty chair" defense. Leach also noted that Rattray and Campbell's conversations with Dr. Zylstra regarding his March 4 letter had "the goal of eviscerating the very purpose for which my letter was sent to you."

WSPIE agreed to pay the one million dollar policy limit to Mullen. Dr. Zylstra then settled with Mullen by assigning his claims against WSPIE for bad faith and for violation of the Washington Consumer Protection Act (CPA). In return, Mullen agreed not to enforce his judgment against Dr. Zylstra. Dr. Zylstra retained all rights and claims for recovery of "attorney fees and legal expenses, emotional distress, damage to reputation and goodwill, and loss of earnings."

Mullen v. Physician's Insurance

In February 2000, Mullen **[*9]** filed a lawsuit against WSPIE asserting Dr. Zylstra's bad faith and CPA claims. Mullen

sought injunctive relief under the CPA to prevent WSPIE from enforcing portions of the WSPIE Defense Counsel Guidelines, arguing that the guidelines improperly limited the information provided to the insured doctor, restricted cross-claims against doctors, limited the decision to mediate, and limited the ability of defense counsel to engage in settlement discussions.

Dr. Zylstra was deposed in September and October of 2001. Dr. Zylstra repeatedly testified that prior to trial and during trial he did not want to settle based on the information he had been provided: "I refused to settle during the trial as based on what I knew at that time." "I declined to give consent [to settle] based on the advice I had at that time." His desire not to settle "was based on the information I had." "I felt on the basis of the information I had that going to trial was a reasonable option." "At that time I didn't want to settle based on what I knew." "Pretrial it's true I refused to sign a settlement for authorization [sic] based on what I knew at that time." "Based on the advice I got I did not want to settle **[*10]** the case."

Dr. Zylstra was asked in his deposition: "[H]ad you been asked to authorize any settlement offer to Mr. Mullen of any amount before the jury verdict was announced, you would have refused to do so. True or false?" Dr. Zylstra replied: "I don't know if I would have . . . I refused to during the trial, but as to whether I would have or not, I don't know. It's speculation to know whether I would have." When asked "what if" Rattray had told him during the trial that he was going to lose, Dr. Zylstra stated, "I think I would have consented to settle."

In his July 8, 2002 declaration in opposition to summary judgment, Dr. Zylstra asserted that if he had known experts hired by WSPIE believed he did not meet the standard of care, he would have taken that into consideration, and if he had been told what was at risk: "I absolutely would have signed WSPIE's form and agreed to any settlement WSPIE wanted to make." He also testified that:

> I needed to have a competent, realistic and accurate evaluation of my risk at trial of being found negligent, the verdict range if I was found negligent, and whether there was an appreciable risk of a judgment against me that exceeded my insurance **[*11]** policy limits. Obviously had I received this information, I would have approved any settlement within my policy, including if necessary the $1,000,000 settlement offer[.]

On August 2, 2002, the trial court granted WSPIE's summary judgment motion to dismiss the bad faith claim. The court concluded that "as a matter of law [Dr.] Zylstra would not have given WSPIE his consent to settle . . . under any circumstances," and therefore causation was not shown.

WSPIE later moved to dismiss Mullen's CPA claim for an injunction, arguing that: because the CPA claim was based on the same factual allegations as Mullen's "failure to settle" claims, Mullen could not prove causation or injury to business or property

as required by the CPA. On February 23, 2004, a different superior court judge granted summary judgment dismissing the CPA claim.

ANALYSIS

We review a trial court's order granting summary judgment de novo, engaging in the same inquiry as the trial court. *Wilson v. Steinbach, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982)*. Summary judgment is appropriate when "there is no genuine issue as to any material fact" and "the moving party is entitled to a judgment **[*12]** as a matter of law[.]" *CR 56(c)*. In making this determination, the court must view the evidence and all reasonable inferences in favor of the nonmoving party. *Wood v. City of Seattle, 57 Wn.2d 469, 473, 358 P.2d 140 (1960)*.

Bad Faith

An insurer owes a duty of good faith and fair dealing to its insured based upon both its quasi-fiduciary relationship and its statutory obligation to the insured. *Van Noy v. State Farm Mut. Auto. Ins. Co., 142 Wn.2d 784, 792, 16 P.3d 574 (2001)*; *RCW 48.01.030*. Both the duty of good faith and the negligence standard of reasonable care apply to the insurer's handling of settlement offers. *Hamilton v. State Farm Ins. Co., 83 Wn.2d 787, 791, 523 P.2d 193 (1974)*. Because of the potential conflict between the interests of the insurer and the insured in a settlement with a third party, the insurer must give equal consideration to the interests of the insured. *Hamilton, 83 Wn.2d at 793-94*; *Tyler v. Grange Ins. Ass'n, 3 Wn. App. 167, 178, 473 P.2d 193 (1970)*. In the context of settlement, indicia of bad faith include an insurer's failure **[*13]** to adequately investigate and communicate with the insured about the risk of recovery in excess of the policy limits. *See Tyler, 3 Wn. App. at 174* (acts affecting the good faith posture of the insurer include "the likelihood of a verdict greatly in excess of policy limits; . . . lack of skillful evaluation of plaintiff's disability; . . . actions which demonstrate greater concern for the insurer's monetary interest than the financial risk attendant to the insured's predicament; . . . and the amount of financial risk to which each party is exposed in the event of a refusal to settle."); 22 Holmes' Appleman on Insurance 2d §137.1[C][2] (2004) ("At the very least, an insurer must make a diligent effort to ascertain facts on which a good faith judgment may be predicated, and must communicate the result of the investigation to the insured . . . so that the insured may take proper steps to protect his or her own interests.")

The insured has the burden of establishing that the bad faith or negligence of the insurer proximately caused damages to the insured. *Smith v. Safeco Ins. Co., 150 Wn.2d 478, 485, 78 P.3d 1274 (2003)* ("Claims by insureds against **[*14]** their insurers for bad faith are analyzed applying the same principles as any other tort: duty, breach of that duty, and damages proximately caused by any breach of duty.") Whether a person has relied upon another's failure to disclose material facts generally presents questions

of fact. *See Tyner v. Department of Soc. & Health Servs, Child Protective Servs., 141 Wn.2d 68, 86, 1 P.3d 1148 (2000)* (materiality is a question of cause-in-fact and a question for the jury); *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 314, 858 P.2d 1054 (1993)* ("The drug company argues that the trial court erred in failing to dismiss the physician's [CPA] claims on the basis that there was insufficient evidence of proximate cause because only the physician testified how he would have acted differently if he had been adequately warned. This argument addresses factual proximate cause rather than legal proximate cause, and the existence of factual causation is generally a question for the jury.")

Here, the trial court concluded that there are genuine issues of material fact regarding breach of the duty of care, but that causation did **[*15]** not exist as a matter of law. Specifically, the court concluded that Dr. Zylstra would not have given WSPIE consent to settle under any circumstances and his assertion that he would have consented to settle was "speculative." We disagree. When viewed in a light most favorable to Dr. Zylstra, there is a genuine issue of material fact about whether Dr. Zylstra would have consented to settle if he had been reasonably informed of the risks of a verdict in excess of his policy limits.

WSPIE argues that Mullen fails to present any non-speculative evidence of causation, relying primarily upon the combination of Leach's May 5, 1998 letter and Dr. Zylstra's deposition testimony. Leach's May 5 letter stated that as of April 2, 1998, Dr. Zylstra was "adamant that he did not and would not have authorized Physicians Insurance to make any offer to Mr. Mullen before the announcement of the jury's verdict." WSPIE reads the letter as an admission that even with absolute knowledge of the outcome of the trial, Dr. Zylstra still adamantly continued to refuse to consent to settle and he "would not" have settled prior to the verdict even knowing the outcome of the verdict. At most, the statement in the **[*16]** May 5 letter that Dr. Zylstra "would not" have settled prior to the verdict is ambiguous. When read with all reasonable inferences in a light most favorable to Dr. Zylstra, the letter merely recites that Dr. Zylstra adamantly refused to settle prior to the verdict, before he received other information about the case. The May 5 letter was also written at WSPIE's request for the limited purpose of mediation between Mullen and WSPIE.

More importantly, 15 days later, Leach sent his May 20 letter to Rattray expressly indicating that a subsequent review of documents, including the mediation materials and a published summary of Mullen's trial tactics, left Dr. Zylstra surprised and now believing "that he was provided very incomplete information before and during trial regarding the risks to which he was exposed as a result of the subject litigation." The May 5 letter must be considered in light of the May 20 follow-up letter, which is consistent with Dr. Zylstra's theory of inadequate disclosure.

WSPIE points to Dr. Zylstra's deposition testimony in the fall of 2001 and asserts that even after receiving allegedly missing

information, Dr. Zylstra said he did not know whether he would have **[*17]** settled prior to the verdict. In the deposition, Dr. Zylstra indicated he did not know if he would have consented to settlement during the trial and "[i]t's speculation" whether he would have. However, he was answering the oddly phrased question: "[H]ad you been asked to authorize any settlement offer to Mr. Mullen of any amount before the jury verdict was announced, you would have refused to do so. True or false?" The question did not inquire whether he would have authorized any settlement offer if he had known of the allegedly undisclosed information or had been more fully informed regarding his risk. In the same deposition, Dr. Zylstra also testified that "I think I would have consented to settle" if Rattray had told him during the trial that he was going to lose.

The balance of Dr. Zylstra's deposition is filled with his repeated statements that he refused to authorize a settlement offer based on the information and advice he received from Campbell and Rattray. He also asserted in his deposition that WSPIE never advised him of his personal risk of an excess verdict, or the risk of being a lone defendant, or the import of the settlement offer made during trial.

Dr. Zylstra's **[*18]** July 8, 2002 declaration in opposition to summary judgment expressly explains that he would have authorized and consented to a settlement for up to the policy limits if he had been advised of the risk of a verdict in excess of the policy limits. WSPIE argues that this assertion directly contradicts Dr. Zylstra's prior deposition testimony, and is thus insufficient to create a material issue of fact. *See, e.g., McCormick v. Lake Wash. Sch. Dist., 99 Wn. App. 107, 111, 992 P.2d 511 (1999)* (Self-serving affidavits contradicting prior sworn deposition testimony cannot be used to create a material issue of fact); *Marshall v. AC&S, Inc., 56 Wn. App. 181, 185, 782 P.2d 1107 (1989)* (a party may not create an issue of fact with an affidavit that merely contradicts, without explanation, previously given "clear answers to unambiguous [deposition] questions which negate the existence of any genuine issue of material fact").

But at most, Dr. Zylstra's deposition testimony was equivocal when considered in the context of his repeated statements that he declined to settle prior to the verdict based upon the information and advice provided by Campbell and **[*19]** Rattray, and that he thought he would have settled if Rattray had told him during the trial that he was going to lose. Equivocal deposition answers do not preclude a subsequent unequivocal declaration. *State Farm Mut. Auto. Ins. Co. v. Treciak, 117 Wn. App. 402, 409, 71 P.3d 703 (2003)* (when equivocal deposition statements are further explained in later declaration, an appellate court reviews those statements along with all the evidence presented to see if there is an issue of fact for the jury), *review denied, 151 Wn.2d 1006, 87 P.3d 1186 (2004)*. Dr. Zylstra's declaration explains and does not flatly contradict his deposition testimony. His declaration establishes a genuine issue of material fact whether he relied on the information he had been provided and

whether he would have consented to settle "but for" WSPIE's alleged breach of the duty.

WSPIE asserts that the mediation materials could not have made a difference in Dr. Zylstra's decision not to pursue settlement because the details he would have learned at the mediation "could hardly have been more informative than what Zylstra observed firsthand as he watched the case unfold" during trial. **[*20]** But it was not until after the trial that Dr. Zylstra had the benefit of the experienced mediator's neutral evaluation that Mullen's damages would likely be three to four million dollars, a figure dramatically higher than the evaluations he received from Campbell and Rattray. At the very least, genuine issues of material fact exist whether obtaining the mediator's evaluation would have informed Dr. Zylstra of his risk of excess liability and caused him to consent to settle.

WSPIE argues that just showing a potential interest in settling is not the same as proof that the case would have settled. But Mullen offered to settle for the policy limits during trial and in his declaration Dr. Zylstra explains he would have consented to settle at that figure if he had been fully advised of his risk of excess liability. It is for the jury to resolve whether the failure to settle in this case was the result of the insurer's breach of duty.

WSPIE also points to Dr. Zylstra's very limited recall of any details of conversations with Campbell and Rattray and his lack of recall whether he received various reports and materials from Campbell prior to trial. Zylstra did not deny he had received several **[*21]** documents from Campbell, but there is no dispute that he did not learn of the mediator's evaluation until after the trial, several documents were not in his file, and he was surprised by much of the information he obtained after the trial.

WSPIE contends that the settlement issues are just legal malpractice claims "dressed up" as bad faith claims and that any assignment of such a legal malpractice claim to Mullen is invalid. But even if there is an overlap between bad faith and attorney malpractice, WSPIE fails to provide any persuasive authority that an insured's alleged failure to adequately advise its insured of the risks of excess liability may be passed off solely as a legal malpractice claim against the attorney retained by the insured.

The other arguments offered by WSPIE are also not persuasive. [1] Viewing the evidence and all reasonable inferences in a light most favorable to Dr. Zylstra, a genuine issue of fact exists whether WSPIE's breach of its duty to keep Dr. Zylstra reasonably informed of his risk of liability, in fact, caused him to refuse to settle with the resulting damages. Therefore, the trial court erred in dismissing this claim on summary judgment.

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[1] There is a fact question regarding causation even if: the lack of an "empty chair" defense had no impact upon Mullen's revised theory of liability; the "empty chair" issue has been waived; Mullen's experts' declarations have no bearing on factual causation; "clear liability" is usually required to trigger a duty to settle; and WSPIE did not prevent Zylstra from meeting with his independent attorney during the trial and did not induce him to repudiate the March 4 demand to settle.

[*22] Consumer Protection Act

Mullen requested an injunction under the CPA to prevent WSPIE from following various portions of its Defense Counsel Guidelines in defending future claims. Mullen alleged the WSPIE's guidelines violated the CPA by improperly limiting the information provided to the insured, restricting cross-claims, limiting the decision to mediate, and restricting defense counsel's ability to engage in settlement. Mullen also argues the Guidelines violate the Rules of Professional Conduct by interfering with Dr. Zylstra's right to an independent lawyer. [2] **[*23]** Noting that Dr. Zylstra had assigned Mullen his claims for violation of the CPA but not his claims for emotional distress, damage to reputation and goodwill, and loss of earnings, the trial court concluded that Mullen's claims represented a *possible* "injury to business or property," not an *actual* injury, as required by the CPA, and granted summary judgment to WSPIE. [3] Because the CPA claims appear inextricably related to the bad faith claims, on remand Mullen may be able to establish actual injury under the CPA. [4]

[*24] Reversed and remanded for trial. [5]

Schindler, J.

WE CONCUR:

Grosse, J.[6]

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[2] An insurer's guidelines that interfere with an independent attorney client relationship are troublesome. *In re Ugrin, Alexander, Zadick & Higgins, P.C., 2000 MT 110, 299 Mont. 321, 2 P.3d 806, 817 (2000)*.

[3] To prevail on a CPA claim, a plaintiff must prove: (1) an unfair or deceptive act or practice, (2) in trade or commerce, (3) that impacts the public interest, (4) which causes injury to the party in his business or property, and (5) which injury is causally linked to the unfair or deceptive act. ***Industrial Indem. Co. v. Kallevig, 114 Wn.2d 907, 920-21, 792 P.2d 520 (1990)*** (citing *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 784-85, 719 P.2d 531 (1986)*).

[4] The elements of causation and injury under the CPA present interesting issues regarding reliance and the nature of the "loss" other than money damages sufficient to support an injunction under the CPA. ***Hockley v. Hargitt, 82 Wn.2d 337, 350, 510 P.2d 1123 (1973)*** (A person who proves injury by violation of the CPA may bring an injunction to enjoin future violations of the CPA, whether they impact that person or someone else.); ***Nordstrom, Inc. v. Tampourlos, 107 Wn.2d 735, 740, 733 P.2d 208 (1987)*** ("nonquantifiable injuries, such as loss of goodwill would suffice for this [injury] element . . . [t]his is bolstered by the fact that the act allows for injunctive relief, clearly implying that injury without monetary damages will suffice."); ***Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 316, 858 P.2d 1054 (1993)*** ("damage to business reputation and loss of goodwill" are sufficient to establish the injury requirement of the CPA.). *See generally Note & Comment, Proving Cause in Fact Under Washington's Consumer Protection Act: The Case for a Rebuttable Presumption of Reliance, 80 Wash. L. Rev. 245 (2005)*.

[5] Mullen also seeks attorney fees under the CPA. Because we have not resolved the ultimate merits of the claim under the CPA, we decline to award attorney fees on appeal.

[6] Judge Faye C. Kennedy had indicated her concurrence prior to her death on September 16, 2005.