77578-2

NO. 77578-2-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

PAUL HAMAKER, individually and as a putative class representative, and JOSEPHINE HAMAKER, individually and as a putative class representative,

Appellants,

v.

HIGHLINE MEDICAL CENTER, a Washington non-profit corporation;

Respondent
REBECCA A. ROHLKE, individually, on behalf of the marital community and as agent of non-party Hunter Donaldson; JOHN DOE ROHLKE, on behalf of the marital community; RALPH WADSWORTH, individually, on behalf of the marital community, and as agent of non-party Hunter Donaldson, JANE DOE WADSWORTH, on behalf of the marital community; TIM CARDA, individually, on behalf of the marital community, and as agent of non-party Hunter Donaldson, JANE DOE CARDA, on behalf of the marital community; GRACIELA PULIDO, individually, on behalf of the marital community and as agent of non-party Hunter Donaldson, JOHN DOE PULIDO, on behalf of the marital community, KIMBERLY WADSWORTH, individually, on behalf of the marital community and as agent of non-party Hunter Donaldson, and JOHN DOE WADSWORTH, on behalf of the marital community,
Defendants.

BRIEF OF RESPONDENT HIGHLINE MEDICAL CENTER

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I. INTRODUCTION

In this proposed class action, Paul and Josephine Hamaker's individual claims against Highline Medical Center were dismissed on summary judgment for lack of standing to challenge the validity of certain notices of claim for medical services liens recorded with the county auditor under Washington's medical lien statute, chapter 60.44 RCW. The trial court also denied the Hamakers' motions for partial summary judgment, declaratory and injunctive relief, and class certification.

On appeal, the Hamakers claim that they presented a genuine issue of material fact for trial as to the essential elements of injury and or damages to prevent summary judgment dismissal of their claims for violations of the Consumer Protection Act, negligence, fraud, and unjust enrichment.[1] Because summary judgment dismissal is proper on numerous grounds supported by the record in addition to the lack of standing, this Court should affirm the trial court orders in all respects.

II. COUNTERSTATEMENT OF ISSUE PRESENTED

Did the trial court properly dismiss the Hamakers' individual claims on summary judgment where they failed to present evidence to raise a genuine issue of material fact as to their standing to challenge the validity of certain notices of claim related to statutory medical liens filed under Washington's medical lien statute, chapter 60.44 RCW, and where they were unable to provide evidence of suffering any injury to their business or property?

[1] Although the Hamakers assign error to the trial court's ruling on their motion for class certification, they did not include argument or authority to support that claim of error.

III. COUNTERSTATEMENT OF THE CASE

A. Factual Background.

1. The Hamakers received medical services at Highline Medical Center, incurring charges for services provided by physicians and the hospital.

On May 30, 2012, Paul and Josephine Hamaker received medical treatment at Highline's emergency department for injuries they suffered when their car was rear-ended by a vehicle driven by Stephanie Nielson, who was insured by American Commerce Insurance Company. CP 646-60, 662-63, 665, 699-701. Believing that Nielson or her insurer would pay for their medical care, Mr. Hamaker used his credit card to pay two charges for physician services of $542, one for each himself and Mrs. Hamaker, rather than providing their insurance information to Highline. CP 449-50, 1136, 1159, 1574-79. The Hamakers retained an attorney, Christopher Williams, to pursue their personal injury claim against Nielsen and American Commerce. CP 662-63, 669-701.

2. Hunter Donaldson preserved Highline's right to assert a medical services lien for the value of charges incurred, but not yet paid, by the Hamakers.

On June 12, 2012, Hunter Donaldson, LLC, an independent contractor hired by Highline in 2011 to implement a first and third party liability program, sent the Hamakers a letter identifying itself as managing "the accident claims process for Highline" and requesting confirmation of

their belief that "someone else is responsible" for their injuries and resulting medical care and information "about other insurance, yours or the other party's," which Mr. Hamaker provided, identifying Ms. Nielsen and American Commerce. CP 590-92, 619-20, 635-44, 665. On July 2, 2012, consistent with the requirements of chapter 60.44 RCW, Hunter Donaldson recorded notices of claim to a medical services lien with the King County Auditor's Office, identifying the Hamakers as patients who received care at Highline "because of injuries allegedly caused by the Tort-feasor" and American Commerce as the tort-feasor's insurer. CP 667-68; former RCW 60.44.020.[2] The notices are signed by Ralph Wadsworth of Hunter Donaldson "as agent for Claimant" Highline, and notarized by Rebecca Rohlke. CP 667-68.

On January 15, 2013, Mr. Hamaker called Highline to inquire about the medical services liens and was referred to Hunter Donaldson,

[2] RCW 60.44.020 was amended in 2015 to require that either providers enforce liens themselves or designate a collection agency licensed under chapter 19.16 RCW to enforce a lien on a provider's behalf. The Hamakers cited to the post-2015 amended statute numerous times in their complaint, and referred to its provisions throughout their briefing before the trial court and in their opening brief before this Court, but their reliance on the current version of certain sections is inapposite. At the time of the events in question in this lawsuit, the medical lien statute did not require a hospital to designate a licensed collection agency to enforce its liens, to disclose its use of liens when billing, or to provide a statement of release lien rights following payment or settlement. Compare former RCW 60.44.020 (Laws of 1975, 1st Ex. S., Ch. 250, § 2) with RCW 60.44.020(1) & (2); and compare former RCW 60.44.060 (Laws of 2012, Ch. 117, § 153) with RCW 60.44.060(2). Given the lack of any contrary intent expressed by the Legislature, the amendments must be "given prospective effect only." *Layton v. Home Indem. Co.*, 9 Wn.2d 25, 35-36, 113 P.2d 538 (1943).This brief includes citations to the sections of statute in effect at the time the relevant events occurred.

where the billing accounts for accident claims were managed. CP 593, 624. During his phone conversation with a Hunter Donaldson representative, Mr. Hamaker asked for an explanation of the lien, given the fact that he had already made a payment to Highline, and learned that the previous charges he had paid were for physicians' fees and that there was an outstanding charge of $833 on both his and Mrs. Hamaker's account for a facilities fee, for a total of $1,666. CP 593, 624, 674, 760. The representative informed him that the lien was asserted "against the [third-party] insurance [because] they are responsible for his bills." CP 760 (initial capitalization omitted); *see also* CP 593, 632.

On May 31, 2013, shortly before the initial notices would have expired, *see* former RCW 60.44.060 (requiring suit to enforce lien be filed within one year after notice of lien is recorded), Hunter Donaldson recorded new notices of claim including all the same information, but signed by Graciela Pulido, "as authorized agent of Highline," and notarized by Rachel Acuna. CP 593, 631, 690-91. On May 8, 2014, shortly before the second notices would have expired, Hunter Donaldson recorded new notices of claim signed by Kimberly Wadsworth as authorized agent, and notarized by Steve Perisho. CP 593, 631, 693-94.

3. After learning of litigation against another hospital regarding Ms. Rohlke's notary license, Highline instructed Hunter Donaldson to withdraw all claims to medical services liens on its behalf.

In May 2013, after the Washington State Department of Licensing received a complaint that she "had falsely notarized medical liens" and began an investigation, Ms. Rohlke, who was originally appointed as a Washington Notary Public in January 2010, voluntarily resigned her appointment. CP 148, 1263. Ms. Rohlke ultimately stipulated that she notarized documents indicating that she was in Pierce County, Washington despite the fact that she was not in Washington when she performed the notarial acts and agreed to discipline including revocation of her eligibility for appointment as a notary in any state. CP 148-49, 1263.

Also in 2013, Darrell Cochran, the Hamakers' attorney in this matter, and his law firm, Pfau Cochran Vertetis Amala, filed two lawsuits, *Walker v. Hunter Donaldson, LLC*, Pierce County Superior Court No. 13-2-08746-0 and *Miesmer v. Hunter Donaldson*, LLC, Pierce County Superior Court No. 13-2-12653-8, that were ultimately consolidated and settled as a class action against MultiCare Health System, Hunter Donaldson, Ms. Rohlke and others, alleging, among other things, that MultiCare "agreed and acted in concert, on or about January 2010, to fraudulently register" Ms. Rohlke as a Washington notary public when she

resided in California and was therefore ineligible for appointment. CP 472; *see also* CP 470-509, 549-55, 557-66, 1630-33, 1635-37. In particular, a MultiCare employee, Jason Adams, was alleged to have assisted Ms. Rohlke in fraud by endorsing her application and allowing her to list his home address in Washington as her residential address despite knowing that she was a California resident. CP 88, 250-51.

After learning of the allegations against MultiCare and Mr. Adams regarding Ms. Rohlke's notary license, and given the fact that it was Mr. Adams, of MultiCare Consulting Services, who had facilitated Highline's retention of Hunter Donaldson in 2011, Highline's Director of Revenue Cycle and Supply Chain, Byron Kaerstner, ultimately directed Mr. Wadsworth on June 20, 2014 to withdraw all lien claims and to ensure that no new lien claims were asserted. CP 213-14, 620, 812, 836-37.

On June 26, 2014, Hunter Donaldson sent its final correspondence to Mr. Williams, stating that it was "withdrawing our lien for medical services rendered to" the Hamakers. CP 696-97. Because the Hamakers had not provided Highline or Hunter Donaldson with any information regarding their own insurance, their accounts had been designated as "self-pay," such that bills for the outstanding facilities charges were sent to them after Hunter Donaldson had ceased pursuing liens and returned the accounts to Highline. CP 625, 1550; *see also* CP 1055-56, 1058.

4. The Hamakers accepted settlement of their personal injury suit in an amount accounting for Highline's outstanding medical bills.

On July 28, 2014, Mr. Williams sent a letter to American Commerce including in a list of medical expenses two charges of $833.00 for "Highline ER" on "5/30/12," one for each of the Hamakers, and recommending a settlement amount of $50,000. CP 699-701. In an email to Mr. Williams dated August 13, 2014, Mr. Hamaker rejected an initial offer from American Commerce, stating that "recent bills we received from Highline Medical Center totaling $1,666 factors into our thinking, as that amount would have to come out of the settlement they offered." CP 703. Ultimately, the Hamakers agreed to settle their claims with American Commerce for $8,343.43 for Mr. Hamaker's claim and $8,000 for Mrs. Hamaker's claim and signed releases on March 27, 2015. CP 705-08. On April 20, 2015, the Hamakers directed Mr. Williams to "pay to Highline medical center $1110.72 for our medical bill," recognizing that "the medical bill is $1660 but Mr. Williams is reducing their fees pursuant to Mahler." CP 710.

On May 27, 2015, Highline received payment in the amount of $1,110.72 from Mr. Williams on behalf of the Hamakers that was applied equally to Mr. and Mrs. Hamaker's separate patient billing accounts ($555.36 to each account). CP 625. Highline subsequently wrote off the

Hamakers' remaining $555.28 balance between the two accounts ($277.64 per) and never attempted to collect this from the Hamakers. *Id*.

B. Procedural History.

1. The Hamakers' complaint.

The Hamakers filed a complaint asserting individual and class action claims against Highline for declaratory and injunctive relief and for damages for violations of the Consumer Protection Act, negligence, fraud, and unjust enrichment.[3] CP 1-32. In their complaint, the Hamakers alleged that because Ms. Rohlke made false statements when obtaining her notary license and when indicating where she performed notarial acts in her attestation affixed to specific documents, every notice of claim she notarized rendered the underlying medical services lien "invalid," such that Hunter Donaldson, and therefore Highline, could not legally collect any money for the unpaid medical bills at any point in time thereafter. CP 11-12, 20-23, 25-29. The Hamakers further alleged that use of Ms. Rohlke's false notarization was an unfair and deceptive act in violation of the CPA and that they were fraudulently induced to pay Hunter Donaldson or Highline a portion of their third-party recovery, or that their recovery

[3] Although the Hamakers also named several owners or employees of Hunter Donaldson, including Ms. Rohlke and Mr. Wadsworth, both in their individual capacity and as agents of Hunter Donaldson, and asserted the same claims against them as well as a claim for damages for unlawful operation of a collection agency, only Highline appeared before the trial court, obtained summary judgment dismissal, and has appeared before this Court. CP 1-32, 1760-61, 1790-93; *see also* Corrected Notice of Association of Counsel, filed February 8, 2018.

from third parties was delayed because the notices of claim were improperly notarized. *Id*.

2. Highline's motion for summary judgment dismissal.

Highline filed a motion for summary judgment dismissal, arguing that the Hamakers lacked standing to challenge the validity of any notice of claim, that they could not identify a genuine issue of material fact as to any injury they sustained as a result of the recording of the notices of claim notarized by Ms. Rohlke, and, alternatively, that there was no basis to impose vicarious liability upon Highline for the alleged tortious activity of an employee of its independent contractor Hunter Donaldson. CP 588-617. As to standing to seek damages for an allegedly defective notice of claim, Highline pointed out that the purpose of recording a notice of claim is to put the tort-feasor, rather than the patient, on constructive notice of a medical provider's claim to a lien and to establish the provider's priority among other creditors. CP 597-603; *see also* RCW 60.44.010; former RCW 60.44.020; RCW 60.44.050; former RCW 60.44.060. Because the aim of a medical services lien is to allow a medical provider to collect payment for medical services from the tort-feasor who caused the patient's injury and may only be enforced against the tort-feasor, Highline argued that the Hamakers' interests, as patients, fell outside the zone of interests protected by the statutory notice requirement. *Id*.

Highline also pointed out the lack of evidence to suggest that the Hamakers suffered any injury, an essential element to all their alleged causes of action. CP 605-06. In particular, deposition testimony of the Hamakers, declarations of Highline managers and employees, and the documentary evidence established that Highline never filed an enforcement action based upon the notices of claim notarized by Ms. Rohlke, or any of the superseding notices properly notarized by other notaries, and the Hamakers (1) acknowledged that Highline's charges were incurred and reasonable; (2) admitted that they did not sustain any injury as a result of the recording of the notices of claim notarized by Ms. Rohlke; and (3) negotiated and obtained an increased settlement amount specifically for the payment of Highline's outstanding medical bills after being notified by Hunter Donaldson that the lien claims had been withdrawn. CP 605-06, 676-78, 684-85, 690-91, 693-94, 696-97, 703, 710, 757-58. Highline also argued that the Hamakers' requests for declaratory and/or injunctive relief were moot, as all notices of claim were expired and unenforceable, and Highline had accepted payment in satisfaction of its medical bills, terminated its contract with Hunter Donaldson, and recorded releases referring to each of the previously recorded notices of claim. CP 607-08, 625, 675-78, 682-85, 710, 748-53.

In the alternative, Highline argued that it could not be liable for the acts of its independent contractor Hunter Donaldson, and presented evidence, including the parties' contract and Mr. Kaerstner's declaration, establishing that Highline did not, by contract or practice, reserve the right to control the method or means by which Hunter Donaldson obtained notary services for the purposes of recording notices of claim and did not review any notice of claim notarized by Ms. Rohlke before it was recorded. CP 608-14, 619-20, 635-44.

In response, without citation to any Washington authority suggesting that (1) *a patient* is entitled to recorded notice under former RCW 60.44.020 or has a cause of action for damages against a lien claimant for an allegedly defective notice of claim; (2) a technical defect in the notarization of a notice of claim to a lien renders collection of the underlying debt from the tort-feasor unlawful; or (3) a hospital must bill a patient's commercial health insurance before recording a notice of claim pursuant to former RCW 60.44.020, the Hamakers claimed that Highline's "liens" "are invalid" "because of Defendant Rohlke's fraudulently obtained and legally invalid Washington State notary commission," CP 773, and that they were injured when Highline "collected a portion of [their] settlement funds," that it "was not entitled to [collect] if the liens

were invalid" and "unlawful," by "using a medical services lien in lieu of billing their commercial insurance," CP 780-81.

As to the zone of interests protected by former RCW 60.44.020 for the purposes of standing, the Hamakers claimed that the requirement is satisfied when the interest asserted is "arguably within the zone of interests to be protected or regulated" by the statutory scheme, CP 776-78 (bold italics omitted), and that under *Arkansas Dep't of Health & Human Servs. v. Ahlborn*, 547 U.S. 268, 285, 126 S. Ct. 1752, 164 L. Ed. 2d 459 (2006), "medical services liens under chapter 60.44 RCW are recorded against the plaintiff and the plaintiff's property, not the tortfeasor[,]" thereby placing the Hamakers within the zone of interests chapter 60.44 RCW was designed to protect, CP 776-78; RP 26-29. Relying on *County of San Bernardino v. Calderon*, 148 Cal. App. 4th 1103, 1107-09 (2007), the Hamakers also claimed that, "like California's medical lien statutes, RCW 60.44.020 manifests the legislature's intent to protect the interests of both medical service providers and recipients." CP 778.

As evidence of injury, the Hamakers pointed to Mr. Hamaker's declaration testimony that (1) at the time he instructed Mr. Williams to pay Highline's outstanding medical bills, "our knowledge was that" "the King County Auditor's website still displayed that multiple liens were recorded against us without a corresponding recording of a release," CP

770-71, 873, 1580-81, 1587-88, 1611, 1617; and that (2) he considered refinancing his house "at some point" in "2014 or 2015," but "did not attempt" to do so, because he believed that "if you had a lien on your property you could not refinance," CP 770-71, 1585. They claimed that their requests for damages and injunctive and declaratory relief were not moot because (1) "Highline has never repaid" the $1,110.72 it accepted from Mr. Williams in satisfaction of its outstanding bills totaling $1,666; (2) a judicial declaration that Highline's "liens" were "unlawful" and "invalid," as opposed to unenforceable, "is integral to establishing their damages claims"; and (3) "Highline will not record such releases for putative class members without litigation." CP 780-82.

As evidence of control required to establish vicarious liability, the Hamakers pointed to language in the parties' contract requiring Hunter Donaldson to provide reports and information to Highline and Highline's right to audit and ensure compliance with policies and guidelines and to correspondence between Mr. Kaerstner and Hunter Donaldson representatives regarding general reports, specific issues arising in particular cases, and addressing information about the notarization process after Highline management learned of the allegations against MultiCare. CP 763-68. However, they did not identify any language in the contract allowing Highline to assert control over Hunter Donaldson's use of

notarization services or any evidence suggesting that Highline knew of or participated in Ms. Rohlke's application for her notary license or her performance of notarial acts at any time before the recording of the initial notices of claim notarized by Ms. Rohlke on July 2, 2012. *Cf*. CP 619-20.

In reply, Highline pointed out that the Hamakers could not establish injury under the CPA or damages under their common law claims by having paid $1,110.72 to Highline because the money was owed on a valid debt that even the Hamakers admitted was reasonable and properly payable or by having made a personal decision to forego attempting to refinance their home. CP 1664-69. Highline also offered analysis and argument distinguishing *Ahlborn* and pointed out the lack of evidence to support the Hamakers' baseless claims regarding vicarious liability. CP 1666-70.

3. The Hamakers' motion for partial summary judgment regarding lien invalidity.

The Hamakers filed a motion for partial summary judgment, seeking a ruling as a matter of law that Highline's "medical services liens" are "invalid" because (1) Ms. Rohlke made false statements as to her place of residence when applying for her notary license, (2) Ms. Rohlke made false statements as to the place she performed her notarial acts and her verification of an electronic signature that was not made in her presence

when notarizing notices of claim, and (3) Mr. Wadsworth or other Hunter Donaldson employees improperly signed notices of claim on behalf of Highline because they are not "claimants" entitled to assert a lien under chapter 60.44 RCW. CP 44-64. Relying primarily on *Klem v. Wash. Mut. Bank*, 176 Wn.2d 771, 295 P.3d 1179 (2013), the Hamakers claimed that the "unlawful and criminal nature of" Ms. Rohlke's misstatements "demands invalidating these liens as a matter of public policy." CP 56.

In response, Highline pointed out that the Hamakers failed to identify any authority to support the proposition that any kind of flaw in a single notice of claim to a lien extinguishes a party's underlying statutory right to assert a lien for the purposes of collecting on a valid debt. CP 1267-68. In contrast, Highline identified Washington authority distinguishing between the effectiveness of a single recorded notice of claim and the underlying statutory right to assert a lien that allows successive lien claims for amounts previously claimed, but not yet paid. CP 1268. Highline also provided authority establishing that a false, defective, or even missing notarization does not render a recorded instrument invalid. CP 1269-71.

Highline distinguished *Klem*, noting that it (1) explicitly "did not decide" whether a falsely notarized document is valid for its statutory purpose; (2) did not suggest that misconduct of a notary could affect or

extinguish the mortgage holder right's to collect on the debt; and (3) involved the falsification of a date that triggered the statutory period for a trustee's sale of mortgaged property in a nonjudicial foreclosure where the plaintiff presented evidence that the debtor could have avoided foreclosure if the notarization had been properly dated. CP 1271-75.

In reply, the Hamakers claimed that their suit is logically justified because a patient may sue a lien holder to release a lien that is preventing use of the property at issue, but they did not claim, or produce any evidence to suggest, that any notice of claim recorded on behalf of Highline delayed or prevented them from obtaining settlement funds. CP 679-80, 1673-74. The Hamakers did not address the Washington case authority identified by Highline holding that a defective or missing notarization does not invalidate a recorded instrument, nor did they identify any evidence of a causal connection between misstatements or robo-signing and any alleged injury. CP 1672-78.

4. The Hamakers' motion for partial summary judgment regarding declaratory relief.

The Hamakers sought a partial summary judgment order declaring "the medical liens filed against class members expired and unenforceable" and requiring Highline to record releases. CP 192-93. Relying primarily on excerpts of a transcript of a hearing in another class action lawsuit filed

by Mr. Cochran, *Bryan v. Grays Harbor Community Hospital*, Grays Harbor Superior Court No. 16-2-00022-0, in which the trial court judge speculated that an expired notice of claim "might show up on some sort of a title report," CP 224, the Hamakers claimed that Highline "bears the responsibility to release these liens now that they are expired and unenforceable" because it decided to "authorize the public recording of these liens" "in the pursuit of profit," CP 189; *see also* CP 190-93. Without reference to any evidence of actual harm resulting from the mere listing of a notice of claim in the county auditor's index as required by RCW 60.44.030, the Hamakers claimed that they and "[c]lass members" have an interest in "setting the record straight through a judicial determination that the liens are expired and unenforceable" because "the liens appear when searching the Auditor's Office's records." CP 190-91. And, without citation to any authority suggesting that a medical services lien holder is obligated to record a release, the Hamakers claimed that recording releases is the remedy for the "harm" of having "expired liens" "appear in the public record." CP 192 (bold italics omitted).

In response, Highline pointed out that the Hamakers (1) failed to satisfy the procedural requirements for declaratory or injunctive relief under the court rules; (2) could not establish a "clear legal or equitable right" to the relief they requested; (3) admitted that they had not

experienced any harm to their credit; and (4) failed to produce any evidence to suggest the possibility of immediate or future harm resulting from the existence of the recorded documents in the auditor's records. CP 1075-90. Highline also pointed out that the 2015 amendment to RCW 60.44.060 does not apply retroactively to this case, but, even if it did apply, it requires only a release delivered to the patient – it does not require a release to be recorded with the county auditor. CP 1088.

In reply, the Hamakers claimed that Mr. Hamaker's testimony regarding his decision to forego applying for refinancing of his home mortgage was sufficient to show an injury resulting from Highline's failure to record releases before the Hamakers filed their lawsuit. CP 1733-40.

5. The Hamakers' motion for class certification.

The Hamakers sought certification of a class of "at least 1,201" people "who had medical services liens filed against them by Hunter Donaldson on behalf of Highline," including those with satisfied or expired liens where no "corresponding lien release" was recorded. CP 255, 257. They pointed out that superior courts in different counties granted class certification in Mr. Cochran's other cases, *Walker* and *Bryan*, which they claimed asserted "virtually identical claims," CP 261, and presented argument supporting certification, CP 262-76.

In response, Highline focused on the Hamakers' total lack of factual support for their claim that Mr. & Mrs. Hamaker could properly represent a class, pointing out (1) their deposition testimony that they did not suffer any of the alleged harms described in the class allegations, CP 879-82, 947-74, 1041-44; (2) their lack of standing, CP 884; and (3) the lack of a live controversy given their lack of injury and the fact that more than a year had elapsed since the notices of claim at issue were recorded, CP 885. Highline also presented authority and analysis of the lack of evidence to support specific requirements of the certification rules, pointing out evidence demonstrating that they were unsuited to represent any class and that it appeared that Mr. Cochran, rather than the Hamakers, was controlling the litigation, and urged the trial court to conduct its own independent analysis of the requirements rather than consider the *Walker* case, which involved a stipulated certification for the purposes of settlement, or the *Bryan* case, in which the trial court had not yet entered a written order on certification. CP 886-904.

In reply, the Hamakers reiterated that the "overriding issue" in all their individual and class claims was the alleged "invalidity" of the liens, and argued that they had no burden to demonstrate the existence of damages at the certification stage. CP 1756.

6. The hearing and the trial court's ruling.

The parties appeared before the trial court on all four motions, and began with the issue of standing. RP 3. In addition to discussing the application of the zone of interests test and clarifying the difference between a single recorded notice of claim and the underlying statutory right to assert a claim for money, Highline focused on the lack of evidence that the Hamakers were harmed by any improper notarization given (1) Mr. Hamaker's testimony that he had good credit, checked his credit report, and hadn't seen a lien on his credit report, RP 8; *see also* CP 675-78; (2) the fact that they did not dispute Highline's medical bills were properly payable, RP 11; *see also* RP 970; (3) Mr. Hamaker's testimony that he did not incur any out-of-pocket expenses as a result of the improper notarizations, RP 13; *see also* CP 961; (4) the lack of evidence before the court to suggest that an expired recorded lien "could impact someone's credit," RP 13; (5) the need for actual injury, rather than the potential for injury had Mr. Hamaker applied for refinancing, RP 13-15; and (6) the payment of the properly owed debt of $1,110 that could not constitute an injury regardless of any deficiency in a lien notice, RP 15-16.

In response, Mr. Cochran began his argument on behalf of the Hamakers by clarifying his belief that "it's not a notice" that was recorded, but "a medical lien," "[b]ecause it's being filed in the county

auditor's office, $74 to file a lien," RP 22, and claimed without reference to any authority that because it was "filed, accepted and maintained in the county auditor's office," "we as consumers have the right not to have a lien against us," RP 23. As for injury, Mr. Cochran claimed that the fact that the lien stayed "on the books" after Highline was paid caused injury because "it comes up on title reports," and relied on "a judicial finding down in Grays Harbor based on an admission by Grays Harbor Hospital that it come up on title reports." RP 32-33.

In reply, Highline pointed out that (1) Mr. Hamaker testified that he paid the initial charges at Highline out-of-pocket by choice, making the allegations about circumventing insurance irrelevant; (2) Highline had a right to payment; and (3) in their letter to Mr. Williams directing payment of settlement amounts, the Hamakers had acknowledged that an insurance company that had paid for medical services necessitated by a tortious act would have a subrogation interest in their settlement proceeds. RP 38-41; *see also* CP 419-20, 710.

Regarding declaratory and/or injunctive relief, Mr. Cochran claimed that the Grays Harbor judge's speculation regarding such potential was evidence, RP 42, 47-48, while Highline focused on the fact that nothing in chapter 60.44 RCW required or suggested the need for or purpose of recording a release with the county auditor, RP 43-47, 50-52.

After hearing argument on the Hamakers' other motions, the trial court took the matter under advisement. RP 89. The trial court then entered orders granting Highline's motion for summary judgment "for lack of standing" and denying the Hamakers' motions for partial summary judgment, declaratory or injunctive relief, and class certification. CP 1760-70. The Hamakers filed a notice of appeal, and, thereafter, the trial court's CR 54(b) order. CP 1771-89, 1790-93.

IV. STANDARD OF REVIEW

Appellate courts review summary judgment decisions *de novo*, engaging in the same inquiry as the trial court, to determine if there is any genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 775 (1971). The nonmoving party may not rely on speculation, argumentative assertions that unresolved factual issues remain, or on having its affidavits considered at face value. *Wash. Fed. Sav. v. Klein*, 177 Wn. App. 22, 311 P.3d 53 (2013), *review denied*, 179 Wn.2d 1019 (2014). An order granting summary judgment dismissal may be affirmed on any basis supported by the record. *LaMon v. Butler*, 112 Wn.2d 193, 200-01, 770 P.2d 1027, cert. denied, 493 U.S. 814 (1989).

The meaning of a statute is a question of law that is also subject to de novo review. *Christensen v. Atl. Richfield Co.*, 130 Wn. App. 341, 343,

122 P.3d 937 (2005). "Courts may not read into a statute matters that are not in it and may not create legislation under the guise of interpreting a statute." *Kilian v. Atkinson*, 147 Wn.2d 16, 21, 50 P.3d 638 (2002).

V. ARGUMENT

A. Summary judgment dismissal is proper because patients are not entitled to relief for an alleged deficiency in a recorded notice of claim to a medical services lien.

As the Hamakers admitted before the trial court and repeat throughout their brief, the central theme of their entire lawsuit is that Highline is responsible for the "filing of invalid, unlawful medical services liens" leading to injuries and damages suffered by hundreds of patients. *App. Br.* at 1, 11, 18. But, merely repeating the refrain "invalid, unlawful medical liens" does not make it so. And, providing bare assertions of potential threats and references to settled or pending litigation involving different parties does not establish injuries or a causal link between the actions at issue and the various injuries claimed.

As the authority presented to the trial court by Highline establishes, chapter 60.44 RCW does not create a cause of action for a *patient* to seek redress for a defect in the notarization of an otherwise facially valid notice of claim that is required to be recorded for the purpose of providing constructive notice of unpaid charges for medical services to the *tort-feasor* who allegedly caused the patient's injury.

Because a defective notarization cannot render a notice of claim "invalid," because it is not "unlawful" to collect a debt or assert a right to a statutory lien even after filing a notice with a defective notarization, and because a defective notarization on a notice intended for a tort-feasor cannot possibly cause any injury or damage to a patient, the trial court properly granted summary judgment dismissal of all the Hamakers' claims.

In other contexts, Washington courts have rejected invitations to recognize similar claims. For example, in *Frias v. Asset Foreclosure Servs., Inc.*, 181 Wn.2d 412, 417, 334 P.3d 529 (2014), our Supreme Court held that the deeds of trust act does not create an independent cause of action for monetary damages based on alleged violations of its provisions when no foreclosure sale has been completed. Similarly, the Court held that the Insurance Fair Conduct Act does not create an independent private cause of action for violations of insurance regulations in the absence of any unreasonable denial of coverage or benefits. *Perez-Crisantos v. State Farm Fire & Cas. Co.*, 187 Wn.2d 669, 672, 389 P.3d 475 (2017). These cases demonstrate that where a party must comply with a statute in order to take some affirmative action, such as foreclosing on real property or denying insurance benefits, that party's failure to comply with the statute when it does not actually take that action, without more, cannot be the basis of a cognizable legal claim. The same reasoning

applies here: because the only purpose of compliance with the notice recording requirement is to perfect a claimant's right to enforcement against a tort-feasor and her insurer, any defect in the recorded notice cannot be recognized as the basis for a viable claim by the patient, particularly in the absence of an enforcement action.

Contrary to the Hamakers' entire case theory, the plain language of chapter 60.44 RCW and Washington case law demonstrate that strict compliance with the notice recording requirement of former RCW 60.44.020 is only relevant in the context of an enforcement action. A medical provider who renders service to a patient injured as a result of a tort "shall have a lien," RCW 60.44.010, that "may be enforced by a suit at law" "within one year after," former RCW 60.44.060, filing "for record with the county auditor" "a notice of claim," former RCW 60.44.020. Thus, the right to assert a lien arises by operation of the statute when services are provided, but enforcement is conditioned upon a timely recorded notice. *See, e.g., Smith v. Moran, Windes & Wong, PLLC*, 145 Wn. App. 459, 466, 187 P.3d 275 (2008) (under plain language of attorney lien statute, lien arose as operation of law when action was commenced and attached to the action and any proceeds, including settlement).

For example, in *Pearl v. Greenlee*, 76 Wn. App. 338, 342, 887 P.2d 405 (1994), Dr. Mesher appealed an order quashing his medical

services lien because he had not taken action to enforce the lien within one year of recording his notice of claim, arguing that the settling patient's initiation of a suit to recover money held in trust by his attorney and determine the lien tolled the running of the one year statutory period for enforcement. *Id*. at 341-42. Although the court distinguished the one-year statutory time period as a "statute of limitation on the duration of the lien," such that it could be tolled, from "a limit on the existence of a lien," the statute provided that the lien could only be enforced by a "suit at law brought by the claimant." *Id*. at 342. Because he did not file a suit within a year of recording his notice, file subsequent notices prior to the initial notice expiring, or file a counterclaim in the patient's suit, which had been commenced before the limitation period expired, he "was not entitled to enforce the lien." *Id*. In other words, the existence of a lien, the right to assert a lien, and the right to collect payment in satisfaction of a debt without seeking enforcement, do not depend on strict compliance with the notice recording requirement.

Moreover, the time for challenging the sufficiency of a notice, like any written instrument, is the time it is offered in evidence to establish or enforce a lien. *See, e.g.*, *Wheeler v. Ralph*, 4 Wash. 617, 625-26, 30 P. 709 (1892) (where a lien notice is offered in evidence for purpose of establishing a lien, "all questions going to the sufficiency of the notice

should also be raised at the time of its offer"). Here, despite the fact that Hunter Donaldson recorded successive notices of claim in order to extend the time limitation for Highline to file an enforcement action, Highline never filed a suit or counterclaim to enforce any lien.

1. A defective notarization does not render a notice of claim or the underlying statutory right to assert a lien "invalid."

The Hamakers fail to identify any authority to support their claim that a defective notarization renders a document invalid. *See, e.g., App. Br.* at 1, 11, 18. Well-settled Washington law provides the opposite: a defect in the notarization process does not invalidate an otherwise proper instrument. *Ockfen v. Ockfen*, 35 Wn.2d 439, 440-41, 213 P.2d 614 (1950) (citing *In re Deaver's Estate*, 151 Wash. 454, 456, 276 P. 296 (1929). In *Ockfen*, plaintiffs seeking to cancel a quitclaim deed claimed that the grantor's failure to appear before or talk to the notary who had signed the acknowledgement rendered the deed invalid. *Ockfen*, 35 Wn.2d at 440. The Supreme Court rejected the claim, noting it had frequently held that such an error did not invalidate a deed. *Id*. at 441; *see also, Skagit State Bank v. Rasmussen*, 109 Wn.2d 377, 380, 389, 745 P.2d 37 (1987) (bank was entitled to enforce mortgage lien despite false statement in notary acknowledgement regarding signer's presence before notary; false statement did not render the bank's mortgage lien invalid); *Melovitch*

v. City of Tacoma, 135 Wash. 533, 539, 238 P.563 (1925) (notary's failure to affix notarial seal on a claim presented to the city did not bar claim).

2. Asserting a right to a statutory lien or collecting a debt after recording a notice with a defective notarization is not "unlawful."

Similarly, no authority suggests that a party who records a notice of claim with a defective notarization cannot thereafter record additional, successive notices, continue to assert a right to a lien, and/or seek enforcement based on a timely recorded notice. On the contrary, the plain language of former RCW 60.44.020 allowing a medical provider to record a notice "[w]ithin twenty days" of providing service or "at any time" before settlement and payment, and that of former RCW 60.44.060 allowing the filing of an enforcement action within one year of the recording of the notice, contemplates the possibility that a claimant may file successive notices of claim. *See, e.g.*, *Geo Exch. Sys. v. Cam*, 115 Wn. App. 625, 632-33, 65 P.3d 11 (2003) (statute providing expiration for specific lien claim does not limit "a claimant's underlying lien rights"; claimant may file successive lien claims including "amounts previously claimed, but not yet paid"); *Wheeler*, 4 Wash. at 625-26 (recognizing that "it is possible that other lien notices for the same claim may have been filed by the same claimants within the time allowed").

It is undisputed that Hunter Donaldson recorded additional notices of claim regarding the outstanding charges on the Hamakers' accounts in 2013 and 2014 that were signed and notarized by different people other than Mr. Wadsworth and Ms. Rohlke. CP 690-91, 693-94. The Hamakers do not contend that any of the superseding notices had defective notarizations or involved robo-signing. To the extent the Hamakers claim that the mere fact that a person other than the "claimant" signed the notice justifies a label of "invalid" or "unlawful," they have provided no authority to suggest that a hospital, which is clearly identified in RCW 60.44.010 as a medical services provider that is entitled to a lien, cannot designate an agent to sign on its behalf. Indeed, a hospital is a corporation that can act only through its agents and employees. *Newman v. Highland Sch. Dist. No. 203*, 186 Wn.2d 769, 780, 381 P.3d 1188 (2016) (organization "can act only though its constituents and agents").

3. A defective notarization on a document recorded to provide constructive notice to a tort-feasor cannot injure a patient.

Before the trial court and on appeal, the Hamakers have repeatedly claimed injuries that have no causal connection to any false statement by Ms. Rohlke or to Mr. Wadsworth's robo-signing or to the fact that Mr. Wadsworth is not a "claimant" or to the fact that Highline did not bill their insurance before asserting their lien rights. Their claim is that the mere

fact that the notice is recorded with the auditor presents the threat of credit troubles but acknowledge that their decision to forego applying for refinancing resulted from a mistaken belief about the lien encumbering their house rather than from a mistaken belief that Ms. Rohlke had a valid notary license or that Mr. Wadsworth signed the notice in her presence.

Importantly, the Hamakers fail to articulate any way in which they were actually injured with regard to notice. As discussed infra Section V. C, the purpose of recording the notice is to protect the interests of the tort-feasor and insurer by virtue of placing them on constructive notice, as well as the lien claimant by perfecting its security interests. The patient, however, is presumed to have notice that the medical services were rendered, such that recorded notice is irrelevant and unnecessary. Here, in fact, the Hamakers had actual notice of (1) their receipt of medical services; (2) their own belief that the tort-feasor was responsible for the injuries and should be liable for medical expenses; (3) the fact that Highline had not been paid; and (4) the amount of the outstanding charges, at least by January 15, 2013. CP 593, 624, 632, 674, 760. Given the evidence that they had actual notice of the lien claim, they cannot logically claim any injury resulting from defects they later discovered in the facially valid notice. *See, e.g., OneWest Bank, FSB v. Erickson*, 185 Wn.2d 43, 72-73, 367 P.3d 1063 (2015) (person with actual notice of deed of trust

encumbering property "should not now be permitted to challenge a technical defect in the notary's certification of acknowledgment").

Moreover, the Hamakers do not explain how a patient could be injured by a defective notarization or a hospital claimant's use of an agent to sign a notice of claim that was never used to attempt enforcement of the underlying statutory right to a lien and has since expired and been superseded.

B. Summary judgment dismissal is proper because the Hamakers did not produce evidence of any injury.

The doctrine of standing prohibits a litigant from raising another's legal rights. *Grant County Fire Protection Dist. No. 5 v. Moses Lake*, 150 Wn.2d 791, 802, 83 P.3d 419 (2004). Washington courts apply a two-part test to determine whether a party has standing. *Branson v. Port of Seattle*, 152 Wn.2d 862, 875-76, 101 P.3d 67 (2004) (citing *Grant County*, 150 Wn.2d at 802)). The first part of the test asks whether the interest asserted is within the zone of interests the statute in question protects. *Id*. The second part of the test considers whether the challenged action has caused an injury in fact, economic or otherwise, to the party seeking standing. *Grant County*, 150 Wn.2d at 802. "Both tests must be met by the party seeking standing." *Branson*, 152 Wn.2d at 876; *High Tide Seafoods v. State*, 106 Wn.2d 695, 702, 725 P.2d 411 (1986).

The Hamakers acknowledge that, in order to prevent summary judgment dismissal, they were required to produce evidence showing that they were harmed by the defects in the notarization process, *App. Br.* 17-24, whether characterized as the second part of Washington's two-part test for standing, or as an essential element of each of their causes of action, *Grant County Fire Protection Dist. No. 5 v. Moses Lake*, 150 Wn.2d 791, 802, 83 P.3d 419 (2004) (plaintiff must show "injury in fact" to obtain declaratory relief); *Perez-Crisantos v. State Farm Fire & Cas. Co.*, 187 Wn.2d 669, 672, 389 P.3d 475 (2017) (CPA claim requires plaintiff to establish "injury to plaintiff in his or her business or property"); *Alhadeff v. Meridian Bainbridge Island, LLC*, 167 Wn.2d 601, 618, 220 P.3d 1214 (2009) (negligence claim requires plaintiff to prove injury resulting from a breach of duty); *Adams v. King County*, 164 Wn.2d 640, 662, 192 P.3d 892 (2008) (prima facie claim of fraud includes element of damages suffered by plaintiff); *Lynch v. Deaconess Med. Ctr.*, 113 Wn.2d 162, 167, 776 P.2d 681, 683 (1989) (unjust enrichment claim requires plaintiff to prove that a party recovered more than an "amount which was owed" to that party). Because they did not identify any evidence of actual harm, rather than mere speculation about potential "threats" to their financial interests, summary judgment dismissal is required.

Mr. Hamaker testified that (1) their settlement was never delayed due to any liens, nor were their recoveries encumbered, obstructed, or delayed due to any liens, CP 964, 969; (2) they were never subjected to litigation, a collection action, or a lien enforcement proceeding, or the threat thereof, relating to any liens, nor did they receive any collection calls relating to any liens, CP 957-58, 963; (3) they have not experienced any negative effect to their credit rating as a result of any medical services liens; their credit limits were never reduced due to any liens, nor were they denied any credit due to any lien, CP 953-55, 957; (4) Hunter Donaldson never actually collected any money from them, CP 959-60; (5) Highline did not collect money in excess of 25% of the their total settlement recovery award, CP 964; (6) they did not incur any expenses in attempt to determine the validity or effect of the lien, and could not otherwise articulate suffering any financial harm or other tangible damage as a result of any of the medical services liens, CP 965-66, 968, 971-72; (7) they did not dispute that the underlying debt owed to Highline was valid and properly payable, CP 970, 973-74.

On appeal, the Hamakers claim that they produced evidence showing that they suffered injury by (1) paying $1,110.72 from their settlement to Highline for outstanding medical bills; (2) losing an opportunity to have their health insurance pay the outstanding bills; (3)

deciding not to seek refinancing for their home mortgage; (4) the fact that the county charges $74 recording fee that they never paid; and (5) potential future financial harm. *App. Br.* at 19-22.

As to the payment of the outstanding bills, the Hamakers cannot establish an injury; payment of a valid debt, without more, is not an injury for purposes of the CPA or their common law claims. *Flores v. Rawlins Co., LLC*, 117 Haw. 153, 169, 177 P.3d 341 (2008) (where plaintiffs did not challenge existence of debt to healthcare provider or allege that collection agency engaged in wrongful methods of collection, plaintiffs could not show injury resulting from agency's failure to register as required by statute when plaintiffs paid less than they owed) (cited with approval in *Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 59-62, 204 P.3d 885 (2009)).

In a footnote in their brief, the Hamakers have anticipated this argument and claim that they suffered a cognizable injury by "incurring expenses" or "paying out-of-pocket" because of Highline's decision to pursue the liens rather than billing their insurance, thereby "eliminating the opportunity for their insurer to pay those expenses." *App. Br.* at 20-21 n.14. This is a mischaracterization of the evidence in the record. The record establishes instead that (1) Mr. Hamaker did not provide his insurance information to Highline or Hunter Donaldson, despite being

asked, until late in 2014, CP 449-50, 625, 1055-56, 1058, 1136, 1159, 1550, 1574-79; (2) the Hamakers negotiated with American Commerce for additional recovery specifically for the purpose of paying Highline's outstanding medical bills, CP 703; (3) the Hamakers instructed their attorney to pay Highline out of the proceeds of their settlement from American Commerce, CP 710; (4) the Hamakers acknowledged in their instructions to their attorney that their insurance company had a right to seek subrogation for medical expenses that it had paid that were incurred as a result of the tort-feasor's actions, CP 710; and (5) Mr. Hamaker testified that he did not pay any money "out-of-pocket" for any medical bills aside from the physicians' charges that he chose to pay on the day of the accident, CP 961; *see also* CP 449-50, 1136, 1159, 1574-79.

As to losing the opportunity to have their health insurance cover their medical costs, the Hamakers fail to identify any authority requiring a hospital to bill a patient's insurance, particularly when the patient refuses to provide insurance information. The Hamakers also fail to point to any evidence of their claimed injury. The record is clear that the Hamakers chose to pay the initial physician charges "out-of-pocket," negotiated a higher settlement so that the tort-feasor's insurer would pay Highline's outstanding bills, and directed their attorney to pay outstanding medical bills out of the proceeds of the settlement with American Commerce. The

record is also clear that the Hamakers were aware that having their own insurer pay for medical services necessitated by the tort-feasor's actions would expose them to a potential subrogation claim when they settled their personal injury suit. CP710.

As to the refinancing claim, there is no evidence that any action or omission by Highline caused the Hamakers to forego a refinancing attempt; Mr. Hamaker testified that he decided not to pursue refinancing based solely on his mistaken belief about the interests encumbered by a medical services lien. The Hamakers similarly cannot establish injury by way of the county auditor charging $74 to release recorded lien notices because (1) the Hamakers were never required or compelled to pay this money, (2) the Hamaker did not in fact pay this money, and (3) the statute does not require a release to be recorded with the county auditor. Finally, contrary to the Hamakers' contention, the speculative statements made by the Grays Harbor judge in Mr. Cochran's *Bryan* case pertaining to the potential detrimental effects a recorded lien notice can have on patients is not admissible evidence for purposes of this case.

C. Summary judgment dismissal is proper because patients are not within the zone of interests that the statutory notice requirement is designed to protect.

When evaluating whether a party's interests are within the zone of interests a statute was designed to protect, courts first look to the statute's

general purpose. *Branson*, 152 Wn.2d at 876 n. 7. If the statute was not designed to protect a party's interests, that party is not within the zone of interest and the claim to standing fails. *Grant County*, 150 Wn.2d at 803.

The primary purpose of recording statutes is to give constructive notice to third-parties. *See Herren v. Kan. City Cas. Co.*, 94 Wash. 77, 81-82, 162 P. 17 (1916); *Fircrest Supply v. Plummer*, 30 Wn. App. 384, 388, 634 P.2d 891 (1981) (citing *Whittier v. Stetson & Post Mill Co.*, 6 Wash. 190, 33 P. 393 (1893)). Recording also serves to perfect the claimants' security interest, determining priority among creditors. *BAC Home Loans Servicing, LP v. Fulbright*, 180 Wn.2d 754, 759, 328 P.3d 895 (2014).

The Hamakers claim that they have standing to seek relief from Highline for defective notarizations and signatures on notices of claim because their interests are within the zone of interests protected or regulated by former RCW 60.44.020 and chapter 60.44 RCW in general. *App. Br.* at 24-29. In particular, they claim that the notice requirement and the statutory scheme protects or regulates (1) "their property interest in their claims against and monetary recovery from the third-party tortfeasor responsible for their automobile accident and resulting injuries[,]" *App. Br.* at 24, (2) "the conditions under which a lien attaches to and may be asserted against a patient's property," *App. Br.* at 26, and (3) "the injured person['s]" interest in receiving "notice of the lien's creation" and "the

medical service provider's intent to seek compensation from the injured person's recovery from third parties." *App. Br*. at 28.

1. The primary purpose of the notice recording requirement is to give constructive notice to responsible third-parties that the hospital or health care provider is claiming an interest in potential future proceeds paid by that party.

Former RCW 60.44.060 expressly delineates the parties against whom an enforcement action may be brought: "Such lien may be enforced by a suit at law brought by the claimant or his or her assignee within one year after the filing of such lien ***against the said tortfeasor and/or insurer***." *See* former RCW 60.44.060 (emphasis added). As the statute provides, medical liens operate only against the responsible third party and/or insurers; they do not create a lien effective and or enforceable against the patient, and this concept was explicitly acknowledged in the *Calderon* case upon which the Hamakers rely. *See County of San Bernardino v. Calderon*, 148 Cal. App. 4th 1103, 1107-09 (2007) (discussing California's Hospital Lien Act "HLA"). In *Calderon*, the court explicitly stated that "a hospital lien created pursuant to the HLA operates only against the responsible third party and his legal representatives and insurers; it does not create a lien effective against the patient, to secure payment of any amounts owing to the hospital which remain unpaid after the third party funds have been disbursed." *Id*. at 1109-10.

As a practical matter, a health care provider's ability to enforce a medical lien against the responsible third-party payor only, and not the patient, is further supported by the fact that health care providers can always attempt to collect payment directly from the patient, without any need for a lien, under general contract principles. *Lynch*, 113 Wn.2d at 167 (noting that, with respect to a patient's debt owed to the hospital for medical services rendered, the relationship between the hospital and the patient is properly characterized as one of creditor-debtor, the debt being owed to the hospital by the patient irrespective of the patient's rights against a third-party tortfeasor). There was no need for the legislature to provide for liens to be enforced against patients under the medical lien statute because the usual channels of legal recourse were available against the patient; the purpose of the medical lien statute was to provide "an additional remedy" to health care providers, one that is enforceable against third-parties liable for causing patients' injuries. *Id*. at 35; *see also Calderon*, 148 Cal. App. 4th at 1109 (finding that California's "HLA provides the hospital with a direct right to payment by the third party, but only if the hospital gives notice to the third party and his or her insurer before funds have been disbursed.").

Further, and as discussed above, the primary purpose of recording statutes is to give constructive notice to third-parties, and under the

medical lien statute, the recording of a notice of claim of lien in the county auditor's office is to notify the third-party payor, not the patient, of the health care provider's interest in any claim or future proceeds recovered by the patient in an underlying personal injury action against the tortfeasor and/or their insurer, and providing a notice of claim to the Hamakers would have been redundant and unnecessary because (1) the Hamakers, as patients, had actual notice of the hospital debt that was incurred and do not dispute that Highline was entitled to compensation for the medical services rendered or that the amounts charged for those services were reasonable, CP 687-688, and (2) the lien would never have been enforced against them as patients, an essential detail that the Hamakers tactfully ignore. *See* former RCW 60.44.020. Rather, by virtue of recording the notice of claim with the county auditor, the primary purpose that third-parties be placed on constructive notice of the hospital's claim, thereby preventing that party from making a settlement in disregard of the hospital's claim, is served.

Contrary to the Hamakers' argument before the trial court, recording a notice of claim under chapter 60.44 RCW does not place them within the zone of interests the medical lien statute was designed to protect, even as the zone of interest is defined *in Five Corners Family Farmers*, 173 Wn.2d 269, RP 26-29, which is a factually distinguishable

case. In *Five Corners Family Farmers*, an organization of family farmers, among others, challenged the Department of Ecology's interpretation of a public groundwater statute that would allow a large cattle feedlot to withdraw over 5,000 gallons of water per day without obtaining a permit. On direct review, the Supreme Court found that the zone of interests test was satisfied because the statutory scheme at issue expressly recognized that "[w]hen determining whether to issue a permit for the use of water, the Department considers, among other things, whether the proposed use will '***impair existing rights or be detrimental to the public welfare[,]***'" which squarely encompassed the interests of the organization of family farmers that had initiated the declaratory action. *Five Corners Family Farmers*, 173 Wn.2d at 305 (emphasis added). Unlike in *Five Corners Family Farmers*, chapter 60.44 RCW does not include express language that provides for the protection of patients receiving medical services, and the Hamakers have failed to identify anything to suggest otherwise.

Relying on RCW 60.44.010-.20 and *Ahlborn* for the proposition that "medical services liens under chapter 60.44 RCW are recorded against the patient and the patient's property[,]" *App. Br.* at 26, the Hamakers claim that the interest they have asserted in this case, that is, "their property interest in their claims against and monetary recovery from the third-party tortfeasor responsible for their automobile accident and

resulting injuries[,]" *App. Br.* at 24, places them within the zone of interests the statute was designed to protect, *App. Br.* at 24-26. This cannot be true because the only challenge the Hamakers raise is that a defective notarization and signature on a notice of claim was "recorded against" this alleged property interest in 2012, *App. Br.* at 26, but, they fail to comprehend that recording notices with the county auditor is a statutory requirement in which hospitals and health care providers must comply in order to initiate an enforcement action against the third party tortfeasor, and the fact of a defective notarization on a notice of claim recorded in 2012 cannot place them within the zone of interests the notice requirement was designed to protect because (1) the notices do not pertain to the Hamakers, (2) there is no evidence that Highline ever initiated an enforcement action against the Hamakers pertaining to any of the Rohlke notices that were recorded in 2012, or any of the subsequently recorded notices, CP 679-80, (3) subsequent, properly notarized notices were recorded within the timeframe provided by the statute, (4) the Hamakers directed their attorney to pay $1,110.72 from their settlement proceeds directly to Highline "for [their] **medical bill**" less a reduction "pursuant to Mahler," CP 593, 703, 710 (emphasis added), and (5) the Hamakers would be in the same position they are in today even if the Rohlke notices of claim were properly notarized in 2012.

Moreover, the Hamakers have misinterpreted *Ahlborn*, 547 U.S. 268. *Ahlborn* did not prohibit the imposition of medical liens on a patient's settlement altogether, nor did it bar a lienholder's ability to collect upon or enforce such a lien, nor did the court actually consider whether calling a patient's settlement his or her "property" makes any difference to its analysis or conclusion. Rather, *Ahlborn* prohibited the imposition of medical liens on any portion of a patient's settlement other than what has been designated as payments for medical care. *Id*. at 284. The Ahlborn court expressed concern about the medical lien against Ahlborn's settlement because the lienholder in that case was permitted by statute to collect from portions of Ahlborn's settlement beyond only those designated as payments for medical care and actually asserted a right to collect from the same. *Id*. This is factually different than the situation presented here. In addition and importantly, the Hamakers fail to acknowledge that a medical lien was never enforced against them (or any other proposed class member).

Here, Washington's medical lien statute expressly limits the amount a lienholder is entitled to collect to no more than 25% of the patient's total settlement amount. RCW 60.44.010. This limitation avoids the inequitable effect that the Arkansas statute in *Ahlborn* allowed. Instead, under chapter 60.44 RCW, injured parties in Washington may sue

tort-feasors for medical payments and hospitals are entitled to recover their costs from the fruits of that lawsuit, up to 25% of the total amount of the settlement. Unlike the lienholder in *Ahlborn*, neither Highline nor Hunter Donaldson were statutorily authorized to collect more than 25% of the total amount of the Hamakers' settlement, nor did they actually collect more than that amount. Indeed, the evidence unequivocally shows that the Hamakers' settlement totaled $16,343.43 and that $1,110.72 of their settlement was paid to Highline to satisfy their medical debt. Thus, no factual dispute exists that Highline recovered less than 7% of the total amount of the Hamakers' settlement and was within the allowable amount Highline was properly entitled to collect under the statute.

As the Washington legislature did not make medical services liens enforceable against patients, but only against the third-party responsible for the patient's injuries in the patient's underlying personal injury action, the Hamakers are not raising their own legal rights in challenging the validity of a recorded notice of claim, but those of the responsible third-party payor and/or insurer, which does not confer standing on the Hamakers. *See Branson,* 153 Wn.2d at 876; *Grant County,* 150 Wn.2d at 802; *see also Kirk v. Pierce County Fire Protection Dist. No. 21*, 95 Wn.2d 769, 772-73, 630 P.2d 930 (1981) (plaintiff "has no standing to raise the matter of improper notice to a board member. Only the aggrieved

member of the board could raise that issue… Since [plaintiff] has no standing to complain that a commissioner was not properly notified" "he cannot challenge any actions taken by those present at the meeting").

D. Summary judgment dismissal is proper because the Hamakers failed to produce evidence to support a prima facie claim of a violation of the Consumer Protection Act.

A person "who is injured in his or her business or property" may bring a claim for damages caused by "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." *Panag*, 166 Wn.2d at 37. To establish a CPA claim, a plaintiff must prove "(1) an unfair or deceptive act or practice, (2) occurring in trade or commerce, (3) affecting the public interest, (4) injury to a person's business or property, and (5) causation." *Id*. (citing *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 784, 719 P.2d 531 (1986)). Failure to meet any one of these elements is fatal to a CPA claim. *Hangman Ridge*, 105 Wn.2d at 793. In their opening brief, the Hamakers address only the fourth element: injury to business or property. *App. Br.* at 19-22. As discussed *supra* Section V. B, their CPA fails for a lack of evidence showing injury.

1. The Hamakers failed to identify an unfair or deceptive act by Highline.

Whether a particular act or practice is "unfair or deceptive" is a question of law. *Panag*, 166 Wn.2d at 47. A "deceptive" act has the

capacity to deceive a substantial portion of the public, *id*.; an act or practice is "unfair" if it "causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits," *Klem v. Wash. Mut. Bank*, 176 Wn.2d 771, 787, 295 P.3d 1179 (2013) (quoting 15 U.S.C. § 45(n)). "Implicit in the definition of "deceptive" is the understanding that the practice misleads or misrepresents *something of material importance*." *Holiday Resort Comty. Ass'n v. Echo Lake Assocs.*, LLC, 134 Wn. App. 210, 226, 135 P.3d 499 (2006).

Without explicitly addressing the first element of the *Hangman Ridge* test, the Hamakers complain of the following acts: (1) false statements on Ms. Rohlke's notary jurat on notices of claim; (2) an unidentified Hunter Donaldson employee's failure to "convince" Mr. Hamaker that the lien was not asserted against his house; (3) Highline's failure to bill the Hamaker's insurance; and (4) Highline's failure to record releases of each notice of claim. *App. Br.* at 12-15; *see, e.g.*, *Hangman Ridge*, 105 Wn.2d at 793.

First, the Hamakers fail to offer any authority or cogent argument to support a conclusion that Ms. Rohlke's false statements involved something of material importance such that Hunter Donaldson's act of recording the notices of claim on Highline's behalf was a "deceptive" or

"unfair" act or practice. *See App. Br.* at 12, 19-22. Instead, they rely solely on circular reasoning, claiming that Ms. Rohlke's false statements allowed Hunter Donaldson and Highline to claim a medical lien to which it was not entitled because Ms. Rohlke's statements were false. CP 780-81; *App. Br.* at 11-15. Not only is such reasoning illogical and legally incorrect, it ignores the difference between a notice of claim, and the underlying statutory right to assert a lien. *See supra* Section V. A.

Even more importantly, contrary to the Hamakers' assumptions, *see, e.g., App. Br.* at 20, n.14, 21, *Klem v. Wash. Mut. Bank* does not support the proposition that any false statement by a notary in notarizing an instrument necessarily constitutes an unfair and deceptive act. In *Klem*, a notary employed by Quality Loan Service Corporation, the company acting as trustee for a deed of trust, initiated a nonjudicial foreclosure for the benefit of the lender, Washington Mutual ("WaMu"), by falsely notarizing the notice of sale, "predating the notary acknowledgement," thereby permitting "the sale to take place earlier than it could have had the notice of sale been dated when it was actually signed." *Klem*, 176 Wn.2d at 774. The plaintiff alleged a violation of the CPA by Quality and provided evidence that "the purpose of the predated notarizations was to expedite the date of sale" and that "the earliest the sale could have taken place was one week later" "if the documents had been properly dated."

Id. at 795. The plaintiff also presented evidence that the debtor's guardian may have been able to arrange a sale to avoid foreclosure if it had had just one more week. *Id.* In other words, under the circumstances, the false dating could cause substantial harm to the debtor that could not be reasonably avoided by the debtor, because the debtor had no way to know of the false date in time to prevent the sale on that basis. The Supreme Court concluded that the "false dating" was an unfair or deceptive act or practice under the CPA, but did not reach the jury question on "the factual issue of whether the false notarization was a cause of the plaintiff's damages," because there was sufficient evidence to support the jury's finding on another CPA violation. *Id.*

Unlike the circumstances in *Klem*, the Hamakers failed to identify how Ms. Rohlke's false statements had any potential to deceive the public with regard to any material information about Highline's lien claim or to cause consumers substantial injury which is not reasonably avoidable. *Cf. Panag*, 166 Wn.2d at 35-36 (notices that looked like collections notices for debt certain, rather than unadjudicated claim, were misleading because ordinary consumer would not understand meaning of subrogation claim and may be induced to remand payment). Unlike the falsely *dated* notarization of the notice of sale that allowed the trustee to expedite the foreclosure to the detriment of the debtor in *Klem*, the false statements

regarding circumstances under which Ms. Rohlke obtained her notary license, the location in which she notarized the notice of claim, or the circumstances surrounding her verification of Mr. Wadsworth's signature did not allow Highline to take any action to the detriment of any party that it would not have been able to take but for the false statements. Even if Highline had filed a "suit at law" under former RCW 60.44.060 against the responsible third party to enforce the lien based on the notice of claim notarized by Ms. Rohlke, the opposing party would have had an opportunity to challenge the sufficiency of the notice based on the false statements, and the respective rights of the parties would be a question for the court. *See, e.g.*, *Wheeler*, 4 Wash. at 625-26.

Similarly, the Hamakers do not claim or establish that the use of an "automatically-generated copy of Wadsworth's signature," *App. Br.* at 12, constituted a deceptive or unfair act or practice by Highline. *See App. Br.* at 18-22. Although the circumstances in *Klem* included "robo-signing," that is, an "assembly line signing and notarizing" of documents intended for recording for the purpose of perfecting liens, *see Klem*, 176 Wn.2d at 792 & n.14, it was not mere falsehoods regarding the procedure for producing a notarized signature that was unfair or deceptive, but the "act of false dating" the notice of trustee sale, which triggered the statutory period for the debtor to avoid foreclosure, *id*. at 794-95.

Finally, there is nothing unfair or deceptive about (1) failing to bill the Hamakers insurance when they refused to provide contact information; or (2) failing to record lien releases that are not required by the previous or current version of RCW 60.44.060.

2. Causation

To satisfy the causation element of a CPA claim, "the plaintiff must establish that, but for the defendant's unfair or deceptive practice, the plaintiff would not have suffered an injury." *Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc.*, 162 Wn.2d 59, 84, 170 P.3d 10 (2017). Because, as described above, all the Hamakers' claims of injury are completely unrelated to the alleged unfair or deceptive acts complained of and the same alleged injuries would be caused by a properly signed and notarized notice of claim just by virtue of it being recorded, they cannot establish any issue for trial as to causation.

VI. CONCLUSION

For the foregoing reasons this Court should affirm the trial court's rulings.

RESPECTFULLY SUBMITTED this 3rd day of August, 2018.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that under the laws of the State of Washington that on the 3rd day of August, 2018, I caused a true and correct copy of the foregoing document, "Brief of Respondent Highline Medical Center," to be delivered in the manner indicated below to the following counsel of record:

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