

No. 69433-2-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

PROGRESSIVE CASUALTY INSURANCE COMPANY

Appellant;

v.

TYLER AINSWORTH,

Respondent.

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STATE OF WASHINGTON
DIVISION I
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**PROGRESSIVE CASUALTY INSURANCE COMPANY'S
REPLY BRIEF**

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I. INTRODUCTION

Progressive Casualty Insurance Company (hereinafter “Progressive”) issued a policy of insurance that provided its insured, Tyler Ainsworth, with personal injury protection wage loss benefits for the period of time that he was unable to work due to injuries sustained in an automobile accident. Ainsworth does not dispute the fact that Progressive paid his income continuation benefits during the period of time that he was unable to work following the accident that is the subject of this claim. However, Ainsworth claims that he should be entitled income continuation benefits for the period of time after his doctors released him to return to work.

Based on the record before this Court, the Superior Court erred when it accepted Ainsworth’s argument that the PIP benefits set forth in the policy somehow extend to the period of time after Ainsworth returned to work. In the Superior Court and again before this Court, Ainsworth relies upon unsupported or misrepresented facts and conclusions of law that are insufficient to support a motion for summary judgment. The *facts* in evidence establish that Progressive paid all sums due and owing on Ainsworth’s claim.

Furthermore, Progressive’s position relating to the payment of benefits after Ainsworth was cleared to return to work full time was

entirely reasonable and comports with the plain language of Progressive's policy. As such, the Superior Court erred in finding that Progressive had violated the Washington Insurance Fair Conduct Act (IFCA). There was no unreasonable denial of coverage or benefits that could support summary judgment on an IFCA claim. At the very least, the reasonableness of Progressive's position is a question of fact.

Based on the record before it, the Superior Court erred in doubling Ainsworth's damages and awarding Ainsworth attorney's fees. There was no IFCA violation that could have entitled Ainsworth to these awards and there is no evidence in the record supporting these awards.

Ainsworth's responsive brief on this appeal fails to present evidence sufficient to support his argument that he is entitled to summary judgment in his favor in regard to his claim for additional benefits and his extra-contractual claim. As such, Progressive asks that this Court reverse the Superior Court and remand this matter for further proceedings.

II. OBJECTIONS TO UNSUPPORTED AND MISREPRESENTED FACTS AND LAW

A party seeking summary judgment bears the burden of establishing facts through admissible evidence establishing that there is no genuine issue of material fact for a jury to consider. CR 56(c); CR 56(e); *Young v. Key Pharmaceuticals*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989).

It is Ainsworth's burden to establish that he is entitled to judgment as a matter of law. Ainsworth's brief fails to meet this burden due to the improper reliance on unsupported and self-serving conclusory statements and misrepresentations of fact and law.

Progressive objects to all such improper reliance and asks that the Court not consider the same in its deliberations on this appeal.

A. Misrepresentations Of Fact.

Ainsworth asserts several facts that are misrepresentations of the record before this Court. For example, he argues that “[t]here is no notation in Progressive’s electronic claim file concerning this [December 22, 2010] letter. **Resp. Brief at 5.** This statement is completely contrary to the record. Progressive’s electronic file includes a notation stating that on December 22, 2010, Progressive left a message for counsel for Ainsworth and faxed him the letter. **CP 741-742.**

Similarly, regarding other correspondence, Ainsworth argues “[t]hat this [December 29, 2010] letter was ever drafted or sent is not reflected in Progressive’s electronic claim file.” **Resp. Brief at 5.** Once again, Progressive’s electronic claim file does indicate that on December 28, 2010, the subject letter was sent to counsel for Ainsworth, per his attorney’s request. **CP 742.**

These are merely two examples of misrepresentations of fact set forth by Ainsworth with regard to Progressive's handling of his claim. Such arguments should not be considered by the Court and certainly cannot be utilized to support a conclusion that Ainsworth was entitled to judgment as a matter of law.

B. Unsupported Factual Assertions.

Ainsworth's arguments rely on several unsupported factual assertions. The following factual statements are all unsupported by any citation to the record, yet are critical to the cohesion of Ainsworth's argument:

- In the course of reviewing Ainsworth's records, it was discovered that Progressive had completely failed to make any payment to Ainsworth for his lost wages from his job at Pagliacci Pizza. Ainsworth calculated that the PIP benefits owed to him were \$3,884.41 for his job at Pagliacci Pizza. On May 26, 2011, Ainsworth submitted his demand for wage loss benefits from both of his jobs to Progressive.

Brief of Respondent at 5.

- It bears repeating that Ainsworth was unable to even carry pizzas to his car.

Resp. Brief at 22.

- Ainsworth makes his showing by pointing out to the Court that there is a complete absence in the record of documentary evidence showing that Ainsworth was reasonably able to perform the duties of his occupations at the time of Progressive's decision to deny coverage to Ainsworth.

Resp. Brief at 20.

- The last word of Dr. Smith received by Progressive made it clear that Ainsworth remained medically restricted at work. Dr. Smith's declaration establishes that, as of April 13, 2012, Ainsworth's physical activities remain medically restricted. . . . It is patently clear from the undisputed facts that Ainsworth is unable to perform the duties at both of his jobs.

Resp. Brief at 20-21.

- Ainsworth provided the trial court with documentation from his employers, including timesheets and pay stubs, showing his time loss from his jobs. Ainsworth's time loss was not challenged by Progressive.

Resp. Brief at 21.

These statements all appear in Ainsworth's brief without any citation to the record and, in fact, none could have been made due to the fact that these statements are not supported by the actual record before this Court. In fact, these are a mere sampling as, due to page limitations, Progressive is unable to provide this Court with a complete recitation of the numerous instances in which Ainsworth failed to cite to the record in support of his arguments.

C. Unsupported Legal Conclusions.

The following legal conclusions are also unsupported by authority. An appellate court may decline to consider a claim or contention that is unsupported by legal analysis. *Schroeder v. Excelsior Mgmt. Grp., LLC*, 2013 Wash. LEXIS 152. Ainsworth also relies upon pattern jury instructions, which are non-binding authority in the State of Washington.

See, e.g., *State v. Howard*, 152 Wn.App. 632, 645-646, 217 P.3d 354 (2009)([f]urthermore, WPICs are not the law; they are merely persuasive authority.), citing *State v. Mills*, 116 Wn.App. 106, 116, 64 P.3d 1253 (2003), *reversed on other grounds*, 154 Wn.2d 1, 109 P.3d 415 (2005).

- Thus, it is undisputed that Ainsworth’s claim is within the scope of the policy’s insured losses and Ainsworth has met his burden of the first step.

Resp. Brief at 18.

- There is no issue as to whether Ainsworth’s claim falls within the scope of the policy’s insured losses and the policy language cited by Progressive serves to limit or restrict the coverage unless otherwise afforded by the policy. Therefore, the policy provision cited by Progressive is an exclusion on which it bears the burden of proof.

Id.

- Quite plainly, the “actual damages” contemplated by IFCA are the insurance coverage and/or payment of benefits.

Resp. Brief at 33.

The Court should disregard each of the unsupported contentions set forth above. Ainsworth should not be allowed to assert his opinions as legal authority.

III. DISCUSSION

A. Summary Judgment Standard.

The Court reviews summary judgment *de novo*. *Lybbert v. Grant County*, 141 Wn.2d 29, 4, 1 P.3d 1124 (2000). Of critical importance to this matter, summary judgment is “plainly inappropriate unless the moving

party meets its initial burden to show there are no genuine issues of material fact and it is entitled to judgment as a matter of law.” *Police Guild v. City of Seattle*, 151 Wn.2d 823, 847, 92 P.3d 243 (2004), citing CR 56(c) and *Young v. Key Pharms. Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). “If the moving party does not sustain its initial burden to offer factual evidence showing it is entitled to judgment as a matter of law, summary judgment should not be entered, irrespective of whether the nonmoving party has submitted affidavits or other materials.” *Police Guild*, 151 Wn.2d at 848 (emphasis omitted).

B. Ainsworth Is Not Entitled To Lost Income Benefits After Returning To Work Full Time.

In examining policy terms, the court must determine whether there is coverage under the plain meaning of the contract. *Kitsap County v. Allstate Insurance Company*, 136 Wn.2d 567, 575, 964 P.2d 1173 (1998).

"The insurance policy must be given a fair, reasonable, and sensible construction as would be given by an average insurance purchaser." *Mid-Century Ins. Co. v. Henault*, 128 Wn.2d 207, 213, 905 P.2d 379 (1995). We should not engage in a "strained or forced construction" that would lead to absurd results. *Morgan*, 86 Wn.2d at 434. Nor should we interpret policy language in a way that leads to an extension or restriction of the policy beyond what is fairly within its terms, or render it nonsensical or ineffective. *Morgan*, 86 Wn.2d at 434-35.

Boag v. Farmers Ins. Co., 117 Wn. App. 116, 124-125, 69 P.3d 370 (2003).

A full, fair reading of the policy clearly indicates that Ainsworth was not entitled to the income continuation benefits after being cleared to work full time. The policy states:

Subject to the Limits of Liability, if **you** pay the premium for Personal Injury Protection, **we** will pay the following benefits to or on behalf of an **insured person** for losses or expenses incurred because of ***bodily injury*** sustained by an **insured person** caused by an accident and arising out of the ownership, operation, maintenance, or use of an **automobile**:

1. **Medical and hospital benefits;**
2. ***Income continuation benefits to or on behalf of each injured person in a remunerative occupation at the time of the accident;***
3. **Funeral expenses; and**
4. **Loss of services benefits.**

CP 126 (*emphasis added*).

The term “income continuation benefit” is defined by the policy as:

“Income continuation benefits” mean payment of an **insured person’s loss of income from work**, subject to the following:

- a. Income from work lost between the date of the accident and the 14th day after the accident will not be paid
- b. ***Payments will end the earliest of:***
 - i. ***The date on which the insured person is reasonably able to perform the duties of his or her usual occupation;***
 - ii. 54 weeks from the date of the accident; or
 - iii. The date of the **insured person’s** death; and
- c. Income earned during the period **income continuation benefits** are being paid will be deducted from **income continuation benefits**.

CP 127 (*emphasis added*).

The central inquiry in this case then revolves around whether or not Ainsworth was “reasonably able to perform the duties” of his job. His

doctor certainly believed he was. Ainsworth's doctor declared he was making "excellent progress" and cleared him to return to work full time on October 15, 2010. **CP 155.**

Ainsworth admits that he was medically cleared to return to work full time as of October 15, 2010. He argues, again without citation, that the medical clearance contained "medical restrictions" which prevented him from performing the duties of his job. Ainsworth fails, however, to identify any time that he missed from work due to any "medical restrictions." It is frankly unclear what Ainsworth believes the significance of the purported medical restrictions to be.

Ainsworth then argues that he allegedly lost wages due to doctors' appointments relating to ongoing treatment and that the policy provides benefits for time missed for those treatments. **Resp. Brief at 20.** Again, however, Ainsworth fails to cite to any actual evidence supporting this proposition and he fails to provide any legal support for the notion that the policy can be construed to provide these benefits.

B. Ainsworth Failed To Meet His Burden To Establish A Right To The Benefits Sought.

Ainsworth argues that the Court should treat the grant of coverage for income continuation benefits as an exclusion to be construed against

Progressive. **Resp. Brief at 15.** In support of this argument, he relies on longstanding case law concerning coverage exclusions:

In structural terms, one section of the policy describes the losses insured; another describes the losses not insured. Determining whether coverage exists is a 2-step process. The insured must show that the loss falls within the scope of the policy's insured losses. To avoid coverage, the insurer must then show the loss is excluded by specific policy language.

McDonald v. State Farm Fire & Cas. Co., 119 Wn.2d 724, 731, 119 P.2d 724 (1992).

This holding outlines the respective burdens of the parties to an insurance coverage dispute. However, the issue in this case is not one of coverage, but rather whether Ainsworth is entitled to additional benefits for his covered loss pursuant to the terms of the policy.

Ainsworth's argument misconstrues the policy's inclusionary and exclusionary provisions as well as Washington law. The provision that Ainsworth argues should be interpreted as an exclusion is merely the definition establishing the scope of the benefit. The definition of "income continuation benefit" is built into the policy provision granting the benefit.

Furthermore, the provision is not exclusionary at all, in that it does not outline losses that are not covered, but rather defines the boundaries of the benefit. Ainsworth fails to set forth any credible evidence or legal support for the proposition that the policy extends beyond the date he was

cleared to return to work full time. Instead, he purports to shift that burden to Progressive. This is a misinterpretation of *McDonald*.

C. There Is At Least A Genuine Issue Of Material Fact As To Whether Ainsworth Was Able To Perform His Job Duties.

Ainsworth argues that there is no genuine issue of material fact that he was not reasonably able to perform the duties of his job. **Resp. Brief at 20-21.** This entire argument lacks citation to the record or legal support. Regardless, he argues that “Progressive presents the Court with absolutely no evidence to the contrary. It is patently clear from the undisputed facts that Ainsworth is unable to perform duties at both jobs.” **Resp. Brief at 20.**

This statement is completely contrary to the record. In fact, as Progressive has maintained throughout this matter and as Ainsworth has admitted, the *evidence* establishes that Ainsworth was cleared to return to work as of October 15, 2011. **CP 155.** Moreover, it is also undisputed that as of October 15, 2011, Ainsworth *did return to work full time.* **CP 759.**

Again, it is Ainsworth’s burden to show that Court that his bodily injury caused lost wages covered by the policy. By arguing that “medically restricted” is the operative fact, he utterly disregards the

purpose of the income continuation benefit and the plain language of the policy.

The logical extension of Ainsworth's contention is that an insured would be able to work full time, but with a restriction, suffering no lost income, but still being entitled to recovery of wage loss benefits. This would allow an insured to voluntarily elect to miss work even though doing so would be unnecessary, and seek reimbursement from their insurance policy. This is exactly the issue confronted by the Court in *Appeal of Gagnon*, 147 N.H. 366, 787 A.2d 874, (2001). As discussed in Progressive's opening brief, the New Hampshire Supreme Court rejected this notion, holding that lost wages due to "scheduling" was not covered under the PIP income continuation provision at issue therein.

Setting aside the clear flaw in Ainsworth's analysis, Progressive submits that if the Court accepts Ainsworth's unsupported contention that the medical restrictions, if any, are somehow relevant, there is a clear question of fact as to whether he was actually restricted, and whether any such restriction actually caused him to lose wages.

Ultimately, however, Ainsworth's arguments are simply without merit. He has not submitted admissible evidence or cognizable legal authority supporting his position. As a result, the Court should rule that

summary judgment in his favor was inappropriate and should reverse this matter and remand for further proceedings.

D. Ainsworth Failed To Mitigate His Damages.

Ainsworth admits in his brief that Washington law states that the victim of a breach of contract is required to mitigate and minimize his damages. **Resp. Brief at 23**, citing *Ward v. Painter's Local Union 300*, 45 Wn.2d 533, 542, 276 P.2d 576 (1954). However, he mischaracterizes the duty to mitigate as only arising after the insurers breach occurs. **Resp. Brief at 23**. This is not responsive to Progressive's argument.

Ainsworth has failed to show that he could not seek appointments with medical providers outside of work hours, but rather enlarged his alleged damages by voluntarily missing work when he did not have to. **Resp. Brief at 25**. To the extent that his lost wages are covered under the policy, which pursuant to the plain language of the policy they are not, he had a duty to mitigate those losses. Otherwise, he is intentionally manufacturing his damages, in direct conflict with Washington law. *Kubista v. Romaine*, 87 Wn.2d 62, 76, citing *Alexander v. Meiji Kaiun K.K.*, 195 F.Supp 831, 834 (E.D. La. 1961); *Ward v. Painters' Local 300*, 45 Wn.2d 533, 542, 276 P.2d 576 (1954).

Ainsworth does not address mitigation in this respect. Rather, he contends that the duty to mitigate does not arise until the other party has

breached their duty to perform. **Resp. Brief at 23**, citing *Sears, Roebuck & Co. v. Grant*, 49 Wn.2d 123, 126, 298 P.2d 497 (1956). Progressive's argument is that he has a duty to mitigate his losses *under the policy*, regardless of any breach of the contract, and is not free to generate his own damages arbitrarily. **Resp. Brief at 21**. Thus, Ainsworth has failed to set forth any argument responsive to this claim by Progressive.

Furthermore, the case law cited by Ainsworth is not applicable. In *Sears*, the Court held that the duty to mitigate did not arise when the injured party was repeatedly assured by the breaching party of its performance. *Sears*, 49 Wn.2d at 126. That is clearly not the case here. There is no evidence that Progressive repeatedly assured Ainsworth that any income lost for medical appointments after being cleared to return to work full time would be paid under the policy.

Finally, Ainsworth relies on the Supreme Court of Washington's holding in *Hogland v. Klein* for the proposition that "[o]nly the conduct of a reasonable man is required of him." **Resp. Brief at 23**, citing *Hogland v. Klein*, 49 Wn.2d 216, 221, 298 P.2d 1099 (1956). The conduct of a "reasonable person" is a question for a jury. *Sears*, 49 Wn.2d at 126. Therefore, Ainsworth's argument establishes that this is not an issue proper for summary judgment.

E. The Superior Court Erred In Granting Summary Judgment On Ainsworth's IFCA Claim.

In order to maintain an action under the Insurance Fair Conduct Act (hereinafter "IFCA"), a plaintiff must show 1) a denial of a claim for coverage, 2) that the denial was unreasonable, and 3) actual damages sustained therefrom. **RCW 48.30.015.** Ainsworth has failed to establish that there is no genuine issue of material fact with regard to each of these elements.

1. No Unreasonable Denial.

Ainsworth contends that Progressive unreasonably denied coverage and payment of loss income benefits. His justification for such a claim is an unsupported statement that "Progressive's answers to written discovery indicate that Ainsworth was entitled to benefits so long as he was physically limited." **Resp. Brief at 26.** He provides no other factual basis for this claim.

However, as set forth above, Progressive's position with regard to these benefits is not only reasonable, but it is ultimately correct. Moreover, the *facts* in evidence establish that there is, at the very least, a question of fact as to whether Progressive was reasonable in its application of the facts to its policy.

Ainsworth was cleared by his doctor to return to work. **Resp. Brief at 4.** He returned to work. **CR 75.** Over two months later, he submitted a claim for income lost due to doctors' appointments. **Resp. Brief at 4.** Progressive asked Ainsworth for a disability note from his doctor. **CP 741.** Ainsworth never provided this documentation. The policy clearly states that the insured shall provide any reasonable documentation the insurer requires. **CP 145.**

Based on these simple facts alone, it was improper for the Superior Court to rule as a matter of law that Progressive's position relating to the availability of additional wage loss benefits was unreasonable. Summary judgment was improperly granted and should be reversed.

2. *Ainsworth's Technical Arguments Do Not Support The Summary Judgment Ruling.*

Avoiding the clear fact that there was no "unreasonable denial of coverage" by Progressive, Ainsworth argues summary judgment was appropriate against Progressive based on alleged technical violations of the Washington Administrative Code provisions for insurance trade practices. **Resp. Brief at 27-30.** The record, however, does not support these claims, nor the proposition that Ainsworth was entitled to summary judgment based on these arguments.

In fact, the Washington Courts have long held that a mere technical violation of a WAC provision is not sufficient to support an extra-

contractual claim and that reasonableness is a complete defense to any such claim. *Keller v. Allstate Ins. Co.*, 81 Wn. App. 624, 633-634, 915 P.2d 1140 (1996).

Moreover, the Courts do not automatically hold that an insurer acts in bad faith if it is ultimately unsuccessful in its policy defense. *Id.*, citing 15A GEORGE J. COUCH ET AL., COUCH ON INSURANCE 2d (rev. ed.) § 58:1 (1983). “[T]he insurer should not be held liable for extra-contractual damages where there is a legitimate controversy as to whether benefits are due or the amount of such benefits... . *Id.* Ainsworth has failed to make a supported argument that Progressive’s denial was unreasonable, and that there is no legitimate controversy as to whether or not the policy extends that income continuation benefit until after a return to full time work.

a. Progressive’s Investigation of Ainsworth’s Claim Was Reasonable.

Progressive’s conduct regarding its investigation of Ainsworth’s claim was reasonable. Ainsworth’s self-serving contentions, which are again unsupported by citation to the record, do not establish a WAC or IFCA violation as a matter of law. **Resp. Brief at 27.**

However, Ainsworth’s contention again misconstrues the facts. When presented with Ainsworth’s claim for lost income after being cleared to return to work, Progressive asked him to provide a disability

note from a doctor. **CP 741.** Ainsworth failed to do so despite the requirement in his policy that he provide Progressive with reasonable documentation when requested. **CP 145.**

Ainsworth cannot rebut these simple facts. Rather, he argues that Progressive has some other vague duty to investigate. There is simply no basis for this allegation. As a result, summary judgment in favor of Ainsworth on this basis was inappropriate and should be reversed.

b. Progressive Did Not Fail To Provide Reasonable Explanations And Assistance To Ainsworth.

Ainsworth claims that Progressive failed to provide a reasonable explanation or assistance. He makes this contention within a claim for lack of a response under WAC 284-30-33(13), 284-30-360(4) and 284-30-360(3). However, he fails to offer any evidence or even an unsupported allegation pertaining to Progressive's failure to promptly respond to a request for a reasonable explanation for a denial, as those regulations require. **Resp. Brief at 29.**

This argument is belied by several factors, including the fact that Ainsworth was represented by counsel at all material times. Moreover, Ainsworth's argument is based not on the failure of Progressive to provide him with an explanation, but rather on his disagreement with the

explanations provided. This is simply a restatement of the argument that Progressive should have paid the disputed benefits.

Moreover, the reasonableness of Progressive's explanations is certainly a question of fact. As such, this allegation does not support Ainsworth's claim that summary judgment was somehow appropriate.

c. Progressive Did Not Force Ainsworth To Commence A Lawsuit.

Ainsworth contends that Progressive violated WAC 284-30-330(7). **Resp. Brief at 30.** In stating his claim, he clearly misconstrues the purpose of this provision. This provision applies to settlement offers. *Greene v. Young*, 2008 Wash. App. LEXIS 1636 (2008). Furthermore, the pivotal question with any claim under this regulation is whether the insurer had reasonable justification for its action. *Anderson v. State Farm Mut. Ins. Co.*, 101 Wn.App. 323, 335, 2 P.3d 1029 (2000).

As set forth above, Progressive acted reasonably with regard to Ainsworth's claims and Progressive did not unreasonably force Ainsworth into litigation. Moreover, the reasonableness of Progressive's conduct remains a question of fact. Summary judgment on this basis is not appropriate.

d. Progressive Did Not Misrepresent Policy Provisions And Facts To Ainsworth.

Ainsworth contends that Progressive violated WAC 284-30-330(1). **Resp. Brief at 30.** His unsupported allegations contend that Progressive “made repeated gross misrepresentations to Ainsworth concerning the exclusionary policy provision about the ability to perform job duties.” *Id.* He fails to cite to any fact in the record supporting this allegation. Rather, the allegation is not that there was any actual “misrepresentation,” but rather once again that he disagreed with Progressive’s explanation of how the policy operates.

These technical arguments are unsupported by the record and are insufficient to warrant judgment as a matter of law in favor of Ainsworth. All of these arguments, while couched in terms of the WAC insurance regulations, are really nothing more than restatements of Ainsworth’s primary complaint that Progressive did not pay benefits to which he believed he was entitled. Progressive’s conduct was reasonable at all times, its determination regarding the claim for additional benefits was reasonable, and summary judgment against it was not supported by the facts or Washington law.

3. *Ainsworth Has Not Demonstrated Damages Caused By Any Potential IFCA Violation.*

Even if Ainsworth could establish that Progressive’s conduct was somehow unreasonable and in violation of IFCA, the Superior Court still

should be reversed due to Ainsworth's failure to establish that Progressive's conduct caused him any actual harm. IFCA explicitly requires a party claiming an IFCA violation to prove "actual damages sustained". RCW 48.30.015.

Here, Ainsworth not only failed to identify any damages, but he has taken the position that he is not required to do so. This position is based on the claim that the contractual measure of damages is also his IFCA measure of damages. This argument is not supported by the plain language of the statute, any Washington case relating to IFCA, and is inapposite of Washington's longstanding jurisprudence concerning the burden of a party making extra-contractual claims in insurance disputes. *Coventry Associates v. American States Insurance Company*, 136 Wn.2d 269, 284, 961 P.2d 933 (1998)(holding that actual damages caused by the bad faith conduct are an essential element of an insurance bad faith claim); *Hangman Ridge Training Stables v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 784-785, 719 P.2d 531 (1986)(requiring proof of "actual injury to business or property" proximately caused by the conduct in violation of the CPA).

In the absence of any evidence whatsoever that Progressive's conduct could have somehow caused him harm, Ainsworth fails to establish an essential element of the IFCA claim. Summary judgment in his favor was therefore clearly in error.

4. *The Superior Court Improperly Doubled Ainsworth's "Contractual" Damages.*

IFCA allows any "actual damages sustained" to be trebled by the Court. Again, though, Ainsworth has not established that he sustained any actual damages as a result of Progressive's conduct in the handling of his claim.

Ainsworth fails to address this argument. He offers no rebuttal to Progressive's contention that actual damages are those caused by the alleged unreasonable denial of benefits, and not the contractual benefits sought.

Frankly, it is unclear how the Superior Court came to the damage figure that it reached with regard to its conclusion that Ainsworth was somehow entitled to additional PIP wage loss benefits. Regardless, even if Ainsworth were entitled to such an amount, it is clearly contrary to Washington law to double that amount under IFCA. As a result, the Superior Court should be reversed.

F. The Superior Court Erred In Awarding Attorney's Fees.

Ainsworth mischaracterizes Progressive's argument to his own benefit with regards to fees under *Olympic Steamship*. The Supreme Court of the State of Washington has ruled:

[T]his case presents a dispute over the value of the claim presented under the policy. Such disputes are not properly governed by the rule in *Olympic Steamship*.

Dayton v. Farmers Insurance, 124 Wn.2d 277, 280, 876 P.2d 896 (1994).

As in the *Dayton* case, this case is not about coverage. Progressive paid Ainsworth for his lost income up until he was cleared to return to work full time. Rather, this case is about the extension of the benefit, and about how much Ainsworth is entitled to under the facts of the matter. As such, attorney's fees under *Olympic Steamship* are inappropriate. The award of such fees by the trial court was improper and should be reversed.

As set forth above, Ainsworth has not established that he was entitled to summary judgment in his favor on his IFCA claim. On this basis alone, the portions of the judgment awarding attorney's fees under IFCA should be reversed.

G. Ainsworth Is Not Entitled To Costs And Attorney's Fees On Appeal.

Ainsworth's request for attorney's fees and costs on appeal rely upon the same grounds as his request in the lower court, *Olympic Steamship* and RCW 48.30.015(3). **Resp. Brief at 36.**

For the reasons set forth above, Ainsworth is not entitled to an award under *Olympic Steamship*. This is not a coverage dispute, but rather it concerns the limits of the income continuation benefit, and the amount

of loss suffered by the insured for which the policy compensates. *Dayton*, supra, 124 Wn.2d at 280.

Attorney's fees and costs should not be awarded under RCW 48.30.015(3) either, as Progressive has not unreasonably denied Ainsworth's claims. Rather, a genuine question exists as to whether the income continuation benefit extends to the degree Ainsworth claims. He has provided no evidence that Progressive acted unreasonably in bringing this appeal, and therefore is not entitled to fees and costs associated with the instant action.

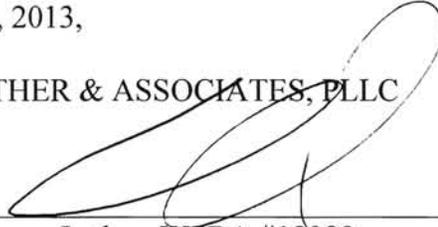
IV. CONCLUSION

Progressive paid Ainsworth all benefits to which he was entitled under the subject policy. Based on the clear and unambiguous language of that policy, he is not entitled to any further benefits. As a result, the Superior Court erred in granting summary judgment in his favor.

Moreover, even if Ainsworth were somehow entitled to some additional benefits, Progressive's position relating to those benefits was at least reasonable. More to the point, the reasonableness of Progressive's position and its conduct in regard to the claim is at the very least a question of fact for the jury. Summary judgment was improper and the Superior Court should be reversed. This matter should be remanded for a trial on the merits.

Dated this 3rd day of April, 2013,

LEATHER & ASSOCIATES, PLLC

A large, stylized handwritten signature in black ink, appearing to be 'T. Lether', is written over the text 'LEATHER & ASSOCIATES, PLLC' and extends slightly below the horizontal line.

Thomas Lether, WSBA #18089

Eric J. Neal, WSBA #31863

Attorneys for Appellant

CERTIFICATE OF SERVICE

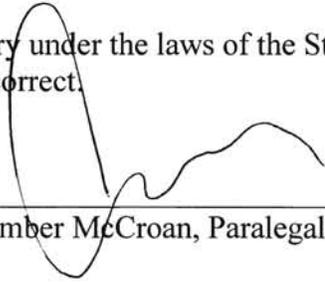
The undersigned hereby certifies under the penalty of perjury under the laws of the State of Washington that on this date I caused to be served in the manner noted below a true and correct copy of the foregoing on the party mentioned below as indicated:

Aaron L. Adee
Attorney for Respondent
The Adee Law Firm, PLLC
705 Second Ave, Ste. 1000
Seattle, WA 98104
aaron@adeelaw.com

By: **First Class Mail** **Legal Messenger** **E-mail**

Executed on this 3rd day of April, 2013, at Seattle, Washington.

I declare under penalty of perjury under the laws of the State of Washington that the above is true and correct.



Amber McCroan, Paralegal