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No. 69433-2-I

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I

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PROGRESSIVE CASUALTY INSURANCE COMPANY

Appellants;

v.

TYLER AINSWORTH,

Respondent.

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**PROGRESSIVE CASUALTY INSURANCE COMPANY'S  
BRIEF OF APPELLANT**

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Thomas Lether, WSBA #1808  
Eric J. Neal, WSBA #3186  
Brent Williams-Ruth, WSBA #324  
Attorneys for Appellant  
Progressive Casualty Insurance Company  
Lether & Associates, PLLC  
3316 Fuhrman Avenue E., Suite 250  
Seattle, WA 98102  
206.467.5444  
[tlether@letherlaw.com](mailto:tlether@letherlaw.com)  
[eneal@letherlaw.com](mailto:eneal@letherlaw.com)  
[bwruth@letherlaw.com](mailto:bwruth@letherlaw.com)

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## I. INTRODUCTION

This matter comes before the court on appeal from the King County Superior Court's ruling in *Tyler Ainsworth v. Progressive Casualty Insurance Company*, Cause No. 11-2-08562-7. The litigation arises out of a claim by Plaintiff-Respondent Tyler Ainsworth (hereinafter "Ainsworth") that he is entitled to personal injury protection (PIP) coverage above and beyond the amount for which he contracted. He contends that Progressive Casualty Insurance Company (hereinafter "Progressive") should have paid him income continuation benefits under the PIP portion of his policy after he was cleared by his doctor to return to work full time.

Specifically, Ainsworth's claim is that Progressive breached the contract and acted in bad faith when it refused to pay for time that he was allegedly off work to attend medical appointments. This claim is contrary to both the plan language of the policy and clear Washington law.

Additionally, Ainsworth failed to substantiate his alleged lost wages as required under the policy. He did not provide any competent proof that he attended any doctor's appointments during work hours. He failed to prove that he arranged his schedule so that he could work full hours and still attend appointments. Furthermore, he did not provide any evidence that he could not find, or even attempted to find, medical

providers that could provide treatment during his non-working hours. In fact, Ainsworth admitted that there are several doctors who provided services outside of his working hours and on weekends.

Despite the fact that Progressive paid all benefits due and owing under the policy to, or on behalf of, Ainsworth, he claims that Progressive breached the policy of insurance, acted in bad faith, and violated other Washington statutes in the handling of his claim. However, the clear evidence shows that Progressive adjusted and paid his claims pursuant to the terms of the policy. Ainsworth's request to rewrite the policy to include benefits for which he did not contract and for which he did not pay for should not be permitted. This is inappropriate and contrary to clear Washington law.

## **II. ASSIGNMENTS OF ERROR**

### **A. Assignments of Error**

1. The Trial Court erred in granting Ainsworth's Motion for Summary Judgment as Ainsworth was not entitled to benefits as a matter of law.

2. The Trial Court erred in ruling that Progressive breached the Insurance Fair Conduct Act of the State of Washington, as Progressive's handling of the claim was reasonable and did not constitute a denial of coverage.

3. The Trial Court erred in doubling Ainsworth's contractual benefits under an extra-contractual theory of law without proof that Ainsworth suffered any actual damages as a result of Progressive's acts or omissions.

4. The Trial Court erred in awarding attorney fees to Ainsworth given that the only dispute in this matter was regarding the value of the claim and at no point was there an unreasonable denial.

**B. Issues Pertaining to Assignments of Error**

1. The Trial Court granted Summary Judgment despite the fact that Ainsworth's own doctor had cleared him to return to work. The fact that Ainsworth continued to seek and set treatment appointments during his work shift does not avail him to income continuation benefits under the policy. Ainsworth made no attempt to schedule appointments around his work schedule, the opposite is true – Ainsworth deliberately chose treatment appointments knowing that they would occur during his working hours. Additionally, Ainsworth has failed to support his claims with competent evidence.

2. The dispute between Ainsworth and Progressive is that of valuation on a covered claim, not is there coverage afforded under the

policy. Progressive has paid fully all benefits owed to Ainsworth in accordance with a reasonable interpretation of the policy.

3. The Trial Court doubled Ainsworth's award for contractual damages under IFCA, an extra-contractual theory of law. Traditionally extra-contractual claims require independent damages separate and apart from contractual damages. Allowing Ainsworth an opportunity to recover contractual damages under an extra-contractual cause of action provides him with an attempt to obtain damages using a different, potentially lesser, legal analysis.

4. *Olympic Steamship* fees are inappropriate in this matter due to the fact that there was no denial of coverage. Attorney's fees awarded under IFCA is similarly inappropriate given that attorney's fees should be awarded only after a finding of an unreasonable denial of coverage or benefits. There was no denial of coverage or benefits. If the Court finds that there was a denial of coverage or benefits, the Court must still find that those actions were unreasonable. Progressive's actions in the handling Ainsworth's claim was reasonable.

### **III. STATEMENT OF CASE**

#### **A. Background**

On July 14, 2010, Ainsworth was allegedly injured in a rear-end motor vehicle accident. CP 111. As a result of the collision, Ainsworth claimed injury leading to medical expenses and lost wages. CP 111.

Sometime thereafter, Ainsworth tendered a PIP claim to Progressive. Progressive acknowledged and adjusted Ainsworth's claim according to the terms and conditions of the policy. CP 108. Additionally, Progressive accepted Ainsworth's PIP wage loss claim and began making payments according to the specific terms and conditions of the policy under Washington law. CP 108. Progressive continued to make these payments throughout Ainsworth's convalescence, until October 15, 2010, when he was cleared by his doctor to return to work full time. CP 108.

**B. Progressive Paid the Claim According to the Terms of the Policy**

Progressive issued Policy Number 45483660-1 to Ainsworth. This policy was in effect from July 4, 2010, to January 4, 2011. CP 115 – 151. The Policy provided coverage according to its terms and conditions and not otherwise. The Policy contains several provisions pertinent to Ainsworth's claims. Regarding Personal Injury Protection in Part II, the policy states as follows:

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 of 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.

The Policy states as follows:

**“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 14<sup>th</sup> 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 definition contained with the applicable policy, stated above, is identical to the definition of “income continuation benefits” provided by RCW 48.22.005.

Under Part VI of the Policy, entitled “**DUTIES IN CASE OF AN ACCIDENT OR LOSS,**” the duties of the insured when making a claim for income continuation benefits are detailed.

A person seeking coverage must:

1. cooperate with **us** in any matter concerning a claim or lawsuit;
2. ***provide any written proof of loss we may reasonably require;***
3. allow **us** to take signed and recorded statements, including sworn statements and examinations under oath, which **we** may conduct outside the presence of **you** or any other person claiming coverage, and answer all reasonable questions **we** may ask as often as **we** may reasonably insure.

CP 145 (*emphasis added*).

On July 28, 2010, Ainsworth’s physician provided Progressive with documentation that Ainsworth was still experiencing significant disability. CP 153. Over the next several weeks, new disability notes were provided to Progressive, in which the number of hours Ainsworth was allowed to work was steadily increased by his doctor. On September, 21, 2010, Progressive received a note from Ainsworth’s doctor, declaring he was making “excellent progress” and that he was cleared to return to work full time as of October 15, 2010. CP 155. Ainsworth did in fact return to full-time work on October 15, 2010.

Progressive stopped making payments for income continuation benefits on October 15, 2010. CP 108. Ainsworth has admitted that once he was allowed to return to work full time, the only reason he missed work was to attend medical appointments. CP 75.

**C. Ainsworth's Claims are Undermined by the Admitted Facts**

Ainsworth has failed to substantiate his claim that he was attending doctor's appointments during working hours, or that he was unable to attend those appointments outside of working hours. Ainsworth's sole piece of evidence that was provided to Progressive consisted of Ainsworth's self-serving discovery responses, which claimed he attended certain appointments that required him to miss work. CP 89-90. The record is devoid of documentation proving that the appointments were during working hours, or that Ainsworth attempted to schedule the appointments outside of working hours and could not.

Initially, Ainsworth's position at Contour was salaried. CP 67. He described a typical schedule as Monday through Friday, eight hours per day. CP 67. He was entitled to certain benefits as well, including one or two weeks per year paid time off. CP 68.

Around May 2010, Ainsworth became an hourly employee. CP 68. He worked in a warehouse that was open Monday through Friday, but was not open for a certain, specific schedule of hours. He explained:

Q. So how is it that you work there full time for over a year and don't know what hours its open?

A. Because the question isn't – because the hours aren't necessarily always specific because different people work at different times during Monday through Friday.

Q. OK

A. So, where when I work, someone else could be there before me, and someone else could be there after me. So it's not a definite structure of 9:00 to 5:00 per se.

CP 71.

Ainsworth's testimony makes it clear that as of the beginning of 2011, he had access to the warehouse and the ability to flex his work schedule around his medical appointments and still work 40 hours per week. CP 71. This arrangement was not requested by Ainsworth, but rather presented as an option by his employer. CP 71. Ainsworth testified that once he was allowed this flexibility of hours, he was able to work full time and receive a full paycheck. CP 72.

Additionally, Ainsworth has failed to provide any evidence that he actually incurred any wage loss from his job at Contour between October 15, 2010, and the beginning of 2011. As such, even if the policy could be construed to extend the benefits as Ainsworth contends, a proposition not supported by the plain language of the policy and Washington law, *infra*, Ainsworth has failed to present evidence sufficient to establish that he actually has a valid wage loss claim.

Ainsworth began as a delivery driver for Pagliacci Pizza in May of 2010, working three shifts per week, approximately three to five hours per shift. CP 71. Ainsworth admits that he never missed any time at Pagliacci due to doctor's appointments. CP 72, 75. Furthermore, Ainsworth admits that he was never restricted by his doctor from work at Pagliacci. CP 72. Rather, Ainsworth testified that any missed time from work at Pagliacci was voluntary. CP 72.

#### IV. ARGUMENT

##### A. Standard of Review

The Court reviews summary judgment *de novo*. *Lybbert v. Grant County*, 141 Wn.2d 29, 4, 1 P.3d 1124, (2000). Summary Judgment is proper if the evidence viewed in a light most favorable to the nonmoving party shows there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *Mohr v. Grant*, 153 Wn.2d 812, 820, 108 P.3d 768 (2005), *citing* CR 56(c). "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). Construing evidence in a light most favorable to the nonmoving party, the court asks whether a reasonable jury could find in favor of that party. *Mohr*, 153 Wn.2d at 821, citing *Herron v. KING Broad. Co.*, 112 Wn.2d 762, 767-68, 776 P.2d 98 (1989).

**B. The Trial Court Erred in Granting Ainsworth’s Motion for Summary Judgment as There Was At Least a Question of Fact as to Whether Ainsworth Was Entitled to Additional Benefits Under the Progressive Policy**

***1. Principles of Policy Construction***

A reviewing court must examine the policy terms to determine whether or not under the plain meaning of the contract, there is coverage. *Kitsap County v. Allstate Insurance Company*, 136 Wn.2d 567, 575, 964 P.2d 1173 (1998). The interpretation of insurance policy language is a question of law. *State Farm General Insurance Company v. Emerson*, 102 Wn.2d 477, 480, 687 P.2d 1139 (1984).

A clause or phrase is only ambiguous when, on its face, it is fairly susceptible of two *different interpretations*, both of which are reasonable. *Weyerhaeuser Company v. Commercial Union Insurance Company*, 142 Wn.2d 654, 666, 15 P.3d 115 (2000)(*emphasis added*); *Kitsap County v.*

*Allstate Insurance Company*, 136 Wn.2d 567, 575, 963 P.2d 1171 (1998). Courts may not strain to find an ambiguity in an insurance contract where none exists. *Farmers Home Mutual Insurance Company v. Insurance Company of North America*, 20 Wn. App. 815, 820, 583 P.2d 664 (1978). Further, Courts may not create ambiguity or doubt where language of an insurance policy is ***not susceptible of more than one reasonable interpretation***, *Truck Insurance Exchange v. Aetna Casualty Insurance*, 13 Wn. App. 775, 778, 538 P.2d 529 (1975); *Britton v. SAFECO*, 104 Wn.2d 518, 528, 707 P.2d 125 (1985).

The rule that contracts of insurance are construed in favor of an insured and most strongly against an insurer should not be permitted to have the effect of making the plain agreement ambiguous, and then construing it in favor of the insured. *West American Ins. Co. v. State Farm Mutual Auto Insurance Company*, 80 Wn.2d 38, 44, 491 P.2d 641 (1971). Thus, if the language is clear and unambiguous, the court must enforce the policy as written and may not modify it or create ambiguity where none exists. *American National Fire Insurance Company v. B & I Trucking and Construction Company*, 134 Wn.2d 413, 428, 951 P.2d 250 (1998).

**2. *Ainsworth's Cause of Action for Breach of Contract Is Without Merit.***

The policy language at issue here is clear and unambiguous. The policy states as follows:

[W]e 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 **insured person** engaged in a remunerative occupation at the time of the accident;
3. **funeral expenses**; and
4. **loss of services benefits**.

CP 126 (*emphasis added*).

The policy provides the following definition for the term "income continuation benefits" used in the prior section of the policy:

**"Income continuation benefits"** means 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*).

a. PIP Benefits Are Paid for Bodily Injury

In the State of Washington, PIP provisions have been narrowly construed. *Tyrrell v. Farmers Inc. CO.*, 140 Wn.2d 129, 994 P.2d 833 (2000); see also *Foote v. Viking Ins. Co. of Wisconsin*, 57 Wn. App. 831, 790 P.2d 659 (1990). The clear language of the policy allows for a loss of income from work related to a **bodily injury**.

Ainsworth was cleared to return to full time work by his treating physician on October 15, 2010. As a result, Progressive discontinued income continuation benefits at that time. CP 155. As Ainsworth was capable of returning to work full time it is a strained interpretation of the policy to conclude that all medical appointments or loss of employment opportunity after this date were appropriate for compensation under income continuation benefits. Furthermore, the restrictions placed upon Ainsworth by his physician did not restrict his earnings, which is the loss the benefit is intended to alleviate. Thus, Progressive actions were reasonable and within the plain meaning of the policy language.

b. PIP Benefits Should Be Paid When Incapable of Performing Work Related Duties

An illustrative case as to this matter is *Zoller v. Transamerica Insurance Company*, 522 A.2d 479 (N.J. App. 1987). In that case, the New Jersey Court of Appeals held that a claim for income continuation

benefits must be tied to “bodily injury rendering [the insured] incapable of carrying out [the insured’s] work-related duties.” The matter arose when an employee retired early because of an injury. The court held that the retiree was not entitled to the benefits, explaining:

[A]n insured is not entitled to benefits unless there is objective, medical proof that the insured’s [loss of income] was because of bodily injury rendering him incapable of carrying out his work-related duties. While the pain and discomfort suffered by plaintiff here was a substantial factor in motivating him to take early retirement, **he was able to resume his employment after the automobile accident and to carry out his job tasks.** Consequently, he was not entitled to income continuation benefits.

*Zoller*, 522, A.2d at 480

Simply put, if the insured can work, and chooses not to, the policy does not apply. They went on:

We construe the applicable provisions as intending to provide income continuation benefits only to **persons who are foreclosed from their normal, gainful employment because of bodily injuries** sustained in an automobile accident. No provision in the PIP statute suggest that benefits should be paid when the insured, capable of working without income loss, voluntarily [does not work] because of the injury . . .

*Id* at 481-482. (internal citations omitted)

The *Zoller* court illustrates the idea that income continuation benefits are for those who simply cannot earn their pre-injury income because of bodily injury. Progressive urges the Court to adopt the

logic exercised by the New Jersey Court of Appeals in the face of the same issue.

Even if medical appointments and time off from work to attend them were related to the injury, once Ainsworth was able to resume his employment on a full-time basis, he became ineligible for income continuation benefits. There is a clear expiration date on these benefits. Ainsworth has admitted that he could work full time. However, he insists on receiving additional compensation not provided by the policy.

c. PIP Benefits Are Not Intended For Attending Appointments

Ainsworth's argument that he was unable to work because he was at medical appointments is unavailing. In *Patton v. Commissioner of Social Security*, 2011 U.S. Dist. LEXIS 112536 (E.D. Mich. 2011), the United States District Court rejected an argument that the party was unable to work because of doctor's appointments. *Id.* at 8. During the plaintiff's administrative hearing, she stated she should qualify for disability because her medical appointments precluded her from simultaneously working. The District Court disagreed, ruling that despite records showing significant loss of time due to various medical appointments, "it d[id] not appear that the time required for her various

courses of therapy was sufficient . . . to have precluded her from working.” *Id.*

Just as in the *Patton* case, Ainsworth’s medical appointments did not preclude him from working. He never provided evidence that he could not make appointments before or after work. In actuality, he made several statements indicating that he did not have to miss work. Specifically, in his deposition, he admitted that his supervisor encouraged him to work off hours to allow for him to make up any time lost to medical appointments. CP 71-72. Furthermore, in the same deposition, he mentioned that there was no rigid timeframe for him to work. He stated: “[s]o, whereas when I work, someone else could be there before me, and someone else could be there after me. So it’s not a definite structure of 9:00 to 5:00 per se.” CP 71.

Another illustrative case on this matter comes from the Supreme Court of New Hampshire, *Appeal of Gagnon*, 147 N.H. 366, 787 A.2d 874, (2001). In that case, the Court considered an appeal from the New Hampshire Workers Compensation Board, who denied benefits for time lost from work when the claimant was able to work, but attending medical appointments. The Court determined, “[t]he relevant focus in determining whether to award indemnity benefits is whether the claimant’s work-related injury affects the ability to physically perform a job *or to otherwise*

*engage in gainful employment.” Gagnon, 787 A.2d at 876 (emphasis added). The court held that “the petitioners’ work-related injuries did not cause them to suffer a loss of earning capacity . . . [r]ather, their inability to perform their work was the result of scheduling problems.” Id. (emphasis added).*

Ainsworth’s wage loss was the result of what the New Hampshire Supreme Court called a “scheduling problem,” when otherwise he was cleared to return to gainful employment. The presence of doctor’s restrictions, as laid out in Dr. Smith’s note returning Ainsworth to work full time, are not sufficient to qualify him for benefits when he was capable to earning 100% of his pre-injury income. Moreover, he had ample opportunity to attend doctor’s appointments outside of work hours or to take advantage of his employer’s flexibility. Thus, the Court should not be concerned with Ainsworth’s scheduling problems, but rather focus on his ability to perform his job when his physician returned him to work full time.

Furthermore, there is no right to compensation for "lost shifts" at Pagliacci under the policy. In his deposition Ainsworth admitted that he did not miss work at Pagliacci to attend medical appointments. In fact, he states that he was willing and able to work, but that shifts were unavailable. According to the plain terms of the policy, he was **"able to**

**perform the duties of his or her usual occupation."** The policy states that benefits end when he is "able to perform" the duties of his usual occupation; there is no requirement that he **actually perform** the duties. Because there was no bodily injury or physical limitation related to the accident that prevented him from working, the policy does not provide for any further benefits.

d. Self-Serving and Conclusory Statements Are Insufficient Evidence to Support Payment of PIP Benefits

Even if the policy could be construed in the strained manner that Ainsworth has advanced, the evidence in the record does not support the argument that he *actually* lost any wages as a result of his attendance at medical appointments. It is undisputed that as of the beginning of 2011, Contour was allowing him to work flexible hours such that he would not lose time at work. It is undisputed that Ainsworth did not lose any time from work at Pagliacci to attend medical appointments. Finally, there is no *evidence* that he missed time from work at Contour during the period of time between October 15, 2010 and the beginning of 2011.

In *Baldwin v. Silver v. Farmers Ins. Co. of Wa.*, 165 Wn. App. 463 (2011), the Court of Appeals affirmed the dismissal of bad-faith and CPA claims based on the Plaintiffs' failure to present competent evidence

supporting the damage and proximate cause elements of those claims.

Specifically, the Court held:

The trial judge's refusal to consider Ms. Silver's affidavit as proof of damages was also reasonable and proper. What the judge did here was refuse to consider the conclusory, unsupported statements set out in the affidavits. Though the trial court may be lenient to a nonmoving party's affidavits presented in response to a motion for summary judgment, it may not consider conclusory statements contained in the nonmoving party's affidavits. A nonmoving party cannot defeat a motion for summary judgment with conclusory statements of fact.

*Id.* at 471, 269 P.3d 284 (2011).

The claim of lost wages made by Ainsworth are wholly unsupported by anything other than self-serving, conclusory statements. This level of evidence is explicitly what the Court in *Silver* addressed. However, the difference is that not only did these statements defeat Progressive's motion for summary judgment, they were the basis upon which the Court *granted* Ainsworth's summary judgment.

As a result, Ainsworth's claims in this matter are both factually and legally deficient. Ainsworth asks the Court to adopt a strained and unreasonable interpretation of the policy and then to speculate that he may have lost wages based solely on his self-serving, conclusory statements.

e. Plaintiff Failed to Mitigate His Damages

Washington has long recognized a duty to mitigate. *City of Seattle v. Blume*, 134 Wn.2d 243, 260, 947 P.2d 22 (1997)(“The Court must decide based on traditional principles of proximate causation whether or not a defendant was the cause of the injuries suffered and whether the duty to mitigate was met.”). In this matter, Ainsworth failed to mitigate his loss by scheduling medical appointments that caused him to miss work, when appointments with the same providers existed outside of work hours. Therefore, his actions amounted to an intentional enlargement of his lost wages. In *Kubista v. Romaine*, the Supreme Court of Washington held that an injured party had a duty to mitigate his lost wages and seek other employment if possible. *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). It logically follows then, that if an injured party has a duty to seek other employment to mitigate lost wages, then one also has a duty to work at his current place of employment as much as he is able. The law should not favor a party who fails to mitigate his damages.

C. **The Trial Court Erred in Ruling that Progressive Breached IFCA, as Progressive’s Handling of the Claim was Reasonable and Did Not Constitute a Denial of Coverage.**

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. Proof of an IFCA violation requires proof of unreasonable conduct. IFCA authorizes damages and attorney's fees should the plaintiff demonstrate an unreasonable denial. RCW 48.30.015(2) & (3).

Ainsworth's IFCA cause of action must be dismissed. Progressive paid all amount due and owing in accordance with the express terms and conditions of the policy of insurance. Progressive's payment of benefits for Ainsworth's loss was based on a reasonable interpretation of the policy and Ainsworth has not identified any actual damages that he allegedly incurred as a result of any act or omission of Progressive. This is not an IFCA case.

Moreover, IFCA applies to coverage disputes, not damage disputes. The Washington State Supreme Court recognizes the difference between these types of disputes, having held that when a "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 Group*, 124 Wn.2d 277, 876 P.2d 896 (1994). *See also Gassed v. Farmers Ins. Co.*, 133 Wn.2d 954, 948 P.2d

1264 (1997); *McCreary v. Northern Ins. Co.*, 138 Wn.2d 550, 980 P.2d 736 (1999); *Farmers Ins. Co. v. Lautenbach*, 93 Wn.App. 671, 963 P.2d 965 (1998).

Also, IFCA applies to situations involving the unreasonable denial of coverage as follows:

- (1) Any first party claimant to a policy of insurance who is
- (2) **unreasonably denied** a claim for coverage or payment of benefits by an insurer may bring an action in the superior court of this state to recover the actual damages sustained, together with the costs of the action, including reasonable attorneys' fees and litigation costs, as set forth in subsection (3) of this section.

RCW 48.30.015 (emphasis added).

In the case at hand, Ainsworth cannot demonstrate an unreasonable denial. The facts of this matter do not present a coverage dispute that triggers a right to assert an IFCA claim. Rather, the dispute is a valuation dispute on a covered claim. Progressive paid fully in accordance with a reasonable interpretation of the policy. Accordingly, there has been no "denial of a valid claim." Dismissal with prejudice is warranted here.

**D. The Trial Court Erred in Doubling Ainsworth's Award Without Proof that Termination of Benefits Caused Him Actual Damages.**

The order granting Ainsworth's Motion for Partial Summary Judgment contained several improper findings of fact. The order granted

partial summary judgment for unpaid “income continuation benefits” in the amount of \$5,458.18. CP 437. The Order then doubled this “amount of actual damages” under IFCA to \$10,916.36. CP 438.

IFCA, as discussed above, allows for the increase of actual damages when an insurer is found to have unreasonably denied a claim. RCW 48.30.015. Here, the Trial Court doubled Ainsworth’s **contractual** damages under IFCA, an **extra-contractual** theory of law.

The Washington Courts have not addressed the “actual damages sustained” provision of IFCA. It is established law that for bad faith and CPA claims, damages must be proximately caused by the breach of contract, separate and apart from the contractual obligations at issue. There is no such definite standard for IFCA claims in case law, forcing the Superior Courts to execute rulings without clear guidelines, and resulting in inconsistent and illogical conclusions. Given the recent proliferation of extra-contractual claims, it is of paramount importance that clear guidelines be established.

IFCA is an extra-contractual claim often asserted alongside allegations of bad faith and CPA violations. Case law regarding these other claims clearly indicates that that a plaintiff is required to show actual damages that result as a consequence of the breach of contract. This standard is settled law for both bad faith and Consumer Protection Act

claims, and it would be logical to apply this standard to IFCA claims as well.

While the Court has yet to rule directly on this issue, it is clear from the holdings on other extra-contractual causes of action that contractual obligations do not constitute actual damages.

***1. Bad Faith Damages***

The Washington State Supreme Court has set forth the bad faith standard as follows:

Claims by insureds against their insurers for bad faith are analyzed applying the same principles as any other tort: duty, breach of that duty, and damages **proximately caused by any breach of duty.**

*Smith v. SAFECO Ins. CO.*, 150 Wn.2d 478, 485, 78 P.3d 1274 (2003); *see also American States Ins. Co. v. Symes of Silverdale, Inc.*, 150 Wn.2d 462, 78 P.3d 1266 (2003).

The distinction between breach of contract and extra-contractual damages is further outlined in the case of first-party bad faith claims in *Coventry Associates v. American States Insurance Company*. The Washington State Supreme Court held:

[U]nlike third-party reservation of rights cases, the loss in the first-party situation has been incurred before the insurance company is aware a claim exists. **Furthermore, an insurer is not liable for the policy benefits but, instead, liable for the consequential damages to the insured as a result of the insurer's breach of its contractual and statutory obligations.**

*Coventry Associates v. American States Insurance Company*, 136 Wn.2d 269, 284, 961 P.2d 933 (1998)(emphasis added).

Clearly, in order to recover bad faith damages, the plaintiff must prove loss that was caused by the breach of contract, and not merely the loss of policy benefits. This is logical. If damages sought are extra-contractual in nature, than they are necessarily related to damages above and beyond the contractual obligation.

## 2. ***CPA Damages***

A plaintiff must show the following to prevail on a Consumer Protection Act (CPA) claim:

1. An unfair or deceptive act or practice;
2. Occurring in trade or commerce;
3. That impacts the public interest;
4. Injury to his business or property and
5. That the injury was proximately caused by the unfair or deceptive act.

*Hangman Ridge Training Stables v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 784-785, 719 P.2d 531 (1986).

The Washington State Supreme Court has further elaborated on the injury requirement of a CPA claim as follows:

The Injury element will be met if the consumer's property interest or money **is diminished** because of the unlawful conduct . . . .”

*Mason v. Mortgage Am.*, 114 Wn.2d 842, 854, 792 P.2d 142 (1990)

Again, it is clear that that the actual damages necessary under an CPA claim must be above and beyond any contractual benefits. As the *Mason* Court noted, the injured party's interest must be diminished because of the unlawful conduct.

Ainsworth did not allege any diminishing of his interest in the income continuation benefits he claims he is entitled to after returning to work full-time. Neither did he allege any injury, monetary or not, suffered because of the termination of benefits.

***3. It Was Improper to Double the Contractual Benefits Based on an Extra-Contractual Theory of Law Without Proof of Actual Damages.***

There is no case law that holds a Court may increase contractual benefits under an extra-contractual theory, when the plaintiff suffered no harm proximately caused by the breach of contract

Ainsworth failed to prove that he suffered any actual damages proximately caused by Progressive's decision to discontinue income continuation benefits. The amount of the award, \$5,458.18, simply reflects the alleged contractual obligation under the policy of insurance. It was improper for the Trial Court to double Ainsworth's contractual benefits under IFCA when he failed to establish any actual damages.

However, were the Trial Court's ruling to stand, Ainsworth would be allowed to receive extra-contractual damages without a scintilla of

proof that he suffered any extra-contractual injury. This is a harmful precedent, counter to the weight of Washington law.

Once again, Progressive urges this Court to resolve this matter and provide a clear standard for the superior courts in this State to follow. It is Progressive's contention that it is inequitable to allow the doubling of damages under an extra-contractual claim when the damages are contractual in nature. The penalty for IFCA violations, like with bad faith or CPA claims, should only apply to the harm caused above and beyond the denial of benefits. Such a standard would be logical, and congruent with existing standards in the State of Washington.

**E. The Trial Court Erred in Awarding Attorney Fees to Ainsworth**

The award of attorney's fees to Ainsworth as the prevailing party fails to follow established Washington law regarding claims that do not involve a coverage dispute or an unreasonable denial of benefits.

***1. There Has Been No Denial of Coverage Therefore Olympic Steamship Fees are Improper***

The Washington State Supreme Court has long recognized the difference between a dispute as to coverage and a genuine dispute as to the amount of benefits an insured is entitled to receive on a covered claim. The Court has held that when a "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 Group*, 124 Wn. 2d 277, 876 P.2d 896 (1994). *See also Gassed v. Farmers Ins. Co.*, 133 Wn. 2d 954, 948 P.2d 1264 (1997); *McCreary v. Northern Ins. Co.*, 138 Wn. 2d 550, 980 P.2d 736 (1999); *Farmers Ins. Co. v. Lautenbach*, 93 Wn. App. 671, 963 P.2d 965 (1998).

The *Olympic Steamship* case set forth a rule of law which allowed an insured to recover for their attorney’s fees if the insured was successful in establishing an improper **denial of coverage**. In subsequent cases which construed the *Olympic Steamship* decision, the Washington Supreme Court made it clear the *Olympic Steamship* rule did not apply to all insurance disputes. The Supreme Court expressly found that the *Olympic Steamship* doctrine did not apply to situations where the dispute between an insurer and insured involved an honest dispute as to the **amount of the loss**. *Dayton v. Farmers Insurance*, 124 Wn.2d 277, 876 P.2d 896 (1994). The *Dayton* court expressly stated as follows:

Washington follows the American rule in awarding attorney fees. Under that rule, a court has no power to award attorney fees as a cost of litigation in the absence of contract, statute, or recognized ground of equity providing for fee recovery. We have recognized a narrow exception to this rule where the specific facts and circumstances warrant. *Olympic Steamship* presented such a situation. This case presents an entirely different set of circumstances. Coverage is not an issue; Farmers accepted coverage. Unlike the insured in *Olympic Steamship*, Mr. Dayton has not compelled Farmers to honor its

commitment to provide coverage. Instead, this 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*, at 280.

The facts in this matter are clear. Progressive accepted coverage and paid until such time as Ainsworth's treating physician released him back to work full-time. The dispute does not relate back to the original submission of coverage but instead is related to the value of the claim, specifically, whether Ainsworth is entitled to additional benefits after being released to work by his medical provider. The present case does not fit within the narrow exception imagined by the Court in *Olympic Steamship*. Accordingly, this Court should reverse the award of *Olympic Steamship* attorney's fee to Ainsworth.

**2. *An Award of Attorney's Fees Under RCW 48.30.015(2) Is Improper***

The order granting Ainsworth's Motion for Summary Judgment stated as follows: "The Plaintiff, as the prevailing party, is entitled to a reasonable attorney's fee under RCW 48.30.015(2) and *Olympic S.S. Co. V. Centennial Ins. Co.*" CP 438. The statute cited by the order, IFCA, provides as follows:

The superior court may, after finding that an insurer has acted unreasonably in denying a claim for coverage or payment of benefits or has violated a rule in subsection (5)

of this section, increase the total award of damages to an amount not to exceed three times the actual damages.

The Superior Court's order is vague and ambiguous as to what specific authority is relied upon in granting attorney's fees. What is clear is that the order refers directly to the provision trebling damage under IFCA and not an award of attorney's fees. The order continues by referring to *Olympic Steamship* which provides for an equitable judgment of attorney's fees. (*see above*) Neither of these citations to law are appropriate for an award of attorney's fees under IFCA.

**3. *There Has Been No Unreasonable Denial or Payment of Benefits Therefore Fees Awarded Under RCW 48.30.015 Is Improper***

Regardless of the Superior Court's intent in its order awarding attorney's fees, any award of fees under IFCA is improper. In order to be awarded fees under IFCA the statute provides as follows:

The superior court shall, after a finding of ***unreasonable denial*** of a claim for coverage or payment of benefits, or after a finding of a violation of a rule in subsection (5) of this section, award reasonable attorneys' fees

RCW 48.30.015(3)(***emphasis added***)

As explicitly stated above, Progressive has not unreasonably denied coverage nor payment of any benefits to which he was entitled pursuant to the terms and conditions of the policy.

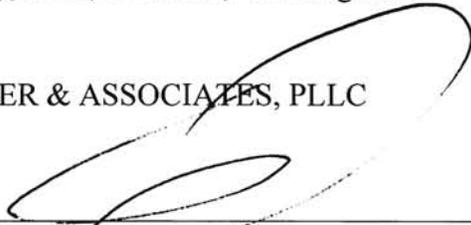
Here, Ainsworth has failed to prove that there has been an unreasonable denial or delay of benefits in this matter. Furthermore, Ainsworth has failed to demonstrate any damage or actual harm as a result of Progressive's conduct. As a result, Ainsworth has failed to prove his claims under IFCA and is therefore not entitled to an award of attorney's fees.

#### V. CONCLUSION

Based on the foregoing, Progressive asks that this Court reverse the rulings of the Superior Court as they pertain to Ainsworth's Partial Motion for Summary Judgment.

Dated this 1<sup>st</sup> day of February, 2013, at Seattle, Washington.

LEATHER & ASSOCIATES, PLLC



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Thomas Lether, WSBA #18089  
Eric J. Neal, WSBA #31863  
Brent Williams-Ruth, WSBA #32437  
Attorneys for Appellant

**CERTIFICATE OF SERVICE**

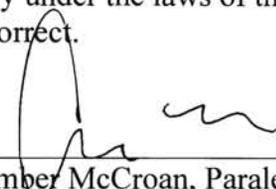
The undersigned hereby certifies under the penalty of perjury under the laws of the State of Washington that on this date I caused to be served in the manner noted below a true and correct copy of the foregoing on the party mentioned below as indicated:

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

By:     **First Class Mail**         **Hand Delivery**         **E-mail**

Executed on this 1<sup>st</sup> day of February, 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

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