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**IN THE SUPREME COURT OF THE
STATE OF WASHINGTON**

CERTIFICATION FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

IN RE:

ENZO MORELLA

Appellant,

v.

SAFECO INSURANCE COMPANY OF ILLINOIS,

Respondent.

**AMICUS CURIAE BRIEF OF
WASHINGTON DEFENSE TRIAL LAWYERS**

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I. INTRODUCTION

Washington Defense Trial Lawyers (WDTL) is a statewide association of civil defense attorneys. In insurance disputes, WDTL members at times represent insureds and at other times represent insurers. WDTL submits this *amicus curiae* brief to supplement the parties' briefing and provide a broader perspective to this Court on the following certified question:

How are "actual damages" calculated or defined under the Insurance Fair Conduct Act (RCW 48.30.015) where, as in this case, the insured obtained a \$62,000 arbitration award in his favor prior to initiating the IFCA action in State Court?

WDTL urges this Court to confirm, consistent with statutory language and well-established Washington common law, that "actual damages" under IFCA do not include (1) the amount of the underlying claim itself, or (2) emotional distress.¹

II. IDENTITY AND INTEREST OF AMICUS CURIAE

WDTL, established in 1962, includes more than 750 Washington attorneys principally engaged in civil defense litigation and trial work. The purpose of WDTL is to promote the highest professional and ethical standards for Washington civil defense attorneys and to serve its members

¹ WDTL takes no position on other issues addressed in the underlying case, as those issues fall outside the scope of this Court's jurisdiction in answering the certified question.

through education, recognition, collegiality, professional development and advocacy. One important way in which WDTL represents its members is through *amicus curiae* submissions in cases that present issues of statewide concern to Washington civil defense attorneys and their clients.

III. STATEMENT OF THE CASE²

Enzo Morella was injured when the truck in which he was riding was struck from behind by an uninsured motorist. Safeco Insurance Company of Illinois had issued a policy of insurance to the driver of the truck, and Morella was covered as an “insured” under that policy. Safeco offered \$1,500 in full settlement of Morella’s claim, later increasing the offer to \$45,000. Morella rejected Safeco’s settlement offers and demanded arbitration under the terms of the insurance policy. The arbitrator issued his decision, awarding \$62,000 in general damages.

After Safeco paid the arbitration award, Morella filed a lawsuit against Safeco, alleging (among other things) violations of the Washington Insurance Fair Conduct Act (“IFCA”). The District Court certified the following issue to this Court:

How are “actual damages” calculated or defined under the Insurance Fair Conduct Act (RCW 48.30.015) where, as in

² This summary of the facts is based upon the facts set forth in the District Court’s order granting partial summary judgment and certifying the damages question to this Court. *Morella v. Safeco Ins. Co. of Illinois*, W.D. Wash. No. 2:12-cv-00672 (RSL), docket #33, at 16-17.

this case, the insured obtained a \$62,000 arbitration award in his favor prior to initiating the IFCA action in State Court?

IV. ARGUMENT

A. Brief History and Context of IFCA.

This case presents this Court with its first opportunity to address Washington's Insurance Fair Conduct Act (IFCA), a statutory cause of action to recover "the actual damages sustained" along with "reasonable attorneys' fees and litigation costs" if an insurance claim is "unreasonably denied" by an insurer. RCW 48.30.015(1). IFCA also gives trial courts the discretion to award up to "three times the actual damages" with no cap. RCW 48.30.015(2). As Washington courts generally follow the American rule under which the prevailing party does not recover attorney fees³ and have consistently disapproved of punitive damages as contrary to public policy,⁴ IFCA has been both controversial and powerful.

³ Washington follows the American rule, under which attorney fees and expenses are not recoverable absent specific statutory authority, contractual provision, or recognized grounds in equity. *Wagner v. Foote*, 128 Wn.2d 408, 416, 908 P.2d 884 (1996).

⁴ "Since its earliest decisions, th[e Washington Supreme] court has consistently disapproved punitive damages as contrary to public policy. Punitive damages not only impose on the defendant a penalty generally reserved for criminal sanctions, but also award the plaintiff with a windfall beyond full compensation." *Dailey v. N. Coast Life Ins. Co.*, 129 Wn.2d 572, 572, 575, 919 P.2d 589 (1996) (citing *Spokane Truck & Dray Co. v. Hoefler*, 2 Wash. 45, 50-56, 25 P. 1072 (1891)).

IFCA was passed by the Legislature as Engrossed Substitute Senate Bill (ESSB) 5726 and signed by Governor Christine Gregoire in May 2007. *See* 2007 Wash. Laws 498. Thereafter, following a voter petition, IFCA appeared as Referendum Measure Number 67 (R-67) on the November 6, 2007 statewide general election ballot. After a contentious campaign, Washington voters narrowly approved the measure and IFCA became law on December 6, 2007. RCW 48.30.015.

The IFCA statute states, in relevant part, as follows:

(1) Any first party claimant to a policy of insurance who is 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.

(2) 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.

(3) 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 and actual and statutory litigation costs, including expert witness fees, to the first party claimant of an insurance contract who is the prevailing party in such an action.

RCW 48.30.015(1)-(3).

As the IFCA statute contains language that is plain and subject to only one reasonable interpretation, this Court need not utilize tools of statutory construction to determine IFCA's meaning.⁵ See *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 20 (2007). Instead, this Court looks to the common law for definitions of terms of art such as "actual damages" that are not specifically defined within a statute. *State v. Engel*, 166 Wn.2d 572, 578-79, 210 P.3d 1007 (2009); *City of Spokane v. Wash. State Dep't of Revenue*, 145 Wn.2d 445, 452, 38 P.3d 1010 (2002). Any additional remedy beyond the common law must be stated with clarity in the statutory language. See *Potter v. Wash. State Patrol*, 165 Wn.2d 67, 77, 196 P.3d 691 (2008).

As the IFCA statutory language does not clearly identify as a remedy or penalty either the underlying amount of the claim or emotional distress, this Court's determination of whether "actual damages" includes these components depends upon the application of established common law principles set forth below.

⁵ To the extent this Court determines that statutory interpretation is required, IFCA's provisions must be strictly construed, as it is a penal (not a remedial) statute. See RCW 48.30.015(2)-(3) (prescribing penalties to include a mandatory award of "reasonable attorneys' fees and actual and statutory litigation costs, including expert witness fees" and discretionary damages up to "three times the actual damages"); see *Broughton Lumber Co. v. BNSF Ry. Co.*, 174 Wn.2d 619, 633, 278 P.3d 173 (2012); *Heitfeld v. Benevolent & Protective Order of Keglers*, 36 Wn.2d 685, 694, 220 P.2d 655 (1950).

B. “Actual Damages” Under IFCA Does Not Include the Underlying Amount of the Insurance Claim.

1. IFCA Does Not Identify the Underlying Claim Amount as a Measure of Damages.

Nowhere does IFCA suggest that the amount of the underlying insurance claim should be considered the measure of damages. Although a nexus could have been created between any covered benefit and the penalty imposed,⁶ the language passed by the Legislature and approved by the voters does not do so. Instead, IFCA directs the trial court to ascertain which damages were actually sustained as a result of the insurer’s IFCA violation.

2. “Actual Damages” Means Compensatory Damages, if Any, Proximately Caused by the Statutory Violation.

This Court has confirmed that “actual damages” is synonymous with “compensatory damages,” which is, in turn, distinct from “nominal, exemplary or punitive damages.” *Martini v. Boeing Co.*, 137 Wn.2d 357, 368, 971 P.2d 45 (1999). “Actual damages” recoveries are, of course, limited by the well-established doctrine of “proximate cause.” *Id.* at 371; *Blaney v. Int’l Ass’n of Machinists and Aerospace Workers Dist. No. 1*, 151 Wn.2d 203, 216, 87 P.3d 757 (2004).

⁶ Compare RCW 48.30.015 (IFCA) (“first party claimant ... may bring an action ... to recover the actual damages sustained”) with Colo. Rev. Stat. § 10-3-1116(1) (“first-party claimant ... may bring an action ... to recover ... two times the covered benefit”).

Proximate cause includes two elements: cause-in-fact and legal causation. *Hertog v. City of Seattle*, 138 Wn.2d 265, 282-83, 979 P.2d 400 (1999). “Cause-in-fact concerns ‘but for’ causation, events the act produced in a direct unbroken sequence which would not have resulted had the act not occurred.” *Id.* “The focus in the legal causation analysis is whether, as a matter of policy, the connection between the ultimate result and the act of the defendant is too remote or insubstantial to impose liability. A determination of legal liability will depend upon ‘mixed considerations of logic, common sense, justice, policy, and precedent.’” *Schooley v. Pinch’s Deli Market, Inc.*, 134 Wn.2d 468, 478, 951 P.2d 749 (1998) (citations and internal alterations omitted).

This Court has interpreted the “actual damages” provision of Washington’s Law Against Discrimination (WLAD) (RCW 49.60), to include only those damages “resulting directly” from the statutorily prohibited act. *Martini*, 137 Wn.2d at 371; 377 (“[T]he doctrine of proximate cause operates to prevent an employee from claiming back pay where the termination of employment was not caused by the wrongful act.”). Likewise, in calculating the “actual damages sustained” under the Consumer Protection Act (CPA), RCW 19.86, this Court has confirmed that a “causal link is required between [the statutory violation] and the

injury.” *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 793, 719 P.2d 531 (1986).

Even in cases involving insurer bad faith, this Court has reiterated that recovery includes only damages the insured can prove were proximately caused by the insurer’s conduct. Addressing another certified question in *St. Paul Fire & Marine Ins. Co. v. Onvia, Inc.*, 165 Wn.2d 122, 134, 196 P.3d 664 (2008), this Court declined to presume that an insured suffered harm as a result of an insurer’s delayed response to a claim. Instead, this Court unanimously concluded that insureds are only permitted to recover actual damages, if any, that were proximately caused by the insurer’s conduct. *Id.*; *see also Coventry Assoc. v. Am. States Ins. Co.*, 136 Wn.2d 269, 284, 961 P.2d 933 (1998) (holding in a first-party case that 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”).

3. The Amount of the Claim (Which Depends Upon the Torfeasor’s Conduct) is Never Caused by the IFCA Violation.

The basis of any IFCA violation is an insurer’s unreasonable conduct. A determination of actual damages proximately caused by that conduct is separate and distinct from the claim amount, which is calculated based upon the injuries and damages resulting from the

tortfeasor's conduct in the underlying claim. The injuries and damages sustained in Morella's car accident were the general damages reflected in the arbitrator's award. As those general damages would have been the same if there had been no IFCA violation, the underlying claim amount is too remote to use as the measure of IFCA damages. *See Hertog*, 138 Wn.2d at 282-83 (discussing cause-in-fact); *Schooley*, 134 Wn.2d at 478 (discussing legal causation). As the insurer's action (or inaction) has no impact whatsoever on the underlying claim amount, there is no causal link between the amount of the claim and the insurer's conduct sufficient to satisfy the doctrine of proximate cause.

Therefore, the underlying claim amount is not an appropriate measure of IFCA damages under any circumstances. Indeed, the notion that insureds with large underlying claims could recover exponentially more than insureds with smaller claims, even where there is similar unreasonable conduct by the insurer, further illustrates why the underlying claim amount is not the appropriate measure of actual damages sustained. Addressing the specific facts presented (a claim that was indisputably paid in full following arbitration before the IFCA violation was alleged), this Court should confirm that the underlying claim cannot be the measure of any actual damages sustained by Morella.

C. **“Actual Damages” under IFCA Does Not Include Damages for Emotional Distress.**

The availability of emotional distress damages following a statutory violation depends on the language of the particular statute at issue. *White River Estates v. Hiltbruner*, 134 Wn.2d 761, 765, 953 P.2d 796 (1998); *see Potter*, 165 Wn.2d at 77 (confirming that any additional remedy beyond the common law must be stated with clarity in the statutory language). Where the statute is silent regarding the availability of emotional distress damages, such damages may be a remedy for a statutory violation only if the violation sounds in intentional tort. *White River Estates*, 134 Wn.2d at 766. The inquiry is not whether the defendant’s wrongful conduct amounted to an intentional tort, rather whether the statute requires wrongful conduct that amounts to an intentional tort. *Id.* at 768-69.

IFCA does not explicitly address whether emotional distress damages may be recovered as part of the “actual damages sustained” from a violation of the statute. Instead, like the Mobile Home Landlord Tenant Act, which was at issue in *White River Estates*, IFCA is silent regarding whether emotional distress damages are available. *Compare White River Estates*, 134 Wn.2d at 765 (MHLTA neither authorizes nor prohibits damages for emotional distress) *with* RCW 48.30.015 (claimant may

“recover the actual damages sustained”). The IFCA statute is also similar to the MHLTA as discussed in *White River Estates*, insofar as both statutes impose liability for “unreasonable” conduct. Compare RCW 59.20.073 (requiring proof that only the landlord acted “unreasonably” when denying consent to tenant’s assignment) with RCW 48.30.015 (imposing liability for the “unreasonable” denial of a claim for coverage or payment of benefits). Because no “intentional” conduct is required to violate RCW 48.30.015, this statutory violation cannot be “akin” to an intentional tort. *White River Estates*, 134 Wn.2d at 768-69 (where Mobile Home Landlord Tenant Act imposed liability based on “unreasonable” conduct, statute imposed liability similar to negligence, not an intentional tort). Accordingly, under *White River Estates*, emotional distress damages are not available as a remedy for an IFCA violation.

V. CONCLUSION

The plain language of IFCA as passed by the Legislature and approved by the voters, coupled with settled Washington common law, compels the conclusion that “actual damages” under IFCA do not include (1) the amount of the underlying claim itself, or (2) emotional distress damages.

Insurers that violate IFCA are compelled to pay the insured's prevailing party attorney fees contrary to the American rule, and are subject to having any actual damages sustained as a result of the insurer's unreasonable conduct trebled with no cap, even though this Court has repeatedly observed that punitive damages are contrary to Washington's public policy. Accordingly, IFCA remains a powerful tool with significant remedies and penalties that augment pre-existing statutory and common law.

RESPECTFULLY SUBMITTED this 23rd day of September,
2013.

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DECLARATION OF SERVICE

Dava Z. Bowzer states:

I am a citizen of the United States of America and a resident of the State of Washington, I am over the age of 21 years, I am not a party to this action, and I am competent to be a witness herein.

On this 23rd day of September, 2013, I caused to be filed via electronic filing with the Supreme Court of the State of Washington the foregoing AMICUS CURIAE BRIEF OF WASHINGTON DEFENSE TRIAL LAWYERS. I also served copies of said document on the following parties as indicated below:

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