

No. 88706-3

SUPREME COURT
OF THE STATE OF WASHINGTON

CERTIFICATION FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON IN RE:

ENZO MORELLA, Plaintiff,

v.

SAFECO INSURANCE COMPANY OF ILLINOIS, Defendant.

RESPONDENT-DEFENDANT'S SUR-REPLY BRIEF
ADDRESSING NEW ARGUMENTS RAISED
IN APPELLANT'S REPLY

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 ORIGINAL

I. INTRODUCTION

Respondent-Defendant Safeco Insurance Company of Illinois (“Safeco”) submits this Sur-Reply Brief to address two incorrect arguments raised by Appellant-Plaintiff for the first time in his Reply Brief: (i) Plaintiff’s argument that the \$62,000 indisputably paid to and received by Plaintiff prior to any IFCA Notice and prior to the commencement of his IFCA action should be disregarded; and (ii) Plaintiff’s assertion that Safeco’s notice and cure arguments are not properly before the Court.

II. ARGUMENT

A. **Plaintiff’s Reply Argument that the Court Should Ignore the \$62,000 Already Paid to Plaintiff Should Be Rejected**

In his Opening Brief, Plaintiff argued that the \$62,000 paid to Plaintiff before he provided any IFCA notice and before he commenced this IFCA action should be treated as an offset to any damages awarded in this action. He argued affirmatively that this offset was needed to prevent “double recovery,” but that the \$62,000 payment should not be considered for purposes of calculating what Plaintiff may recover as actual damages under IFCA. Pl. Br. at 1, and 21-25. In response, Safeco established that Plaintiff cannot recover in this IFCA action what he had already been paid prior to the commencement of the action and, accordingly, he cannot “recover” the \$62,000 as “actual damages” under IFCA. In his Reply

Brief, Plaintiff raised a new argument that directly conflicts with his Opening Brief and acknowledgement therein that an insured is not entitled to “double recovery.” He argued that the \$62,000 should not be treated as an offset or considered for purposes of calculating recovery of actual damages. Rather, he argued that the \$62,000 -- paid five months before his IFCA Notice and over a year before his IFCA action -- should be disregarded completely. Plaintiff’s new argument is contrary to the IFCA statute, principles of statutory construction, and common sense.

First, Plaintiff’s argument should be rejected under the plain language of the statute. Payment to Plaintiff of benefits or interest or for a claim therefore prior to the commencement of an IFCA action negates any damage claim to the extent of the benefits or interest paid. Subsection (1) authorizes an insurer to “bring an action to recover actual damages.” RCW 48.30.015(1); Safeco Br. at 19. Simply put, a person cannot claim to have actual damages left to recover under subsection (1) where those alleged damages have been paid.¹ That interpretation of the statute is corroborated by the statute’s notice and cure provisions, which make clear that no IFCA recovery will lie where payment is made before the suit is

¹ The district court recognized this in its Certification Order. *See* Certification Order at 8 (“Safeco ... rightly points out that the \$62,000 had already been paid at the time this action was filed and cannot be re-awarded in this lawsuit. What, then, are the ‘actual damages’ that may be recovered in this IFCA action?”).

commenced. RCW 48.30.015(8); Safeco Br. at 20-21. That is the purpose of subsection (8), to give an opportunity to cure and avoid IFCA liability before the IFCA action is commenced. *Id.*; *see also Norgal P'ship v. Nat'l Sur. Corp.*, 2012 U.S. Dist. LEXIS 55256, at *11 (W.D. Wash. April 19, 2012) (“purpose of the notice provision” is “to allow the insurer to correct violations before suit is filed”) (cited and quoted in Safeco’s Br. at p. 20).

Second, Plaintiff’s new argument that the \$62,000 must be disregarded fails because IFCA is a penal statute that must be strictly construed. IFCA provides for treble damages. Under clear precedent from this Court, IFCA is, therefore, a penal statute that must be strictly construed. *See* Safeco Br. at 16-17 (citing cases). Plaintiff does not dispute that IFCA’s multiple damages provision “impose[s] a penalty.” Pl. Reply Br. at 1; *see also* Pl. Br. at 21 and 24 (referring to “penalty under the Act” and “penalty intended by voters”). Further, even under Plaintiff’s own cited authorities, strict construction requires that between two reasonable constructions, the Court must apply the narrower one more favorable to the person being sanctioned. *See Estate of Bunch v. McGraw Residential Ctr.*, 174 Wn.2d 425, 432-33 (2012) (strict construction requires that “where two interpretations are equally consistent with legislative intent, the court opts for the narrower interpretation of the statute”). This is also required by the rule of lenity. *See* Safeco Br. at 35;

In re Discipline of Haley, 156 Wn.2d 324, 347 (2006). Here, Plaintiff argued in his Opening Brief that the \$62,000 payment should be an offset against any recovery. Thus, even assuming that Plaintiff's two proffered constructions were both reasonable (and they are not), the Court would be required to apply the narrower construction that results in less sanctions.²

Third, Plaintiff's proposed construction of IFCA leads to absurd results. If an insurer that is sued under IFCA has not already paid a claimant any money, the claimant may be entitled to a maximum of three times actual damages. That is clear from the statute, which allows the claimant to file suit "to recover actual damages" (*see* subsection (1)) and then allows the court to "increase the total award of damages to an amount not to exceed three times the actual damages" (*see* subsection (3)). RCW 48.30.015. The words "increase the total award" make clear that it is the award of actual damages being increased potentially to three times, not actual damages first being awarded and then a separate additional penalty of three times those actual damages being piled on top. Under Plaintiff's

² For the reasons stated in Safeco's Brief, this issue is purely academic because the \$62,000 payment made to Plaintiff prior to his giving IFCA notice and filing this IFCA action negates his claimed IFCA damages. The construction advocated by Safeco most closely follows the statute's language and the legislative intent embodied therein and, therefore, should apply even ignoring principles of strict construction. Once strict construction is given effect, however, Plaintiff cannot credibly argue for his broad, remedial constructions that the insurer payments should be treated as an offset or disregarded.

argument, an insurer would be penalized for having paid any of the claimant's alleged damages prior to judgment. If the insurer paid the claimant's actual damages in advance of judgment, the insurer could under Plaintiff's theory be liable for another three times his actual damages (for a total of four times his actual damages). That is not the law, it is not supported by the language of the statute or legislative history, and Plaintiff does not identify any cases interpreting IFCA in this fashion. *See Broughton Lumber Company v. BNSF Railway Co.*, 174 Wn.2d 619, 635 (2012) ("we avoid interpretations 'that yield unlikely, absurd or strained consequences'").

Finally, Plaintiff's argument is based entirely on a decision by a Massachusetts court applying a Massachusetts statute that Safeco showed in its Response Brief was amended in 1989 and is now substantially different from IFCA. The Massachusetts Legislature (unlike the Washington Legislature that enacted IFCA) amended the Massachusetts statute to expressly define the "amount of actual damages to be multiplied by the court" where a claimant has recovered judgment on the underlying claim to be "the amount of the judgment on all claims arising out of the same and underlying transaction or occurrence regardless of the existence or nonexistence of insurance coverage available in payment of the claim." *R.W. Granger & Sons v. J & S Insulation, Inc.*, 754 N.E.2d 668, 680

(Mass. 2001). Thus, under the Massachusetts statute, where the claimant has obtained a judgment, there is no need for any calculation or determination of “actual damages,” they are set by statute. That is mandated by use of the word “shall” in the statute: “[the] amount of actual damages to be multiplied by the court shall be the amount of the judgment ...” The Massachusetts court’s finding was based on legislative intent embodied in the 1989 amendment. *Id.* at 680-82. That amendment was not made in Washington, and the amended language in the Massachusetts statute is not in IFCA.³

B. Plaintiff’s Claim that Safeco’s Notice and Cure Arguments Are Not Properly Before the Court Should be Rejected.

Safeco established in its Brief that the IFCA notice and cure provisions contained in subsection (8) support a finding that Plaintiff has no actual damages to recover under IFCA. In his Reply Brief, Plaintiff

³ Further, there was no judgment entered in this case and even Massachusetts courts reject the notion that an arbitration award constitutes a judgment for purposes of a multiple damage award under Massachusetts’ amended statute. Where no judgment has been entered, the claimant’s recovery under the Massachusetts statute is loss of use value. *See* Safeco Br. at 34, n. 18; *see also* *Martinez-Rivera v. Commerce Ins. Co.*, 2011 Mass Super. LEXIS 129 (2011) (“actual damages” where case against insurer settled after substantial litigation but before judgment were limited to “loss of use of money” measured by interest rate found appropriate by judge times the difference between the unreasonable amount insurer had previously offered and amount court found insurer should have offered; “this amount represents the actual damages sustained, i.e., the losses which were the foreseeable consequence of Commerce’s unfair conduct after it had sufficient information to offer a reasonable settlement”); *aff’d in part, vacated in part, and remanded*, 2013 Mass App. LEXIS 131 (Mass. App. Aug. 16, 2013) (“actual damages” under statute included “loss of use of money” plus reasonable “tort-related litigation expenses” if caused by the bad faith delay but excluding attorney’s fees).

argued for the first time that the notice and cure arguments are not properly before the Court.⁴ Plaintiff argued that the certified question “does not ask this Court to interpret or apply the notice and cure provisions of the IFCA,” which he argues are “procedural preconditions to commencement of the IFCA action.” Reply at 2-3. Plaintiff further argued that “Safeco asserted the same argument that the notice and cure provisions bar Mr. Morella’s action to the District Court that it makes here, but did not raise these arguments in a timely fashion.” Reply at 3.

Plaintiff’s arguments fail to comprehend the distinction between the lack of notice defense that may be raised where a claimant fails to give notice before filing suit and the separate issue of how the intent embodied in the notice and cure provisions affects construction of the phrase “to recover actual damages.” The first is a procedure-based defense that arises where a claimant fails to give the requisite IFCA Notice before filing suit. The second relates to how the phrase “to recover actual

⁴ Plaintiff was aware from a motion for continuance that was filed in this Court at the outset of the certification proceedings that IFCA’s notice and cure provisions would be central to this appeal. *See* Motion to Extend Time to Submit Briefs Re: Certified Issue at p. 4 (“Safeco will not seek by this Motion to argue the merits of the certified question. Suffice it to say: Since Plaintiff’s damages were paid in full prior to giving any IFCA notice or filing his IFCA claims, he has no IFCA damages.”). Yet Plaintiff strategically chose to completely ignore this dispositive issue in his Opening Brief and address it for the first time on reply. Safeco addressed in its Response Brief most of the arguments Plaintiff raised in Reply, and Plaintiff’s Reply failed to respond and refute many of Safeco’s arguments. Safeco will not seek to re-state all of those arguments here, only address Plaintiff’s argument that the notice and cure provisions should not be considered.

damages” should be construed to give effect to legislative intent and the statute as a whole. The defense of failure to give notice before commencing the action is not at issue on this appeal, but the meaning of the IFCA statute is.

The district court certified the question of what “actual damages” may be recovered where the claimant is paid prior to bringing suit. In certifying that issue, the district court also acknowledged: “Safeco ... rightly points out that the \$62,000 had already been paid at the time this action was filed and cannot be re-awarded in this lawsuit. What, then, are the ‘actual damages’ that may be recovered in this IFCA action.”

Certified Order at 8. That certified question directly implicates the notice and cure provisions for purposes of statutory construction. As Plaintiff affirmatively argued in his Opening Brief, “A court must, when possible ‘give effect to every word, clause and sentence of a statute.’” Pl. Br. at 15 (citing cases). As Safeco likewise established in its Brief, the “plain meaning” of a statute is “discerned from all that the Legislature has said in a statute.” Safeco Br. at 22.

Further, a statute should not be interpreted in a way that renders any portion meaningless or superfluous. *Id.* at 23 (citing cases). The purpose of subsection (8) is to enable an insurer to avoid treble damages by payment of what is reasonably due to the insured before suit is

commenced. That purpose is defeated if a Plaintiff is allowed to recover under IFCA that which he was paid prior to commencing his IFCA action.

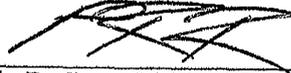
Safeco is not asking this Court to dismiss Plaintiff's claim on the basis that Plaintiff did not give notice more than 20-days prior to filing suit. Rather, Safeco asks that the statute be read as a whole, that the determination of what "actual damages" may be recovered be made with an appreciation and understanding of the intent underlying the entire statute, including the notice and cure provisions, and that these provisions not be rendered superfluous. Those provisions allow an insurer to cure by paying the insurer what he is owed prior to the commencement of the action. As the District Court found, that is precisely what happened here - - Plaintiff was paid prior to the commencement of the action and that payment "cannot be re-awarded in this lawsuit." *See* Certification Order at 8. Plaintiff now wants a total windfall to which he is not entitled.

III. CONCLUSION

For the reasons stated in Safeco's Brief and above, the Court should find that Plaintiff's recovery of \$62,000 prior to any IFCA Notice or commencing his IFCA action negates his claim to recover any actual damages under IFCA.

RESPECTFULLY SUBMITTED this 27th day of August, 2013.

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A handwritten signature in black ink, appearing to be "K.P. Corr", written over a horizontal line.

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