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No. 69433-2-1

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

TYLER AINSWORTH,

Plaintiff/Respondent

v.

PROGRESSIVE CASUALTY INSURANCE COMPANY, a foreign insurance
corporation,

Defendant/Appellant

Appeal from the Superior Court for King County
The Honorable Michael J. Trickey

BRIEF OF RESPONDENT TYLER AINSWORTH

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2019 MAR 18 PM 3:58
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I. INTRODUCTION

Plaintiff/respondent Tyler Ainsworth (hereafter "Ainsworth") suffered injuries and other damages, including lost wages, when his car was rear-ended by an 18-wheeler on Interstate 5. After Ainsworth's automobile insurance carrier, defendant/appellant Progressive Casualty Insurance Company (hereafter "Progressive") refused to pay Ainsworth's \$736.12 claim for income continuation benefits pursuant to the terms of his insurance policy, Ainsworth filed suit against Progressive. This appeal, initiated by Progressive, arises from the trial court's order granting summary judgment in Ainsworth's favor.

The uncontested evidence presented to this Court establishes that Ainsworth is entitled to unpaid insurance benefits in the amount of \$5,458.18, punitive damages pursuant to Washington's Insurance Fair Conduct Act (IFCA), and costs, including reasonable attorney fees, pursuant to *Olympic S.S. Co. v. Centennial Ins. Co.*, 117 Wn.2d 37, 811 P.2d 673 (1991) and IFCA. Progressive's appeal is completely without merit and attempts to raise a substantive issue for the first time on appeal. Ainsworth requests that this Court uphold the decision of the trial court, award

attorney fees to Ainsworth pursuant to RAP 18.1, and remand the matter to the trial court.

II. COUNTER-STATEMENT OF ISSUES

1. Whether the trial court properly granted summary judgment in favor of Ainsworth?
2. Whether Ainsworth is awarded attorney fees and costs on appeal pursuant to RAP 18.1?

III. STATEMENT OF THE CASE

A. Ainsworth's Losses, Progressive's Denial of Ainsworth's Claim, and the Ensuing Lawsuit

On July 14, 2010, Ainsworth was injured and suffered other damages when his car was rear-ended on Interstate 5 by a tractor-trailer. CP 799-800.¹ At the time of the collision, Ainsworth was insured by Progressive. CP 800. Ainsworth promptly submitted a written application for personal injury protection ("PIP") benefits to Progressive in which he described his injuries and identified his two employers – Contour, Inc. (f/k/a Twenty20, Inc.) and Pagliacci Pizza. CP 654. Ainsworth's job duties at Contour, Inc. included

¹ Progressive neglected to identify any of Ainsworth's evidence supporting the trial court's order granting summary judgment in its Designation of Clerk's Papers. Progressive's failure to provide the Court with a record sufficiently complete to permit a decision on the merits is sanctionable pursuant to RAP 9.10. Notwithstanding, Ainsworth designated additional documents to complete the record and this supplemental brief contains citations to the record.

moving stock, shipping and receiving items, and diagnosing and repairing broken cameras. CP 800. Ainsworth's job duties for Pagliacci Pizza included washing dishes, moving bulk cardboard, making boxes, restocking items, cleaning, laundry, carrying many pizzas and drinks at one time, and delivering many pizzas and drinks. CP 801. Both of Ainsworth's jobs required frequently lifting items weighing more than 25 pounds. CP 800-01.

Progressive assigned Michelle Becerra to handle Ainsworth's PIP claim. CP 657. Unbeknownst to Ainsworth, Ms. Becerra requested salary verification from both Contour, Inc. and Pagliacci Pizza. CP 659-64. On July 28, Contour, Inc. responded indicating that Ainsworth had not worked since the collision and that Ainsworth's annual salary was \$28,000. CP 666-67. On August 13, Pagliacci Pizza responded to Ms. Becerra indicating that Ainsworth still had not returned to work. CP 669-71. Progressive began paying Ainsworth for his wage loss from Contour, Inc. CP 673. However, Progressive did not make any payment to Ainsworth for lost wages from his Pagliacci Pizza job. *Id.*

Also unbeknownst to Ainsworth, Ms. Becerra began communicating with Ainsworth's primary care physician, Christopher Smith, M.D. On August 11, 2010, Dr. Smith informed

Ms. Becerra that Ainsworth was unable to work. CP 675. A letter to Ms. Becerra from Dr. Smith dated September 15, 2010 indicates that Ainsworth was able to resume working part-time. CP 677. Starting October 15, 2010, Dr. Smith indicated that Ainsworth could resume working full time, but with restrictions on his lifting and instructions to take 10 minutes of rest per hour worked. CP 679. Ms. Becerra noted Ainsworth's restrictions in the claim file. CP 737. However, Ainsworth continued to miss time from his Contour, Inc. job to attend appointments with his health care providers for his collision-related injuries. CP 800. Ainsworth was able to stop missing time from work once Contour, Inc. allowed him to make up his missed time during off hours. CP 72. Ms. Becerra never followed up with Dr. Smith and, to this day, Dr. Smith has not cleared Ainsworth to resume working without restrictions. CP 778.

On December 7, 2010, Ainsworth submitted a written demand for additional lost wages and attached pay stubs from his job at Contour, Inc. showing that he missed time from work. CP 681-84. A handwritten notation on the facsimile cover sheet produced by Progressive reads "Awaiting dis(ability) note." CP 681. On December 13, 2010, instead of sending a request for information to Dr. Smith, Ms. Becerra sent a letter to physiatrist

Richard Seroussi, M.D. requesting information concerning Ainsworth's ability to work. CP 686-87. Again, Ainsworth was not informed of this communication and was not copied on the letter. Notwithstanding, without waiting to receive a response from Dr. Seroussi, Ms. Becerra denied Ainsworth's claim in a facsimile dated December 22, 2010. CP 689-91. Ainsworth responded on the same day with a request for an explanation as to how Ainsworth was able to perform the duties of his occupation and offered to provide a note from his physician. CP 693. On a copy of the December 22 letter produced by Progressive is a handwritten note which reads "nothing showing can not reas(onably) perform job." *Id.* However, there is no indication as to any of Ainsworth's job duties in the claim file. CP 714-45. There is no notation in Progressive's electronic claim file concerning this letter. *Id.*

In a letter dated December 29, 2010, Ms. Becerra responded stating that nothing showed that Ainsworth was unable to perform the duties of his usual occupation. CP 695-96. That this letter was ever drafted or sent is not reflected in Progressive's electronic claim file. CP 714-45.

Ainsworth made two more requests for an explanation from Ms. Becerra, but only received conclusory responses. CP 698-704.

There too is no notation within Progressive's electronic claim file regarding any of these letters. CP 714-45. On February 2, 2011, Ainsworth served a 20-day notice of violations of IFCA. CP 706-08. Receipt of the 20-day notice is, however, noted in Progressive's electronic claim file. CP 743.

On February 11, 2011, Ms. Becerra drafted a written response to Ainsworth's 20-day notice letter. CP 710-12. The letter, for the first time, informed Ainsworth of Ms. Becerra's communications with Ainsworth's health care providers. While the letter acknowledged the December 13 request for information to Dr. Seroussi, it notes no response. The letter concluded with a denial of Ainsworth's claim. On March 3, 2011, Ainsworth filed this lawsuit. CP 1-7.

In response to a request from Progressive for a written settlement demand, Ainsworth calculated that the PIP benefits owed to him were \$736.12 for his job at Contour, Inc. CP 189-90. 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. Receiving no response to his demand, Ainsworth served a second 20-day notice of IFCA violations for Progressive's failure to pay any benefits to Ainsworth for his lost income from his job at Pagliacci Pizza. CP 747-48. On October 3, 2011, Ainsworth supplemented his written settlement demand with his final calculation of benefits owed for wage loss from Pagliacci Pizza in the amount of \$4,722.06. CP 190-91. Again, Ainsworth received no response from Progressive so a third 20-day notice of IFCA violations was served. CP 180. On January 24, 2012, the trial court granted leave for Ainsworth to file an amended complaint to reflect the additional claims for unpaid PIP benefits from his job at Pagliacci Pizza. CP 28-29.

B. Discovery

Progressive deposed Ainsworth on November 22, 2011, almost one year after it denied Ainsworth's claim. When asked if he was able to perform the duties of his job at Contour, Inc., Ainsworth testified that he still could not:

Q: Your job description, as I understood you to say, was that you would have to lift a hundred pounds repeatedly, is that correct?

A: Yes.

Q: Okay. Is that what you're actually doing today?

A: I can't do that.

Q: Okay, you can't do that –

A: Right now.

Q: Okay. So, if you could do that, would you be repeatedly lifting a hundred pounds in your current job?

A: I would be lifting 25 to a hundred pounds, moving cases and various units.

Q: And I understand that you're not currently doing that; why?

A: I'm on weight restrictions from my doctor.

Q: Who has you on the weight restrictions?

A: Dr. Christopher Smith.

CP 756.

In the course of interrogating Ainsworth, the leading questions asked by counsel for Progressive also made it clear that Progressive possessed records showing that Ainsworth continued to suffer from a disability even after he returned to eight-hour days at Contour, Inc.:

Q: ***The records that I have show that you were released back to work with some restrictions as of October 15th, 2010.***

A: Okay.

Q: I'm not asking you to recall that specific date, but do you recall that you were released with some restrictions around October 2010?

CP 758-59 (emphasis added).

Q: I understand. Once you were released back to work even with some restrictions, was the only reason you were missing work following that time period related to going to doctors' appointments?

A: For which work?

Q: Well, let's focus on Contour for just a moment.

A: Yes.

Q: ***The doctor's note indicates that he released you as of October 15th, 2010, to return to work with some restrictions?***

A: For how many hours a day?

Q: The only restriction, according to this note, was that it was lifting no more than 50 pounds, rarely more than 25 pounds.

CP 759 (emphasis added).

Additionally, Mr. Ainsworth agreed with the leading questions asked by Progressive's counsel that pizza delivery is "medium" or "heavy" work and testified that he was unable to carry pizzas to his car. CP 757.

Following the collision, Ainsworth was unable to return to his job at Pagliacci Pizza until September 2010. CP 801. Even after Ainsworth was able to return to work, Pagliacci Pizza did not allow him to work his regular hours due to his disability so Ainsworth continued to miss additional time. *Id.* Progressive provides no

facts concerning the handling of Ainsworth's claims for lost wages from his Pagliacci Pizza job and there is no evidence to support Progressive's claim that Ainsworth "voluntarily" missed time from his job at Pagliacci Pizza.²

On February 15, 2012, Ainsworth received the following supplemental interrogatory answer from Progressive:

Interrogatory No. 7: Identify every act, fact and/or circumstance upon which you base a limitation, termination and/or denial of Ainsworth's Claim.

ANSWER:

Without waiver, once Ainsworth was no longer restricted in his ability to work, the income continuation benefits conferred under the policy ceased to exist...When Ainsworth was able to return to work **and all limitations were removed** the condition of the policy was no longer applicable.

CP 762 (emphasis added).

On April 22, 2012, Ainsworth provided Progressive with the Declaration of Christopher Smith, MD, FACP. CP 777-81. Almost two years after the collision, the same lifting restrictions Dr. Smith

² Progressive claims that the following deposition testimony of Ainsworth establishes his time loss was "voluntary":

Q. Did you ever discuss with him whether pizza delivery was considered a light duty job?

A. No, because it's not a light duty job.

Q. If you never discussed it with him, how do you know that?

A. Because I deliver pizzas for Pagliacci's.

The "him" is Christopher Smith, MD, FACP and his testimony is that his restrictions applied equally to both of Ainsworth's jobs.

informed Ms. Becerra about remained in effect. CP 778. Additionally, Dr. Smith testified that Ainsworth was unable to perform his job at the time he visited his health care providers for collision-related treatment. CP 778-79.

Through discovery, Progressive admits that Ainsworth incurred losses of income from work because of bodily injuries he sustained that were caused by an accident arising out of the ownership, operation, maintenance, or use of an automobile. CP 768. Progressive also admits that Ainsworth was engaged in two remunerative occupations at the time of the collision. *Id.*

C. Ainsworth's Motion for Summary Judgment

On May 25, 2012, Ainsworth filed and served his motion for partial summary judgment on the following issues:

1. That Ainsworth's claim for income continuation benefits falls within his insurance policy's insured losses and is not excluded;
2. That Ainsworth is entitled to income continuation benefits in the amount of \$5,458.18;
3. That Ainsworth is entitled to an award of reasonable attorney fees and costs;
4. That Ainsworth is entitled to an award of prejudgment interest;

5. That Progressive violated provisions of Washington's Insurance Fair Conduct Act and that, as a result, Ainsworth is entitled to an award of triple damages;

6. That all affirmative defenses of Progressive not based on language of the insurance policy are stricken.

CP 175-197. The motion was supported by a declaration submitted by Ainsworth, a declaration from Dr. Smith, and a declaration from counsel. CP 184. The same calculation of income continuation benefits owed Ainsworth previously provided to Progressive was provided to the trial court. CP 189-91.

Progressive also sought summary judgment dismissing all of Ainsworth's claims, but the hearing of that motion was continued due to Progressive's ongoing tactics to frustrate Ainsworth's discovery. CP 268-70. However, that order was not entered until the day Ainsworth's response to Progressive's summary judgment was due so Ainsworth still filed and served a response. CP 250-67.

Progressive served its response to Ainsworth's summary judgment motion on June 11, 2012. CP 271-293. Progressive argued that its denial of Ainsworth's claim was a correct interpretation of policy language, but also argued that the matter was not an issue of coverage so IFCA did not apply. Progressive's response outright dismissed the argument that Progressive carried

the burden of proof and failed to provide any substantive evidence of either Ainsworth's job duties or his ability to perform them. Progressive did not contest the amount of Ainsworth's claimed unpaid benefits. No argument about triple damages pursuant to IFCA or anything even discussing a damages multiplier was raised by Progressive. Progressive did argue Ainsworth was not entitled to an award of attorney fees.

Following oral arguments, the trial court found that Progressive failed to meet its burden of proof and granted summary judgment as to Ainsworth's uncontested income continuation benefits in full. The trial court found Progressive's actions unreasonable and in violation of IFCA. Ainsworth was awarded double damages and attorney fees pursuant to RCW 48.30.015(2) and *Olympic Steamship Co. v. Centennial Ins. Co.*, 117 Wn.2d 37, 811 P.2d 673 (1991).³ This order is the basis of Progressive's appeal.

The trial court then requested additional briefing to establish the amount of attorney fees to award as well as proposed findings

³ Ainsworth believes that the trial court's citation to RCW 48.30.015(2) as a basis for the award of attorney fees is a scrivener's error. On remand, the trial court can amend the order to reflect that RCW 48.30.015(3) is the proper basis for the award of attorney fees.

of fact and conclusions of law. After hearing from both sides, the trial court entered its findings and conclusions along with final judgment in favor of Ainsworth. CP 628-36. These are not appealed by Progressive.

IV. ARGUMENT

A. Standard of Review

The standard of review of an order of summary judgment is de novo, and the appellate court performs the same inquiry as the trial court. *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002).

Summary judgment is appropriate when there are no issues of material fact. CR 56(c). A material fact is one on which the outcome of the litigation depends. *Capitol Hill Methodist Church of Seattle v. Seattle*, 52 Wn.2d 359, 364, 324 P.2d 113 (1958). The burden of showing that there are no issues of material fact is on the moving party. *Jones*, 146 Wn.2d at 300. The admission of a party may constitute substantial evidence of any fact in issue. *Faust v. Albertson*, 166 Wn.2d 653, 662, 211 P.3d 400 (2009). Moreover, questions of insurance coverage are for the court to determine as a matter of law. *Detweiler v. J.C. Penney Cas. Ins. Co.*, 110 Wn.2d

99, 113, 751 P.2d 282 (1988). In the insurance coverage dispute at hand, no facts material to Ainsworth's motion are in dispute.

B. 2-Step Process for the Court to Determine Insurance Coverage

1. Washington Insurance Coverage Law

The interpretation of insurance policy language is a question of law. *Allstate Ins. Co. v. Bowen*, 121 Wn. App. 879, 884, 91 P.3d 897 (2004). The language of insurance policies is interpreted in accordance with the way it would be understood by the average person, rather than in a technical sense. *American Stars Ins. Co. v. Grice*, 121 Wn.2d 869, 874, 854 P.2d 622 (1993). The Washington Supreme Court has held:

Determining whether coverage exists is a 2-step process. The insured must show 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). As noted in Progressive's briefing, a reviewing court must examine the policy terms to determine whether or not there is coverage. *Kitsap County v. Allstate Ins. Co.*, 136 Wn.2d 567, 575, 964 P.2d 1173 (1998).

Courts will liberally construe inclusionary policy language in favor of insureds. *State Farm Mut. Auto Ins. Co. v. Ruiz*, 134 Wn.2d 713, 718, 952 P.2d 157 (1998). When an insured establishes a prima facie case giving rise to coverage under the insuring provisions of a policy, the burden is on the insurer to prove that a loss is not covered because of an exclusionary provision in the policy. *Grice*, at 875.

Limitations on coverage are set forth in exclusionary provisions of the policy, whose function is to restrict and shape the coverage otherwise afforded. *Diamaco, Inc. v. Aetna Cas. & Sur. Co.*, 97 Wn. App. 335, 337, 983 P.2d 707 (1999) rev. denied, 140 Wn.2d 1013 (2000). Exclusionary provisions do not grant coverage; rather they subtract from it. *Nation Union Fire Ins. Co. v. Northwest Youth Servs.*, 97 Wn. App. 226, 231, 983 P.2d 1144 (1999). Exclusionary provisions are narrowly construed by courts for the purpose of providing maximum coverage to the insured. *George v. Farmers Ins. Co. of Wash.*, 106 Wn. App. 430, 439, 23 P.3d 552 (2001). Because coverage exclusions are contrary to the fundamental protective purpose of insurance, they are strictly construed against the insurer and will not be extended beyond their clear and unequivocal meaning. *Diamaco*, at 337. Exclusionary

policy provisions may appear in any part of the policy. See generally, *Reliable Credit Ass'n, Inc. v. Progressive Direct Ins. Co.*, 171 Wn. App. 630, 287 P.3d 698 (2012).

2. Ainsworth's Claim Falls Within the Policy's Insured Losses

The insurance coverage provision at issue is as follows:

PART II – PERSONAL INJURY PROTECTION COVERAGE

INSURING AGREEMENT

Subject to the Limits of Liability, if **you** pay the premium for Personal Injury Protection Coverage, **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**:

2. **income continuation benefits** to or on behalf of each insured person engaged in a remunerative occupation at the time of the accident;

The words and phrases in bold are defined terms within the policy. "Income continuation benefits" are defined as payment of an insured person's loss of income from work. The terms "insured person" and "you" are defined as the person shown as a named insured on the declarations page.

It is admitted by Progressive that Ainsworth, the named insured, was employed in two remunerative occupations at the time of his collision-related injuries. Further, it is admitted that Ainsworth suffered a loss of income due to his collision-related injuries. 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. Accordingly, as a matter of law, the burden shifts to Progressive to establish any exclusions from coverage based on specific policy language.

3. Progressive Cannot Meet its Burden to Exclude Coverage

Progressive relies upon the following policy provision within the definition of "income continuation benefits" to deny Ainsworth's claim:

- 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;

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 otherwise afforded by the policy. Therefore, the policy provision cited by

Progressive is an exclusion on which it bears the burden of proof. On an issue on which it bears the burden of proof, a defendant must come forward with evidence to establish a factual issue in response to a summary judgment motion.

[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of element essential to that parties case, and on which that party will bear the burden of proof at trial. In such a situation, there can be “no genuine issue as to any material fact,” since a complete failure of proof concerning an essential element of the non-moving party’s necessarily renders all other facts immaterial. The moving party is “entitled to judgment as a matter of law” because the non-moving party has failed to make a sufficient showing on an essential element of [its] case with respect to which [it] has the burden of proof.

Celotex Corp. v. Catrett, 477 U.S. 317, 322-3, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 226, 770 P.2d 182 (1989), adopted the *Celotex* rule stating, “While *Celotex* is not binding upon us, Washington courts treat as persuasive authority federal decisions interpreting the federal counterparts of our own court rules.” The *Young* court noted that where the other party has the burden of proof:

The moving defendant may meet the initial burden by “‘showing’--that is, pointing out to the district court--that there is an absence of evidence to support the nonmoving party’s case.” *Celotex Corp. v. Catrett*, 477

U.S. 317, 325, 106 S.Ct. 2548, 2554, 91 L.Ed.2d 265 (1986).

Id. at n. 1.

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. Progressive fails to identify the duties of Ainsworth's jobs and provide competent testimony that he is reasonably able to perform those duties. Therefore, as a matter of law, Progressive cannot meet its burden. Ainsworth's claim for income continuation benefits is not excluded from coverage and Ainsworth is entitled to payment from Progressive for his losses.

4. The Undisputed Evidence Submitted by Ainsworth Establishes he is Unable to Perform the Duties of his Jobs

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. Ainsworth testified during his deposition about the physical requirements of his jobs and that he was unable to perform the physical duties of

his jobs. 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 of his jobs.

Moreover, 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. Similarly, the formulaic computation of benefits payable to Ainsworth was not disputed by Progressive.

No reasonable mind would disagree that Ainsworth is unable to perform the duties of his usual occupations. Thus, even if burden of proof is on Ainsworth, summary judgment in favor of Ainsworth is appropriate.

5. Progressive's Foreign Cases are Unpersuasive

Progressive's brief cites three out-of-state decisions without any showing that either the laws of the other states or the language of the insurance policies at issue are the same as our matter. Without such a showing the cases are not helpful and certainly not persuasive. Notwithstanding, the uncontroverted evidence shows that Ainsworth was unable to "carry out his job tasks" so the New Jersey court's decision in *Zoller v. Transamerica Ins. Co.*, 522 A.2d

479, 480 (1987) is actually helpful to Ainsworth. Further, the two cases based on administrative law cited by Progressive are not helpful since the issue at hand is clearly one of contract law.

Additionally, as Progressive's brief reminds the Court, the Court must enforce the policy as written and may not modify it. *American Nat'l Fire Ins. Co. v. B & L Trucking and Constr. Co.*, 134 Wn.2d 413, 428, 951 P.2d 250 (1998). However, Progressive's reliance on the two administrative law cases requires a blatant modification of the policy. To rely on the two administrative law cases Progressive must rewrite the policy by exchanging the word "work" for the policy phrase "perform the duties of his or her usual occupation." The Court cannot do that so Progressive's reliance on these two cases is misplaced.

Finally, Progressive makes assumptions of fact and grossly misconstrues facts. Without any evidence, Progressive's argument assumes that Ainsworth's employers were able to accommodate his physical limitations. With respect to Ainsworth's Pagliacci Pizza job, that assumption is unfounded. As Progressive's brief acknowledges, his shifts were not offered to him due to his disability. Brief at 18. It bears repeating that Ainsworth was unable to even carry pizzas to his car. Clearly, Ainsworth's ability to

perform the duties of both of his jobs was compromised. The out-of-state decisions are not helpful to Progressive.

C. Progressive Cannot Establish that Ainsworth Failed to Mitigate his Damages

The party alleging that the damages should have been mitigated has the burden of proof. *Sutton v. Shufelberger*, 31 Wn. App. 579, 582, 643 P.2d 920 (1982). The general rule regarding mitigation of damages is that the victim of a breach of contract is required to use means that are reasonable to avoid or minimize his damages. *Ward v. Painter's Local Union 300*, 45 Wn.2d 533, 542, 276 P.2d 576 (1954). Moreover, the duty to mitigate does not arise so long as there is a basis for a reasonable belief by the injured party that the breaching party will perform. *Sears, Roebuck & Co. v. Grant*, 49 Wn.2d 123, 126, 298 P.2d 497 (1956). Since it is reasonable for an insured to rely on the insurer to comply with the terms of the policy, it follows that the duty to mitigate damages arising from the breach of an insurance contract does not arise until *after* the insurer breaches the contract.

The Supreme Court has further held:

A wide latitude of discretion must be allowed to the person who by another's wrong has been forced into a predicament where he is faced with a probability of injury or loss. Only the conduct of a

reasonable man is required of him. If a choice of two reasonable courses presents itself, the person whose wrong forced the choice cannot complain that one rather than the other is chosen.

Hogland v. Klein, 49 Wn.2d 216, 221, 298 P.2d 1099 (1956).

Again, summary judgment is appropriate when the non-moving party is unable to demonstrate the existence of an element essential to the case on which it bears the burden of proof. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225-25, 770 P.2d 182 (1989).

As a preliminary consideration, Progressive's mitigation of damages argument only applies to Ainsworth's claim for benefits from his job at Contour, Inc. Progressive's breach of its contract that it claims gives rise to a duty to mitigate did not occur until December 22, 2010, well after Ainsworth missed time from his Contour, Inc. job to visit his health care providers. So, temporally, it is impossible for Ainsworth to mitigate his damages in the manner argued by Progressive because the duty had not even arisen. Further, until Progressive affirmatively denied Ainsworth's claim, Ainsworth had every reason to believe Progressive would pay his claim pursuant to his policy. Moreover, Progressive cites no policy provision that requires Ainsworth to mitigate his damages prior to a

breach of the policy terms by Progressive. Thus, Progressive could deny coverage pursuant to a policy provision, but Ainsworth had no duty to mitigate his damages in the manner argued by Progressive.

Furthermore, Progressive presents no medical testimony or other admissible evidence of any kind to show that Ainsworth acted unreasonably in visiting his health care providers during their work hours. Progressive's claim that "appointments with the same [health care] providers existed outside of [Ainsworth's] work hours" is unsupported by the record. Brief at 21. Even if it is assumed that such appointment times existed, it is Progressive's burden to establish that these times were open and made available to Ainsworth, and that he still chose appointments that caused him to miss work. No such evidence exists.

The duty to mitigate, as argued by Progressive, does not exist. Even if it did exist, Progressive presents no evidence that Ainsworth acted unreasonably. Accordingly, summary judgment on Progressive's failure to mitigate defense is appropriate.

D. Progressive's Violations of IFCA

An insured that is unreasonably denied a claim for coverage or payment of benefits by an insurer may bring an action to recover the actual damages sustained along with the costs of the action,

including attorney fees and costs. RCW 48.30.015(1). Additionally, the court may increase the total award of damages to three times the amount of the actual damages. RCW 48.30.015(2). In addition to unreasonable denials of a claim for coverage or payment of benefits, the acts constituting a violation of IFCA are enumerated in RCW 48.30.015(5). While Progressive committed multiple violations of IFCA in the course of handling Ainsworth's claim, Ainsworth limited the violations presented to the trial court for consideration to five.

1. Progressive Unreasonably Denied Coverage and Payment of Benefits

It is a violation of IFCA for an insurer to unreasonably deny an insured's claim for coverage or payment of benefits. RCW 48.30.015. An insurer must have a reasonable justification before refusing to pay a first-party claim. WPI 320.04. Here, there is no reasonable justification for Progressive's denial of coverage and rejection of Ainsworth's claim for benefits. The policy language clearly provides for the payment of income continuation benefits to Ainsworth when he is unable to perform the duties of his job. Progressive's answers to written discovery indicate that Ainsworth was entitled to benefits so long as he was physically limited.

Progressive's counsel indicated that documentary evidence in Progressive's possession showed Ainsworth was physically limited. The undisputed evidence is that Ainsworth is physically unable to perform the duties of both of his jobs. Notwithstanding, Progressive denied and continues to deny Ainsworth's benefits claim. Furthermore, Progressive has yet to articulate a reasonable basis for the denial of Ainsworth's claim – Progressive simply refuses to pay. The denial of Ainsworth's claim without any justification is unreasonable and a violation of IFCA.

2. Progressive Failed to Conduct a Reasonable Investigation of Ainsworth's Claim

An insurer's refusal to pay the claim of an insured without conducting a reasonable investigation is a violation of IFCA. RCW 48.30.015(5); WAC 284-30-330(4). The claim file shows that Ms. Becerra, when presented with Ainsworth's claim for wage loss from his job at Pagliacci Pizza and verified by Pagliacci Pizza, failed to take any action let alone conduct any further investigation. When presented with Ainsworth's claim for additional time loss from his job at Contour, Inc., Ms. Becerra did not seek any follow up information from the medical doctor providing her with updates of Ainsworth's work status to that point. Dr. Smith's declaration shows

that Ms. Becerra never asked Dr. Smith whether Ainsworth was able to perform the regular duties of his occupations. Instead, Ms. Becerra sent a request for information to a completely different medical doctor. However, without waiting for a response, Ms. Becerra unilaterally denied Ainsworth's claim for benefits.

Most significantly, the policy provision at issue excludes claims when the insured is "reasonably able to perform the duties of his or her usual occupation." Thus, at the very least, a reasonable investigation would include a determination of job duties. There is no evidence showing that Ms. Becerra or any other person at Progressive ever investigated the duties of Ainsworth's occupations. That Progressive denied Ainsworth's claim based on his ability to perform his job duties with no investigation into the nature of Ainsworth's job duties is completely unreasonable.

Based on Progressive's actions, no reasonable person would reach any conclusion but that Progressive failed to conduct a reasonable investigation of Ainsworth's claim before it was denied. Accordingly, Progressive violated this provision of IFCA as a matter of law.

3. Progressive Failed to Provide a Reasonable Explanation or Assistance to Ainsworth

The failure to promptly provide a reasonable explanation of the basis for the denial of a claim is a violation of IFCA. WAC 284-30-330(13). An appropriate reply to an insured's request for a reasonable explanation for the denial of a claim must be provided by the insurer within ten (10) working days. WAC 284-30-360(3). Moreover, an insurer must promptly provide an insured with all necessary claim forms, instructions, and reasonable assistance so that the insured can comply with the insurance policy. WAC 284-30-360(4).

Progressive's only response to Ainsworth's claim was a denial of coverage. Its only response to requests for an explanation as to the reason for denying Ainsworth's claim was to state and restate policy language. In the face of repeated requests by Ainsworth, Progressive provided no explanation as to how the policy language excluded Ainsworth's claim from coverage. Progressive did not provide notes from Ainsworth's doctors indicating that he was in any way able to perform all the duties of his occupations and no such record exists. Progressive did not provide any claim forms, instructions, or reasonable assistance so

that Ainsworth could comply with the insurance policy. No reasonable person would conclude that Progressive provided an explanation to Ainsworth or that it assisted Ainsworth to comply with the coverage provisions of his policy.

4. Progressive Offered Nothing and Forced a Lawsuit

Offering nothing to an insured and forcing the insured to initiate litigation to recover insurance benefits is a violation of IFCA. WAC 284-30-330(7). Even after receiving each of Ainsworth's three IFCA 20-day notices, Progressive offered nothing to Ainsworth. No reasonable person would conclude that Progressive did anything but force Ainsworth to file suit.

5. Progressive Misrepresented Policy Provisions and Facts to Ainsworth

An insurer's misrepresentation of pertinent facts or insurance policy provisions is a violation of IFCA. WAC 284-30-330(1). Here, Progressive has made repeated gross misrepresentations to Ainsworth concerning the exclusionary policy provision about the ability to perform job duties. Again, as Progressive's brief reminds the Court, the Court must enforce the policy as written and may not modify it. *American Nat'l Fire Ins. Co. v. B & L Trucking and Constr. Co.*, 134 Wn.2d 413, 428, 951 P.2d 250 (1998).

Nonetheless, Progressive's brief repeatedly modifies the policy by substituting the word "work" for the policy phrase "perform the duties of his or her usual occupation." Time and time again, Progressive equates the ability to work full time to the ability to perform job duties, essentially adding language to the policy. It seems perfectly obvious that one can work full time without being able to perform job duties (i.e. "light duty"). Adding language to a policy for the purpose of denying coverage or the payment of a benefit is a clear misrepresentation of policy language. Additionally, every representation by Progressive that Ainsworth is able to perform the duties of his jobs is a patent misrepresentation of the undisputed facts.

E. The Trial Court Appropriately Doubled Ainsworth's Damages

With respect to new arguments raised for the first time on appeal:

RAP 2.5(a) states the general rule for appellate disposition of issues not raised in the trial court: appellate courts will not entertain them. The rule reflects a policy of encouraging the efficient use of judicial resources. The appellate courts will not sanction a party's failure to point out at trial an error which the trial court, if given the opportunity, might have

been able to correct to avoid an appeal and a consequent new trial.

State v. Scott, 110 Wn.2d 682, 685, 757 P.2d 492 (1988) (citations omitted). More bluntly, an issue, theory, or argument not presented at trial will not be considered on appeal. *Herberg v. Swartz*, 89 Wn.2d 916, 925, 578 P.2d 17 (1978).

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. RCW 48.30.015(2). Here, Ainsworth's summary judgment motion clearly sought an award of triple damages. CP at 176. Progressive's argument that the trial court improperly doubled Ainsworth's damages is raised for the first time on appeal. For the reasons enumerated by the Supreme Court in the *Scott* matter, Ainsworth respectfully submits that the Court should not consider this issue on appeal.

Notwithstanding, Progressive's argument that Ainsworth failed to establish he suffered any "actual damages" is unsupported by citation and contrary to a plain reading of the statute. As noted by Progressive, IFCA provides that an insured may recover actual

damages and costs, including reasonable attorneys' fees and litigation costs, when their own insurance carrier unreasonably denies a claim for coverage or payment of benefits. RCW 48.30.015. Quite plainly, the "actual damages" contemplated by IFCA are the insurance coverage and/or payment of benefits. Here, Progressive unreasonably denied both coverage and the payment of benefits totaling \$5,458.18. Thus, the actual damages incurred by Ainsworth are \$5,458.18.

Further, the bad faith and Consumer Protection Act violation cases cited by Progressive have no bearing on this issue and do not even logically support the legal proposition for which they are cited. Consider Progressive's attempt to argue the distinction between contractual and extra-contractual damages in the context of an insurance bad faith claim and relate it to an IFCA violation. Brief at 25. Progressive seemingly argues that actual damages are exactly what Ainsworth established at summary judgment: proof of loss caused by a breach of contract. Similarly, Progressive's comparison to damages arising from a CPA violation is confusing because the elements of a CPA claim, including the damages element, are completely dissimilar to the elements of an IFCA claim.

Additionally, Progressive's argument disregards the public policy considerations driving the triple damages provision of IFCA. The legislature specifically imposed a punishment for insurance carriers that unreasonably deny a claim for coverage or payment of a benefit to an insured. It is the triple damages provision, along with the prospect of paying attorney fees, that give IFCA its teeth.

F. Ainsworth is Entitled to an Award of Costs Including Reasonable Attorney Fees

1. Costs and Attorney Fees Pursuant to *Olympic Steamship*

An award of attorney fees and costs is required in any legal action where the insurer compels the insured to assume the burden of legal action to obtain the full benefit of his insurance contract. *Olympic S.S. Co. v. Centennial Ins. Co.*, 117 Wn.2d 37, 53, 811 P.2d 673 (1991). Insurers are obligated to do this because "when an insurer unsuccessfully contests coverage, it has placed its interests above the insureds." *Panorama Vill. Condo. Owners Ass'n Bd. Of Dirs. V. Allstate Ins. Co.*, 144 Wn.2d 130, 143, 26 P.3d 910 (2001). Generally, when an insured must bring suit against its own insurer to obtain a legal determination interpreting the meaning or application of an insurance policy, it is a *coverage dispute*. *Matsyuk v. State Farm Fire & Casualty Co.*, 173 Wn.2d 643, 660,

272 P.3d 802 (2012) citing *Colorado Structures, Inc. v. Insurance Co. of the West*, 161 Wn.2d 577, 606, 167 P.3d 1125 (2007).

It is acknowledged by Progressive that this matter is a pure question as to the interpretation of Ainsworth's insurance policy. Brief at 14. Were this a valuation dispute, as subsequently argued by Progressive, then the Court would be evaluating competing valuations of Ainsworth's claim instead of looking at policy language. That this is not a valuation dispute is evidenced by Progressive's lack of any argument regarding the valuation of Ainsworth's claim. Yet again, the mutually exclusive positions taken by Progressive highlight the unreasonableness of Progressive and the absurdity of its appeal. Ainsworth is entitled to an award of attorney fees and costs pursuant to *Olympic Steamship*.

**2. Costs and Attorney Fees Pursuant to RCW
48.30.015(3)**

An award of attorney fees and costs is mandatory for an IFCA violation:

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(3). That the trial court cited RCW 48.30.015(2) as the basis for an award of attorney fees and costs is clearly a scrivener's error that can be corrected on remand. Assuming this Court upholds the decision of the trial court, an award of attorney fees and costs is required pursuant to RCW 48.30.015(3).

G. Ainsworth is Entitled to an Award of Costs Including Reasonable Attorney Fees on Appeal

A request for appellate attorney fees requires a party to include a separate section in her or his brief devoted to the request. RAP 18.1(b). This requirement is mandatory. *Phillips Bldg. Co. v. An*, 81 Wn. App. 696, 705, 915 P.2d 1146 (1996). The rule requires more than a bald request for attorney fees on appeal. *Thweatt v. Hommel*, 67 Wn. App. 135, 148, 834 P.2d 1058, review denied, 120 Wn.2d 1016, 844 P.2d 436 (1992). Argument and citation to authority are required under the rule to advise the court of the appropriate grounds for an award of attorney fees as costs. *Austin v. U.S. Bank of Wash.*, 73 Wn. App. 293, 313, 869 P.2d 404, review denied, 124 Wn.2d 1015, 880 P.2d 1005 (1994).

On appeal, the bases for an award of attorney fees and costs remain the same as at the trial court; *Olympic Steamship* and

RCW 48.30.015(3). Ainsworth will not restate the arguments already within this brief, but incorporates them into his request for an award on appeal by reference.

V. CONCLUSION

Progressive's appeal is without merit. Ainsworth's claim for benefits falls within the scope of the policy's insured losses and Progressive cannot meet its burden to establish that Ainsworth's claim is otherwise excluded from coverage. Progressive provides no evidence that Ainsworth is able to perform the duties of his jobs, let alone the nature of those duties. Moreover, the uncontroverted evidence shows that Ainsworth remains unable to perform the duties of his two jobs. Progressive's denial of coverage and payment of benefits to Ainsworth is a violation of IFCA and the trial court's award of double damages is appropriate. Finally, the award of costs, including reasonable attorney fees, to Ainsworth was proper pursuant to *Olympic Steamship* and RCW 48.30.015(3). Accordingly, the order granting summary judgment in favor of Ainsworth should be affirmed and costs on appeal, including reasonable attorney fees, should be awarded to Ainsworth pursuant to RAP 18.1. This matter should be remanded to the trial court.

Respectfully submitted this 18th day of March, 2013.

THE ADEE LAW FIRM, PLLC

A handwritten signature in cursive script, appearing to read "Aaron L. Adee", written over a horizontal line.

Aaron L. Adee, WSBA No. 27409
Attorney for Respondent Tyler Ainsworth

DECLARATION OF SERVICE

I, Aaron L. Adee, declare, under penalty of perjury under the laws of the State of Washington that on March 18, 2013 I caused the following document(s) to be served on the person(s) listed below in the manner shown:

DOCUMENT(S) SERVED:

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SIGNED at Seattle, Washington this 18th day of March, 2013.



Aaron L. Adee