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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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

ENZO MORELLA,

Plaintiff/Appellant,

vs.

SAFECO INSURANCE COMPANY OF ILLINOIS,

Defendant/Respondent.

BRIEF OF AMICUS CURIAE
WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington State Association for Justice Foundation (WSAJ Foundation) is a not-for-profit corporation organized under Washington law, and a supporting organization to the Washington State Association for Justice (WSAJ). WSAJ Foundation is the new name of the Washington State Trial Lawyers Association Foundation (WSTLA Foundation), a supporting organization to the Washington State Trial Lawyers Association (WSTLA), now renamed WSAJ. WSAJ Foundation, which operates the amicus curiae program formerly operated by WSTLA Foundation, has an interest in the rights of plaintiffs under the civil justice system, including the rights of insureds under Washington law.

II. INTRODUCTION AND STATEMENT OF THE CASE

This case presents the Court with its first opportunity to interpret the Insurance Fair Conduct Act (IFCA), see Laws of 2007, Ch. 498 (codified at RCW 48.30.010-.015), which Washington voters approved by referendum in 2007, see Referendum Measure No. 67, effective December 6, 2007. Enzo Morella (Morella) filed an action in state court against Safeco Insurance Company of Illinois (Safeco) for, inter alia, violations of IFCA in Safeco's handling of Morella's first-party insurance claim. Safeco removed the action to the United States District Court for the Western District of Washington. The federal district court certified to this Court a legal question regarding the meaning of "actual damages," as that phrase is used in IFCA.

The underlying facts are drawn from the federal district court order certifying the legal question, and the briefing of the parties before this Court. See "Order Granting In Part Plaintiff's Motion for Summary Judgment and Certifying Question to State Supreme Court" (Order); Morella Br. at 2-5; Safeco Br. at 1-5, 7-16. For purposes of this amicus curiae brief, the following facts are relevant: In January 2006, Morella sustained personal injuries while a passenger in a truck insured by Safeco, which was rear-ended by an uninsured motorist. Morella sought medical treatment for his injuries and filed a claim for underinsured motorist (UIM) coverage with Safeco. Safeco did not dispute coverage under the policy, and on two occasions it offered Morella \$1,500 to resolve the claim.

Morella rejected each of these offers, and demanded arbitration under the UIM policy. Shortly before the arbitration occurred, Safeco increased its offer of settlement to \$45,000. Morella rejected this offer too, and the claim proceeded to arbitration. In November 2010, the arbitrator awarded \$62,000 in compensatory damages for Morella's UIM claim, and Safeco paid this amount to Morella in December 2010.

Morella subsequently filed a pre-suit notice of claim pursuant to IFCA, RCW 48.30.015(8), then filed an IFCA action against Safeco, based on its handling of his first-party UIM claim.¹ Safeco removed the action to federal district court, where it remains pending at this time.

¹ The briefing before the Court does not reflect whether or how Safeco responded to the pre-suit notice.

Morella filed a motion for summary judgment in federal court, contending that Safeco is liable under IFCA as a matter of law. Order at 4. Specifically, Morella sought a determination that Safeco violated RCW 48.30.015(1), which prohibits unreasonable denial of a claim for payment of benefits, and subsection (5)(a), which incorporates the Insurance Commissioner's regulations regarding unfair claims settlement practices, including WAC 284-30-330(7). This regulation makes it an unfair practice for an insurer to compel a first-party insured to submit to arbitration to recover the amount due under an insurance policy by offering substantially less than the amount ultimately recovered in the proceeding. The court ruled that Safeco violated both of these provisions of IFCA as a matter of law, and granted partial summary judgment in Morella's favor. See Order at 4-5 (regarding violation of WAC 284-30-330(7)); id. at 5-8 (regarding violation of RCW 48.30.015(1)).

Morella also sought summary judgment that he suffered "actual damages" under IFCA in the amount of \$62,000. See Order at 4.² Morella contended that, in order for IFCA to provide meaningful relief, actual damages must include the \$62,000 UIM award. See id. at 8. On the other hand, Safeco urged that because it had already paid the \$62,000 by the time the IFCA action was filed, these monies could not be "re-awarded" in the IFCA action. Id.

² Morella presumably reserved the questions of whether the district court should award other damages and/or enhance the actual damages awarded pursuant to the treble damages provision of IFCA, RCW 48.30.015(3). See Order at 4, 9; Safeco Br. at 1.

These conflicting views caused the district court to ask rhetorically, regarding actual damages recoverable under IFCA, "[i]s it the \$62,000 awarded in arbitration or is it simply the loss of use of that money for some period of time, the cost of the arbitration proceeding itself, or some other compensable injury?" Id. at 9. The court concluded that it was unable to resolve this question of Washington law, so it entered an order granting summary judgment on IFCA liability and certified the actual damages issue to this Court. See Order at 8-11. The district court stayed further proceedings in the IFCA action pending resolution of the certified question. See id. at 11.

III. ISSUE PRESENTED

"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?" Order at 10.

IV. SUMMARY OF ARGUMENT

In answer to the certified question, under IFCA the phrase "actual damages" is plain and unambiguous, and generally encompasses the full panoply of compensatory damages available under tort law. These actual damages include special damages for economic loss and general damages for noneconomic loss, such as mental and emotional distress.

When a first-party insurer violates IFCA by making an unreasonable offer, thereby compelling its insured to litigate or arbitrate the claim, actual damages under IFCA may include the amount of benefits awarded by a court or arbitrator on that claim. To the extent that the

insurer pays the benefits owed to the insured on the underlying claim in advance of the IFCA action, it is entitled to a credit for that amount against the IFCA actual damages amount, but only *after* the court determines whether to treble the amount under RCW 48.30.015(3). This result is in keeping with the letter and spirit of IFCA, while honoring the policy against double recovery.

V. ARGUMENT

Introduction

In their briefing, both parties address the specific issue of whether the \$62,000 UIM arbitration award constitutes actual damages under IFCA, and also discuss in some detail what damages should qualify as actual damages under this act. See Morella Br. at 6-22, Safeco Br. at 19-49. Morella argues that the \$62,000 UIM award constitutes actual damages under IFCA, regardless of whether Safeco paid that amount in satisfaction of the UIM arbitration award. See Morella Br. at 18-23. In his opening brief, Morella indicates that Safeco would be entitled to a credit for this amount, but only after the court determines whether punitive damages are warranted under the IFCA treble damages provision. See Morella Br. at 21-22. However, in his reply brief, Morella revisits this issue and suggests that no such credit should be allowed, in furtherance of the purposes of IFCA. See Morella Reply Br. at 18-20. Otherwise, Morella essentially argues that actual damages under IFCA encompass all compensatory damages available under tort law and, in the context of this

case, may include litigation costs related to the underlying UIM arbitration, interest on the loss of use of money due to belated payment of benefits, and general damages for emotional distress resulting from the IFCA violation. See Morella Br. at 16-17.

On the other hand, Safeco argues that the \$62,000 does not constitute actual damages under IFCA because that amount was paid in full in advance of the IFCA action, not only satisfying the UIM arbitration award but also eliminating any claim for actual damages under IFCA, other than perhaps for interest on loss of use of this money due to delay in payment. See Safeco Br. at 23.³ Safeco contends that any other outcome would violate the rule of strict construction that applies to punitive statutes like IFCA, and would result in a double recovery. See Safeco Br. at 2, 19-20. Generally, Safeco argues that IFCA actual damages are limited to monetary losses proximately caused by an IFCA violation, excluding benefits due under the policy and litigation costs on the underlying claim; it also argues that general damages for mental and emotional distress are not recoverable. See Safeco Br. at 4-5, 26-27, 37-41.

In light of the parties' broad discussion of what types of damages may constitute actual damages under IFCA, the federal court's rhetorical question, see Order at 9, and uncertainty whether the Court will reach this larger issue in the course of answering the certified question, this brief addresses to some degree the overall meaning of "actual damages" in the

³ Safeco argues that "loss of use value," which it equates with "interest" but distinguishes from prejudgment interest, is not available in this case for a number of reasons. See Safeco Br. at 46-50.

course of proposing an answer to the specific question posed by the district court.

A. Background Regarding IFCA And The Remedies Available Under Washington Law For Insurer Misconduct At The Time Of Its Enactment.

Existing Remedies

At the time IFCA was enacted in 2007, there was a fairly broad range of remedies available to insureds victimized by wrongful conduct of a first-party insurer.⁴ These remedies, which all remain available to this day, include:

- **Breach of Contract:** The insurer-insured relationship arises from the insurance contract. Recovery for breach of contract is typically limited to amounts due under the contract plus interest. See Kirk v. Mt. Airy Ins. Co., 134 Wn. 2d 558, 560, 951 P.2d 1124 (1998). Usually, there is no recovery for general or punitive damages, or attorney fees and costs.

- **Equitable Attorney Fees:** Given the disparity of bargaining power between insurer and insured, concern that litigation costs erode contracted-for benefits, and the Washington public policy favoring prompt payment of claims, an insured who prevails in litigation

⁴ Insurance policies often provide for a dispute resolution process, such as arbitration, that may be invoked by insured or insurer to resolve disputes, including those over the value of a claim. This process does not necessarily involve wrongful conduct by the insurer, e.g., where there is a legitimate difference of opinion between insurer and insured regarding the value of a claim. When this process is invoked, absent a coverage-based dispute or wrongful conduct by the insurer, insureds typically must bear their own attorney fees and costs, although the insurer may have to pay for the costs of arbitration. See Kenworthy v. Pennsylvania Gen. Ins. Co., 113 Wn.2d 309, 315, 779 P.2d 257 (1989) (holding insured is not obligated to pay share of UIM arbitration costs).

with the insurer regarding a *coverage* issue may recover attorney fees and costs. See Olympic S.S. Co., Inc., v. Centennial Ins. Co., 117 Wn.2d 37, 52-53, 811 P.2d 673 (1991). This one-way fee shifting is unavailable if the dispute is over the *value* of the claim. See Dayton v. Farmers Insurance Group, 124 Wn.2d 277, 280-81, 876 P.2d 896 (1994).

- **Insurance Bad Faith Tort Claim:** Independent of contract, insurer and insured have a duty to act in good faith, which is based upon public interest and the quasi-fiduciary nature of their relationship. See Tank v. State Farm Fire & Cas. Co., 105 Wn.2d 381, 385-87, 715 P.2d 1133 (1986); RCW 48.01.030 (declaring public interest and duty of good faith). Bad faith conduct gives rise to a claim sounding in tort, including recovery for “consequential damages,” and “general tort damages.” Coventry v. American States Ins. Co., 136 Wn.2d 269, 284-85, 961 P.2d 933 (1998); accord St. Paul Ins. Co. v. Onvia, Inc., 165 Wn.2d 122, 129-33, 196 P.3d 664 (2008).⁵ This remedy does not include punitive damages or attorney fees and costs.⁶

⁵ Coventry, 136 Wn.2d at 284-85, equates “consequential damages” with damages incurred “as a result of the insurer’s breach of its contractual and statutory obligations” and “amounts [the insured] has incurred as a result of the bad faith.” Accord Onvia, 165 Wn.2d at 133; see also infra n.9 (regarding attorney fees and costs as consequential damages). The Court of Appeals has interpreted “general tort damages” as including damages for mental or emotional distress. See American Manufacturers Mut. Ins. Co. v. Osborn, 104 Wn. App. 686, 698, 17 P.3d 1229 (citing Coventry), *review denied*, 144 Wn.2d 1005 (2001); Anderson v. State Farm Mut. Ins. Co., 101 Wn. App. 323, 333, 2 P.3d 1029 (2000) (citing Coventry), *review denied*, 142 Wn.2d 1017 (2001); Werlinger v. Clarendon Nat. Ins. Co., 129 Wn. App. 804, 809, 120 P.3d 593 (2005) (citing Anderson), *review denied*, 157 Wn.2d 1004 (2006).

⁶ Under some circumstances a liability insurer may be liable in tort for damages awarded against its insured in excess of the policy limits. See Murray v. Aetna Cas. & Sur. Co., 61 Wn.2d 618, 620-21, 379 P.2d 731 (1963). Similarly, in cases involving a liability insurer’s failure to defend, an insured (or assignee) may be awarded “coverage by

• **Consumer Protection Act:** Because the business of insurance implicates the public interest, an insured may also file suit against an insurer for unfair or deceptive acts in violation of the Consumer Protection Act, Ch. 19.86 RCW (CPA). See RCW 48.01.030 (declaring public interest in insurance). Violations of the Insurance Code, Title 48 RCW, and certain Insurance Commissioner regulations, e.g. WAC 284-30-330, are deemed to be per se violations of the Act. See Industrial Indem. Co. v. Kallevig, 114 Wn.2d 907, 920-25, 792 P.2d 520 (1990); Onvia, 165 Wn.2d at 133-34; Coventry, 136 Wn.2d at 276-81; see also RCW 19.86.170 (describing relationship between Insurance Code and its regulations and CPA).⁷ Under the CPA, an insured may recover actual damages for injury to business or property, attorney fees and costs, and injunctive relief for an insurer's wrongful conduct. See RCW 19.86.090; Coventry at 284 (referring to "the consequential damages to the insured as a result of the insurer's breach of its contractual and statutory obligations" as recoverable under the CPA, as well as under the tort of insurance bad faith).⁸ Damages for mental and emotional distress are not recoverable under the CPA because they do not arise from injury to business or

estoppel" as a result of the insurer's wrongful conduct. See Safeco Ins. Co. v. Butler, 118 Wn.2d 383, 394, 823 P.2d 499 (1992).

⁷ This type of CPA claim is often coupled with an insurance bad faith tort claim. See e.g. Coventry, 136 Wn.2d at 275 (noting complaint for breach of insurance contract, bad faith, and CPA violations).

⁸ There appear to be no Washington cases regarding whether recovery against a UIM insurer for bad faith or CPA violations may include as consequential damages attorney fees and costs incurred in litigating or arbitrating the underlying claim. Generally, the law regarding recovery of attorney fees and costs *as damages* is under-developed in this state. See Jacob's Meadow Owners Ass'n v. Plateau 44 II, LLC, 139 Wn.App. 743, 759, 162 P.3d 1153 (2007). The cases tend to address this issue based upon principles of equitable indemnity. See id.

property. See Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 317-18, 858 P.2d 1054 (1993).⁹ Under the CPA, the court has discretion to treble the actual damage amount, but only up to a maximum of \$25,000. See RCW 19.86.090.

IFCA Provisions

Notwithstanding the existence of the above remedies, in 2007 the Washington Legislature enacted IFCA, and the voters subsequently ratified this enactment through the referendum process.¹⁰ The key features of this legislation are:

- IFCA specifically preserves other remedies available at law, recognizing the nonexclusive nature of the remedies under IFCA and imposing a duty on the courts to harmonize the other remedies available to an insured. See RCW 48.30.015(6).

- Procedurally, IFCA requires a twenty-day pre-suit notice of claim before filing suit, providing an opportunity for the insurer “to resolve the basis for the action within the twenty-day period.” RCW 48.30.015(8).

- IFCA creates a cause of action for unreasonable denial of a claim for coverage or payment of benefits by an insurer. See RCW

⁹ In the appropriate case, damages may be awarded a plaintiff in a CPA claim for damage to professional reputation, although it is not clear whether this is a specie of general or special damages. See Fisons, 122 Wn.2d at 316 & n.11.

¹⁰ The full text of IFCA, Laws of 2007, Ch. 498, is reproduced in the Appendix to this brief. IFCA amended RCW 48.30.010 and enacted RCW 48.30.015, and the full texts of the current versions of these statutes are also reproduced in the Appendix to this brief.

48.30.015(1). This appears to overlap to some extent with liability for the tort of insurance bad faith and non-per se violations of the CPA.

- IFCA also provides that violations of specified Insurance Commissioner regulations constitute violations of IFCA. See RCW 48.30.015(5). This appears to overlap to some extent with liability for per se violations of the CPA.

- IFCA allows a first party claimant to recover “actual damages” sustained as a result of the insurer’s violation of the act. See RCW 48.30.015(1)-(2). This appears to overlap to some extent with the tort damages recoverable for insurance bad faith and, to a lesser extent, with damages for injury to business or property recoverable under the CPA.

- IFCA provides for recovery of the costs of prosecuting the IFCA action, including attorney fees, expert witness fees, and costs. See RCW 48.30.015(1) & (3). This appears to overlap to some extent with attorney fees and costs recoverable under Olympic S.S. and the CPA.

- IFCA authorizes the court to “increase the total award of damages to an amount not to exceed three times the actual damages.” RCW 48.30.015(2). While this overlaps to some extent with treble damages available under the CPA, it is not limited to damages arising from injury to business or property, nor is it subject to the CPA’s \$25,000 cap. IFCA’s relatively broad punitive damages provision is perhaps the

centerpiece of the Act, in that the prospect of punitive damages is a strong deterrent against wrongful conduct by the insurer.

While the certified question before the Court relates to the meaning of "actual damages" under IFCA, unquestionably, how the Court answers this question under the certified facts will have consequences as to the amount of punitive damages the federal district court may award under RCW 48.30.015(2). The meaning of "actual damages" is addressed in §B.

B. The Meaning Of "Actual Damages" Under IFCA Is Plain And Unambiguous, Allowing For A Recovery Sounding In Tort For All Special And General Damages Proximately Caused By Violation Of The Act.

The parties each argue that the phrase "actual damages" in RCW 48.30.015(1) & (2) is ambiguous. See Morella Br. at 7, 16-18; Safeco Br. at 16-18, 34-35, 37-38; Morella Reply Br. at 11. Morella contends that such ambiguity requires either a liberal construction or a "fair reading" because IFCA is remedial legislation, Morella Reply Br. at 5-8, while Safeco argues for a strict construction in light of the punitive nature of the act, see Safeco Br. at 34-39. WSAJ Foundation disagrees with the premise of these arguments.

The goal of statutory interpretation is to effectuate the intent of the Legislature, and if the meaning of a statute is plain, enforcing it as written effectuates the legislative intent. See Burns v. City of Seattle, 161 Wn.2d 129, 140, 164 P.3d 475 (2007). A statute is not ambiguous merely because different interpretations are conceivable. See Bowie v. Washington Dep't of Revenue, 171 Wn.2d 1, 11 n.7, 248 P.3d 504 (2011).

As noted in Razor v. Retail Credit, 87 Wn.2d 516, 522, 554 P.2d 1041 (1976):

Words used in a statute are to be given their ordinary meaning in the absence of persuasive reasons to the contrary. Where the language of a provision is clear, the words employed are to be considered the final expression of legislative intent.

(Citations omitted)

The phrase "actual damages" in IFCA is plain and unambiguous, with a well-understood meaning under Washington law.¹¹ This Court has previously found that this phrase has a generally accepted legal meaning allowing for full compensatory damages recoverable in tort. See Razor, 87 Wn.2d at 525-31 (interpreting "actual damages" in a federal fair credit reporting act); Martini v. Boeing Co., 137 Wn.2d 357, 366-68, 971 P.2d 45 (1999) (interpreting "actual damages" under Washington Law Against Discrimination, Ch. 49.60 RCW (WLAD)). The statutory schemes involved in Razor and Martini each involve conduct recognized as tortious in nature. See Razor, 87 Wn.2d at 529-30; Martini, 137 Wn.2d at 367; see also Blair v. Washington State University, 108 Wn.2d 558, 576, 740 P.2d 1379 (1987) (regarding tortious nature of WLAD claim).¹² IFCA,

¹¹ A plain and unambiguous statute is not subject to strict construction under the doctrine of lenity. See Safeco Br. at 34-35 (urging strict construction under rule of lenity); see also Broughton Lumber Co. v. BNSF Ry., 174 Wn.2d 619, 633, 278 P.3d 173(2012) (noting statute with plain meaning is not subject to other rules of statutory construction); In re Pers. Restraint of Stenson, 153 Wn.2d 137, 149 n.7, 102 P.3d 151 (2004) (concluding doctrine of lenity inapplicable to interpretation of unambiguous penal statute).

¹² Safeco seems to suggest that the result in Martini is based on the WLAD's mandatory rule of liberal construction. See Safeco Br. at 28 n.15. While the Court in Martini acknowledges this rule of construction in the course of its analysis, see 137 Wn.2d at 364, the ultimate holding in Martini is that the phrase "actual damages" is unambiguous. See id. at 367 (relying on Razor, supra). Similarly, Razor recognizes the remedial nature of

too, is rooted in tort law. See Butler, 118 Wn.2d at 393-94 (recognizing bad faith handling of insurance claim sounds in tort); see also 6A Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 320.00, Introduction at 314 (6th ed.) (surveying Washington insurance bad faith law).¹³

Under the above plain meaning analysis—equating actual damages under IFCA with full compensatory damages recoverable in tort—a successful plaintiff is entitled to recover those special and general damages proximately caused by the insurer's wrongful conduct.¹⁴ This includes both special damages for economic loss, and general damages for mental and emotional distress. See 6 Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 30.00, Introduction at 277 (6th ed.) (describing special and general damages recoverable in personal injury actions)¹⁵; see also Rasor, 87 Wn. 2d at 525 & 530 (approving jury instruction allowing jury to consider mental suffering as a result of violation of federal fair credit

the legislation at issue, but resolves the "actual damages" question based upon its "generally accepted legal meaning," 87 Wn.2d at 529-30.

¹³ Safeco argues that "actual damages" under IFCA should be given the same meaning as under the CPA, as the "closest statutory analog." Safeco Br. at 39. This argument does not account for the language limiting cognizable injury under the CPA to "business or property." RCW 19.86.090; see also Fisons, 122 Wn.2d at 317-18 (noting restrictive significance of injury to business or property element).

¹⁴ See generally Dyal v. Fire Companies, Etc., Inc., 23 Wn.2d 515, 521-22, 161 P.2d 321 (1945) (describing generally the tort measure of damages with respect to property and personal injuries); Shoemaker ex rel. Guardian v. Ferrer, 168 Wn. 2d 193, 198, 225 P.3d 990, 992 (2010) (stating "[t]he guiding principle of tort law is to make the injured party as whole as possible through pecuniary compensation." ... Simply stated, a plaintiff is entitled to that sum of money that will place him in as good a position as he would have been but for the defendant's tortious act"; internal quotation omitted).

¹⁵ Special damages are also known as "economic" damages, and general damages are also referred to as "noneconomic" damages. See RCW 4.56.250, the current version of which is reproduced in the Appendix to this brief. (The cap on damages provision of this statute was found unconstitutional in Sofie v. Fibreboard Corp., 112 Wn.2d 636, 771 P.2d 711, 780 P.2d 260 (1989).)

reporting act); Martini, 137 Wn.2d at 367-68 (approving Rasor formulation of actual damages for purposes of WLAD).

Damages for mental and emotional distress, in particular, should be recoverable when an insurer violates IFCA. As Morella correctly points out, see Morella Br. at 11, an insured procures insurance for “peace of mind.” Nat’l Sur. Corp. v. Immunex Corp., 176 Wn. 2d 872, 878, 297 P.3d 688 (2013) (third party context); accord Coventry, 136 Wn.2d at 283 (first party context). Unlike other products or services, if an insurer fails to act reasonably or otherwise violates IFCA, the insured cannot “cover” or obtain substitute insurance from another insurer after a loss has occurred. See Hillhaven Properties Ltd. v. Sellen Const. Co., Inc., 133 Wn. 2d 751, 767, 948 P.2d 796 (1997) (describing known risk doctrine). In this way, the insured is uniquely vulnerable and at the mercy of the insurer. Cf. Berger v. Sonneland, 144 Wn.2d 91, 113, 26 P.3d 251 (2001) (recognizing emotional damages recoverable for unauthorized disclosure of confidential information by health care provider).¹⁶

¹⁶ Safeco argues that “actual damages” does not include general damages for emotional distress based on a U.S. Supreme Court case interpreting the damages provision of the Privacy Act of 1974, 5 U.S.C. § 552a(g)(4)(A). See Safeco Br. at 37-38 (discussing Federal Aviation Admin. v. Cooper, 132 S. Ct. 1441 (2012)). The U.S. Supreme Court’s analysis differs from this Court’s analysis in Martini and Rasor to the extent it holds that the phrase “actual damages” is ambiguous. On the basis of the ambiguity, the U.S. Supreme Court strictly construes the phrase as being limited to special damages (i.e., “proven pecuniary loss”) in light of the presumption against waiver of sovereign immunity. Cooper, 132 S. Ct. at 1452-53.

Safeco also argues that any emotional distress damages under IFCA would have to meet the “objective symptomology” requirement for negligent infliction of emotional distress (NIED) claims. See Safeco Br. at 40; Hegel v. McMahan, 136 Wn.2d 122, 132, 960 P.2d 424 (1994). This requirement has been limited to NIED claims. See Berger, 144 Wn.2d at 113. While the Court need not reach this issue under the certified question, if it does it should not impose the Hegel evidentiary requirement in this quasi-fiduciary context. See Price v. State, 114 Wn. App. 65, 71, 57 P.3d 639 (2002) (explaining how

The certified question before the Court does not require to Court to specify each and every type of special or general damage that may be recoverable under IFCA. However, the Court should make clear that "actual damages" under IFCA may include recovery of the full panoply of compensatory damages generally available under tort law, consisting of proven special damages for economic loss and general damages for noneconomic loss, including mental and emotional distress. The Court need say no more on this record.¹⁷ However, the Court must decide whether under the certified facts the \$62,000 UIM arbitration award constitutes actual damages under IFCA, an issue addressed in §C.

C. In Answer To The Certified Question, The Amount of the UIM Arbitration Award Constitutes Actual Damages Under IFCA, And Should Be Taken Into Account By The District Court In Determining Whether To Award Punitive Damages Under The Treble Damages Provision, *Before Giving Safeco A Credit For The Amount It Paid To Satisfy The UIM Award.*

The certified question requires the Court to determine whether the \$62,000 paid to resolve the UIM arbitration qualifies as "actual damages" under IFCA. These are special damages incurred by the insured, and the

objective symptomology requirement does not apply, based on characteristics of pre-existing relationship, including relationship between insurer and insured).

¹⁷ The federal district asks whether "the cost of the arbitration proceeding itself" constitutes actual damages under IFCA. Order at 9. The nature of an IFCA violation based on WAC 284-30-330(7), which involves compelling an insured to initiate and submit to an unnecessary arbitration, would seem to favor awarding the costs of the arbitration proceeding as special damages. Morella distinguishes attorney fees and costs incurred in the underlying arbitration from those incurred in prosecuting the IFCA action, and contends that arbitration costs are included within the meaning of actual damages, relying principally on an analogy to CPA cases. *See* Morella Br. at 13-17. Safeco acknowledges that actual damages may include losses (other than policy benefits) proximately caused by the IFCA violation, *see* Safeco Br. at 26, but also argues that attorney fees and costs are only recoverable as costs for successfully prosecuting the IFCA action, *see id.* at 41-46.

answer should be "yes" because these damages were proximately caused by Safeco's mishandling of the UIM claim.

Safeco contends that the amount of the UIM arbitration award cannot constitute actual damages under IFCA because this award is related solely to the underlying personal injury claim. See Safeco Br. at 30-34. This analysis disregards the fact—indisputable for purposes of this certification—that the arbitration award is the result of Safeco failing to fulfill its obligations under IFCA. Safeco compelled Morella to invoke and participate in arbitration in order to obtain relief, rather than fulfilling its duty to timely offer a reasonable amount for Morella's claim. Under these circumstances, the UIM award constitutes special damages proximately caused by the IFCA violation.

The fact that this determination also serves to set the amount of Safeco's contract obligation to Morella under its UIM coverage should not prevent it from serving as the basis for actual damages under IFCA. These are two separate and distinct injuries, each cognizable in their own right. Cf. Reese v. Sears, Roebuck & Co., 107 Wn.2d 563, 568, 731 P.2d 497 (1987) (recognizing employee's claims under Industrial Insurance Act, Title 51 RCW (IIA), and WLAD involve "two separate and distinct injuries"), *overruled on other grounds*, Phillips v. City of Seattle, 111 Wn.2d 903, 766 P.2d 1099 (1989). IFCA itself contemplates that a court will be required to harmonize an IFCA recovery with other remedies available at law. See RCW 48.30.015(6).

Any uneasiness in recognizing that the same damages may be recoverable under each of these remedial schemes may be tied to concern that Morella would obtain both satisfaction of the UIM arbitration award and recover the same monies as actual damages under IFCA. This result would run afoul of the rule against double recovery under Washington law. See Sherry v. Financial Indem. Co., 160 Wn.2d 611, 618, 621-22, 160 P.3d 31 (2007) (noting rule against double recovery in insurance subrogation context). However, this concern is easily resolved, as it was in Reese:

Here, there are two distinct wrongs. In addition, any possible double recovery can be easily avoided. Appellants' potential damage recoveries under RCW 49.60 date from when their discrimination claims matured: When their employers refused to allow them to report back to work and allegedly refused to reasonably accommodate their handicaps. Should appellants prevail at trial, IIA benefits received after this date can be deducted from their discrimination damages wherever necessary to prevent double recovery.

107 Wn.2d at 574.

In this instance, in order to "protect the integrity" of the deterrent effect of IFCA, see Reese at 573, any credit for payment of the UIM arbitration award should only be made *after* the court has determined whether to award punitive damages under the treble damages provision. Safeco's argument to the contrary should be rejected.

In a similar vein, Safeco argues that, because it satisfied the UIM arbitration award before any IFCA pre-suit notice required by RCW 48.30.015(8), the UIM benefits paid cannot constitute "actual damages"

under the act. See Safeco Br. at 22 n.11. This argument must be rejected because, under the certified record, at the time Safeco made this payment it had already violated IFCA by compelling Morella to invoke arbitration in order to obtain relief. The payment in satisfaction of the arbitration award did not eliminate, ab initio, Safeco's original failure to pay benefits/amounts due. As Morella argues, to read IFCA to allow Safeco to avoid liability in this manner would completely undermine the purposes of the Act. See Morella Br. at 1-2, 13-14.¹⁸

Yet, Safeco contends that the pre-suit notice requirement of RCW 48.30.015(8), provides precisely such an opportunity to avoid liability for IFCA violations. See Safeco Br. at 2-3, 19-24. Safeco refers to subsection (8) throughout its briefing as a "notice and cure provision," suggesting that it provides insurers with a unilateral right to cure any IFCA violation. E.g. id. at 2. This is an extravagant view of what is a plain and unambiguous pre-suit notice of claim provision, designed to give the insurer fair warning and encourage it to reach a bilateral resolution of the dispute without having to litigate IFCA liability. Nowhere in subsection (8) does the word "cure" appear. The language of this provision is more akin to other notice of claim statutes such as those in Chs. 4.92 and 4.96 RCW, than provisions for curing a deficient performance of a contractual obligation. Cf. RCW 62A.2-508(1) & Cmts. (regarding opportunity to

¹⁸ Safeco makes a related argument that it made a \$45,000 offer shortly before arbitration, and that this too should absolve the company of IFCA liability. See Safeco Br. at 24-26. This argument should be rejected because it appears to go beyond the scope of the certified question, and involves a unilateral act by Safeco after it had violated IFCA by compelling Morella to seek arbitration. See Morella Br. at 3.

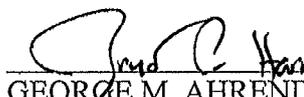
cure non-conforming performance of contract for the sale of goods within the original time for performance). Statutes must be construed to avoid absurd results. See Lowy v. PeaceHealth, 174 Wn.2d 769, 779, 280 P.3d 1078 (2012). It would be an absurd result if an insurer could violate IFCA by delaying payment of a claim or compelling an insured to submit to arbitration on the claim, and then avoid IFCA liability by making a belated payment on the underlying claim after receiving an IFCA notice.

VI. CONCLUSION

The Court should adopt the analysis set forth in this brief, and answer the certified question accordingly.

DATED this 23rd day of September, 2013.


BRYAN P. HARNETIAUX


GEORGE M. AHREND *George M. Ahrend,
with authority*

On Behalf of WSAJ Foundation

Appendix

CERTIFICATION OF ENROLLMENT
ENGROSSED SUBSTITUTE SENATE BILL 5726

Chapter 498, Laws of 2007

60th Legislature
2007 Regular Session

INSURANCE FAIR CONDUCT ACT

EFFECTIVE DATE: 07/22/07

Passed by the Senate April 14, 2007
YEAS 31 NAYS 18

BRAD OWEN

President of the Senate

Passed by the House April 5, 2007
YEAS 59 NAYS 38

FRANK CHOPP

Speaker of the House of Representatives

Approved May 15, 2007, 2:44 p.m.

CHRISTINE GREGOIRE

Governor of the State of Washington

CERTIFICATE

I, Thomas Hoemann, Secretary of the Senate of the State of Washington, do hereby certify that the attached is ENGROSSED SUBSTITUTE SENATE BILL 5726 as passed by the Senate and the House of Representatives on the dates hereon set forth.

THOMAS HOEMANN

Secretary

FILED

May 16, 2007

Secretary of State
State of Washington

ENGROSSED SUBSTITUTE SENATE BILL 5726

AS AMENDED BY THE HOUSE

Passed Legislature - 2007 Regular Session

State of Washington 60th Legislature 2007 Regular Session

By Senate Committee on Consumer Protection & Housing (originally sponsored by Senators Weinstein, Kline and Franklin)

READ FIRST TIME 02/16/07.

1 AN ACT Relating to creating the insurance fair conduct act;
2 amending RCW 48.30.010; adding a new section to chapter 48.30 RCW;
3 creating a new section; and prescribing penalties.

4 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON;

5 NEW SECTION. Sec. 1. This act may be known and cited as the
6 insurance fair conduct act.

7 Sec. 2. RCW 48.30.010 and 1997 c 409 s 107 are each amended to
8 read as follows:

9 (1) No person engaged in the business of insurance shall engage in
10 unfair methods of competition or in unfair or deceptive acts or
11 practices in the conduct of such business as such methods, acts, or
12 practices are defined pursuant to subsection (2) of this section.

13 (2) In addition to such unfair methods and unfair or deceptive acts
14 or practices as are expressly defined and prohibited by this code, the
15 commissioner may from time to time by regulation promulgated pursuant
16 to chapter 34.05 RCW, define other methods of competition and other
17 acts and practices in the conduct of such business reasonably found by

1 the commissioner to be unfair or deceptive after a review of all
2 comments received during the notice and comment rule-making period.

3 (3) (a) In defining other methods of competition and other acts and
4 practices in the conduct of such business to be unfair or deceptive,
5 and after reviewing all comments and documents received during the
6 notice and comment rule-making period, the commissioner shall identify
7 his or her reasons for defining the method of competition or other act
8 or practice in the conduct of insurance to be unfair or deceptive and
9 shall include a statement outlining these reasons as part of the
10 adopted rule.

11 (b) The commissioner shall include a detailed description of facts
12 upon which he or she relied and of facts upon which he or she failed to
13 rely, in defining the method of competition or other act or practice in
14 the conduct of insurance to be unfair or deceptive, in the concise
15 explanatory statement prepared under RCW 34.05.325(6).

16 (c) Upon appeal the superior court shall review the findings of
17 fact upon which the regulation is based de novo on the record.

18 (4) No such regulation shall be made effective prior to the
19 expiration of thirty days after the date of the order by which it is
20 promulgated.

21 (5) If the commissioner has cause to believe that any person is
22 violating any such regulation, the commissioner may order such person
23 to cease and desist therefrom. The commissioner shall deliver such
24 order to such person direct or mail it to the person by registered mail
25 with return receipt requested. If the person violates the order after
26 expiration of ten days after the cease and desist order has been
27 received by him or her, he or she may be fined by the commissioner a
28 sum not to exceed two hundred and fifty dollars for each violation
29 committed thereafter.

30 (6) If any such regulation is violated, the commissioner may take
31 such other or additional action as is permitted under the insurance
32 code for violation of a regulation.

33 (7) An insurer engaged in the business of insurance may not
34 unreasonably deny a claim for coverage or payment of benefits to any
35 first party claimant. "First party claimant" has the same meaning as
36 in section 3 of this act.

1 NEW SECTION. Sec. 3. A new section is added to chapter 48.30 RCW
2 to read as follows:

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

9 (2) The superior court may, after finding that an insurer has acted
10 unreasonably in denying a claim for coverage or payment of benefits or
11 has violated a rule in subsection (5) of this section, increase the
12 total award of damages to an amount not to exceed three times the
13 actual damages.

14 (3) The superior court shall, after a finding of unreasonable
15 denial of a claim for coverage or payment of benefits, or after a
16 finding of a violation of a rule in subsection (5) of this section,
17 award reasonable attorneys' fees and actual and statutory litigation
18 costs, including expert witness fees, to the first party claimant of an
19 insurance contract who is the prevailing party in such an action.

20 (4) "First party claimant" means an individual, corporation,
21 association, partnership, or other legal entity asserting a right to
22 payment as a covered person under an insurance policy or insurance
23 contract arising out of the occurrence of the contingency or loss
24 covered by such a policy or contract.

25 (5) A violation of any of the following is a violation for the
26 purposes of subsections (2) and (3) of this section:

27 (a) WAC 284-30-330, captioned "specific unfair claims settlement
28 practices defined";

29 (b) WAC 284-30-350, captioned "misrepresentation of policy
30 provisions";

31 (c) WAC 284-30-360, captioned "failure to acknowledge pertinent
32 communications";

33 (d) WAC 284-30-370, captioned "standards for prompt investigation
34 of claims";

35 (e) WAC 284-30-380, captioned "standards for prompt, fair and
36 equitable settlements applicable to all insurers"; or

37 (f) An unfair claims settlement practice rule adopted under RCW

1 48.30.010 by the insurance commissioner intending to implement this
2 section. The rule must be codified in chapter 284-30 of the Washington
3 Administrative Code.

4 (6) This section does not limit a court's existing ability to make
5 any other determination regarding an action for an unfair or deceptive
6 practice of an insurer or provide for any other remedy that is
7 available at law.

8 (7) This section does not apply to a health plan offered by a
9 health carrier. "Health plan" has the same meaning as in RCW
10 48.43.005. "Health carrier" has the same meaning as in RCW 48.43.005.

11 (8)(a) Twenty days prior to filing an action based on this section,
12 a first party claimant must provide written notice of the basis for the
13 cause of action to the insurer and office of the insurance
14 commissioner. Notice may be provided by regular mail, registered mail,
15 or certified mail with return receipt requested. Proof of notice by
16 mail may be made in the same manner as prescribed by court rule or
17 statute for proof of service by mail. The insurer and insurance
18 commissioner are deemed to have received notice three business days
19 after the notice is mailed.

20 (b) If the insurer fails to resolve the basis for the action within
21 the twenty-day period after the written notice by the first party
22 claimant, the first party claimant may bring the action without any
23 further notice.

24 (c) The first party claimant may bring an action after the required
25 period of time in (a) of this subsection has elapsed.

26 (d) If a written notice of claim is served under (a) of this
27 subsection within the time prescribed for the filing of an action under
28 this section, the statute of limitations for the action is tolled
29 during the twenty-day period of time in (a) of this subsection.

Passed by the Senate April 14, 2007.

Passed by the House April 5, 2007.

Approved by the Governor May 15, 2007.

Filed in Office of Secretary of State May 16, 2007.

West's RCWA 48.30.010

48.30.010. Unfair practices in general--Remedies and penalties

- (1) No person engaged in the business of insurance shall engage in unfair methods of competition or in unfair or deceptive acts or practices in the conduct of such business as such methods, acts, or practices are defined pursuant to subsection (2) of this section.
- (2) In addition to such unfair methods and unfair or deceptive acts or practices as are expressly defined and prohibited by this code, the commissioner may from time to time by regulation promulgated pursuant to chapter 34.05 RCW, define other methods of competition and other acts and practices in the conduct of such business reasonably found by the commissioner to be unfair or deceptive after a review of all comments received during the notice and comment rule-making period.
- (3)(a) In defining other methods of competition and other acts and practices in the conduct of such business to be unfair or deceptive, and after reviewing all comments and documents received during the notice and comment rule-making period, the commissioner shall identify his or her reasons for defining the method of competition or other act or practice in the conduct of insurance to be unfair or deceptive and shall include a statement outlining these reasons as part of the adopted rule.
- (b) The commissioner shall include a detailed description of facts upon which he or she relied and of facts upon which he or she failed to rely, in defining the method of competition or other act or practice in the conduct of insurance to be unfair or deceptive, in the concise explanatory statement prepared under RCW 34.05.325(6).
- (c) Upon appeal the superior court shall review the findings of fact upon which the regulation is based de novo on the record.
- (4) No such regulation shall be made effective prior to the expiration of thirty days after the date of the order by which it is promulgated.
- (5) If the commissioner has cause to believe that any person is violating any such regulation, the commissioner may order such person to cease and desist therefrom. The commissioner shall deliver such order to such person direct or mail it to the person by registered mail with return receipt requested. If the person violates the order after expiration of ten days after the cease and desist order has been received by him or her, he or she may be fined by the commissioner a sum not to exceed two hundred and fifty dollars for each violation committed thereafter.
- (6) If any such regulation is violated, the commissioner may take such other or additional action as is permitted under the insurance code for violation of a regulation.
- (7) An insurer engaged in the business of insurance may not unreasonably deny a claim for coverage or payment of benefits to any first party claimant. "First party claimant" has the same meaning as in RCW 48.30.015.

[2007 c 498 § 2 (Referendum Measure No. 67, approved November 6, 2007); 1997 c 409 § 107; 1985 c 264 § 13; 1973 1st ex.s. c 152 § 6; 1965 ex.s. c 70 § 24; 1947 c 79 § .30.01; Rem. Supp. 1947 § 45.30.01.]

West's RCWA 48.30.015

48.30.015. Unreasonable denial of a claim for coverage or payment of benefits

- (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.
- (4) "First party claimant" means an individual, corporation, association, partnership, or other legal entity asserting a right to payment as a covered person under an insurance policy or insurance contract arising out of the occurrence of the contingency or loss covered by such a policy or contract.
- (5) A violation of any of the following is a violation for the purposes of subsections (2) and (3) of this section:
 - (a) WAC 284-30-330, captioned "specific unfair claims settlement practices defined";
 - (b) WAC 284-30-350, captioned "misrepresentation of policy provisions";
 - (c) WAC 284-30-360, captioned "failure to acknowledge pertinent communications";
 - (d) WAC 284-30-370, captioned "standards for prompt investigation of claims";
 - (e) WAC 284-30-380, captioned "standards for prompt, fair and equitable settlements applicable to all insurers"; or
 - (f) An unfair claims settlement practice rule adopted under RCW 48.30.010 by the insurance commissioner intending to implement this section. The rule must be codified in chapter 284-30 of the Washington Administrative Code.
- (6) This section does not limit a court's existing ability to make any other determination regarding an action for an unfair or deceptive practice of an insurer or provide for any other remedy that is available at law.
- (7) This section does not apply to a health plan offered by a health carrier. "Health plan" has the same meaning as in RCW 48.43.005. "Health carrier" has the same meaning as in RCW 48.43.005.
- (8)(a) Twenty days prior to filing an action based on this section, a first party claimant must provide written notice of the basis for the cause of action to the insurer and office of the insurance commissioner. Notice may be provided by regular mail, registered mail, or certified mail with return receipt requested. Proof of notice by mail may be made in the same manner as prescribed by court rule or statute for proof of service by mail. The insurer and insurance commissioner are deemed to have received notice three business days after the notice is mailed.
 - (b) If the insurer fails to resolve the basis for the action within the twenty-day period after the written notice by the first party claimant, the first party claimant may bring the action without any further notice.

(c) The first party claimant may bring an action after the required period of time in (a) of this subsection has elapsed.

(d) If a written notice of claim is served under (a) of this subsection within the time prescribed for the filing of an action under this section, the statute of limitations for the action is tolled during the twenty-day period of time in (a) of this subsection.

[2007 c 498 § 3 (Referendum Measure No. 67, approved November 6, 2007).]

WAC 284-30-330

284-30-330. Specific unfair claims settlement practices defined

The following are hereby defined as unfair methods of competition and unfair or deceptive acts or practices of the insurer in the business of insurance, specifically applicable to the settlement of claims:

- (1) Misrepresenting pertinent facts or insurance policy provisions.
- (2) Failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies.
- (3) Failing to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies.
- (4) Refusing to pay claims without conducting a reasonable investigation.
- (5) Failing to affirm or deny coverage of claims within a reasonable time after fully completed proof of loss documentation has been submitted.
- (6) Not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear. In particular, this includes an obligation to promptly pay property damage claims to innocent third parties in clear liability situations. If two or more insurers share liability, they should arrange to make appropriate payment, leaving to themselves the burden of apportioning liability.
- (7) Compelling a first party claimant to initiate or submit to litigation, arbitration, or appraisal to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in such actions or proceedings.
- (8) Attempting to settle a claim for less than the amount to which a reasonable person would have believed he or she was entitled by reference to written or printed advertising material accompanying or made part of an application.
- (9) Making a claim payment to a first party claimant or beneficiary not accompanied by a statement setting forth the coverage under which the payment is made.
- (10) Asserting to a first party claimant a policy of appealing arbitration awards in favor of insureds or first party claimants for the purpose of compelling them to accept settlements or compromises less than the amount awarded in arbitration.
- (11) Delaying the investigation or payment of claims by requiring a first party claimant or his or her physician to submit a preliminary claim report and then requiring subsequent submissions which contain substantially the same information.
- (12) Failing to promptly settle claims, where liability has become reasonably clear, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage.
- (13) Failing to promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement.
- (14) Unfairly discriminating against claimants because they are represented by a public adjuster.
- (15) Failing to expeditiously honor drafts given in settlement of claims. A failure to honor a draft within three working days after notice of receipt by the payor bank will constitute a violation of this provision. Dishonor of a draft for valid reasons related to the settlement of the claim will not constitute a violation of this provision.
- (16) Failing to adopt and implement reasonable standards for the processing and payment of claims after the obligation to pay has been established. Except as to those instances where the time for payment is governed by statute or rule or is set forth in an applicable contract,

procedures which are not designed to deliver a check or draft to the payee in payment of a settled claim within fifteen business days after receipt by the insurer or its attorney of properly executed releases or other settlement documents are not acceptable. Where the insurer is obligated to furnish an appropriate release or settlement document to a claimant, it must do so within twenty working days after a settlement has been reached.

(17) Delaying appraisals or adding to their cost under insurance policy appraisal provisions through the use of appraisers from outside of the loss area. The use of appraisers from outside the loss area is appropriate only where the unique nature of the loss or a lack of competent local appraisers make the use of out-of-area appraisers necessary.

(18) Failing to make a good faith effort to settle a claim before exercising a contract right to an appraisal.

(19) Negotiating or settling a claim directly with any claimant known to be represented by an attorney without the attorney's knowledge and consent. This does not prohibit routine inquiries to a first party claimant to identify the claimant or to obtain details concerning the claim.

Statutory Authority: RCW 48.02.060 and 48.30.010, 09-11-129 (Matter No. R 2008-07), § 284-30-330, filed 5/20/09, effective 8/21/09. Statutory Authority: RCW 48.02.060, 48.44.050 and 48.46.200, 87-09-071 (Order R 87-5), § 284-30-330, filed 4/21/87. Statutory Authority: RCW 48.02.060 and 48.30.010, 78-08-082 (Order R 78-3), § 284-30-330, filed 7/27/78, effective 9/1/78.

Current with amendments included in the Washington State Register, Issue 2013-16, dated August 21, 2013.

RCW 4.56.250. Claims for noneconomic damages--Limitation

(1) As used in this section, the following terms have the meanings indicated unless the context clearly requires otherwise.

(a) "Economic damages" means objectively verifiable monetary losses, including medical expenses, loss of earnings, burial costs, loss of use of property, cost of replacement or repair, cost of obtaining substitute domestic services, loss of employment, and loss of business or employment opportunities.

(b) "Noneconomic damages" means subjective, nonmonetary losses, including, but not limited to pain, suffering, inconvenience, mental anguish, disability or disfigurement incurred by the injured party, emotional distress, loss of society and companionship, loss of consortium, injury to reputation and humiliation, and destruction of the parent-child relationship.

(c) "Bodily injury" means physical injury, sickness, or disease, including death.

(d) "Average annual wage" means the average annual wage in the state of Washington as determined under RCW 50.04.355.

(2) In no action seeking damages for personal injury or death may a claimant recover a judgment for noneconomic damages exceeding an amount determined by multiplying 0.43 by the average annual wage and by the life expectancy of the person incurring noneconomic damages, as the life expectancy is determined by the life expectancy tables adopted by the insurance commissioner. For purposes of determining the maximum amount allowable for noneconomic damages, a claimant's life expectancy shall not be less than fifteen years. The limitation contained in this subsection applies to all claims for noneconomic damages made by a claimant who incurred bodily injury. Claims for loss of consortium, loss of society and companionship, destruction of the parent-child relationship, and all other derivative claims asserted by persons who did not sustain bodily injury are to be included within the limitation on claims for noneconomic damages arising from the same bodily injury.

(3) If a case is tried to a jury, the jury shall not be informed of the limitation contained in subsection (2) of this section.

[1986 c 305 § 301.]

Wash. Rev. Code Ann. § 4.56.250 (West)

OFFICE RECEPTIONIST, CLERK

To: amicuswsajf@wsajf.ORG
Subject: RE: Morella v. Safeco Ins. Co. of Illinois (S.C. #88706-3)

9/23/13

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

-----Original Message-----

From: amicuswsajf@wsajf.ORG [<mailto:amicuswsajf@wsajf.ORG>]

Sent: Monday, September 23, 2013 4:22 PM

To: OFFICE RECEPTIONIST, CLERK

Cc: m.schein@sullivanlawfirm.org; ray@bishoplegal.com; james@bishoplegal.com;
praskin@corrchronin.com; kcorr@corrchronin.com; sestes@kbmlawyers.com

Subject: Morella v. Safeco Ins. Co. of Illinois (S.C. #88706-3)

Dear Mr. Carpenter,

Attached is the WSAJ Foundation amicus curiae brief in MORELLA. It is being served on counsel for the parties and Washington Defense Trial Lawyers by email today, per prior arrangement.

Respectfully submitted,

Bryan Harnetiaux, WSBA #5169
On Behalf of WSAJ Foundation

OFFICE RECEPTIONIST, CLERK

To: amicuswsajf@wsajf.ORG
Subject: RE: Morella v. Safeco Ins. Co. of Illinois (S.C. #88706-3)

I do not see a proof of service attached.

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-----Original Message-----

From: amicuswsajf@wsajf.ORG [<mailto:amicuswsajf@wsajf.ORG>]
Sent: Monday, September 23, 2013 4:22 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: m.schein@sullivanlawfirm.org; ray@bishoplegal.com; james@bishoplegal.com; praskin@corrchronin.com; kcorr@corrchronin.com; sestes@kbmlawyers.com
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On Behalf of WSAJ Foundation

OFFICE RECEPTIONIST, CLERK

From: Kurt Madsen [madsen.appellant@gmail.com]
Sent: Monday, September 23, 2013 4:09 PM
To: OFFICE RECEPTIONIST, CLERK; paoappellateunitmail@kingcounty.gov;
paul.sherfey@kingcounty.gov
Subject: Re: State v Madsen 11-1-10408-3 Supreme Court 86998-7

This is a reminder to Mr.Sherfey, who I noticed was not included in the reply.

Are you going to ensure the "trial" court does it's job? Which I presume is your job.
It's not my job to scan, to eliminate the scam, the "trial" court was paid \$.50 per page to add a %\$#ing number. which according to the rules mandate generation by electronic means, therefore, the "trial" court needs to adhere to RAP 9.6.

Mr. Sherfey you may also think about providing equal protection of the law, and digitally record "trials" , video would also eliminate the head gestures performed in "judge", I know the "court reporters" well at least one, must provide a service to the PAO to do some editing to thwart off appellate issues, as the promotions the PAO provides to deputies to gain wrongful convictions, this wasn't my first obtained by the injustice by King Count.

Please, Get Busy....

Thank You.

On Mon, Sep 23, 2013 at 7:52 AM, OFFICE RECEPTIONIST, CLERK <SUPREME@courts.wa.gov> wrote:

Received 9-20-13

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Kurt Madsen [mailto:madsen.appellant@gmail.com]
Sent: Friday, September 20, 2013 3:57 PM
To: paul.sherfey@kingcounty.gov; OFFICE RECEPTIONIST, CLERK; Whisman, Jim
Subject: Re: State v Madsen 11-1-10408-3 Supreme Court 86998-7

I neglected to note the email in the first attachment, which verifies the Supreme Court DID NOT receive the "clerks papers" electronically.

(see attachment 86998-7 7-20-13...) in originally message

On Fri, Sep 20, 2013 at 3:53 PM, Kurt Madsen <madsen.appellant@gmail.com> wrote:

Mr. Sherfey,

The erroneous determination which original rejected my "designation of clerks papers" see attached, your executive branch "judge" sent the rejection from the Juvenile court, It's unclear where Sub # 90 came from.

The King County Superior Court Mandates electronic filing , therefore, they are "generated" in electronic format.

Note RAP 9.6 (c) (3)

If the trial court clerk generates the clerk's papers in electronic format, the trial court clerk shall make available to any party a copy of the clerk's papers in electronic format, upon payment of the trial court clerk's reasonable expenses.

See Attachment (86998-7 order of indigence...) That authorizes payment and orders clerks papers, "the court orders as follows... 4 (c) Preparation of original documents to be reproduced by the clerk as provided in rule 14.3(b) AND 9.6 ELECTRONIC FORMAT.

Perhaps the King County Court is pulling some scam with OPD in generating "paper" documents from "electronic" documents to receive the additional .25 per page (see attached OPD COURT CLERK INVOICE...)

Can You please see to it that the Court, Counsel and myself receive the ordered "clerks papers" in electronic format?

Thank You

Madsen.appellant@gmail.com

--

Kurt Madsen,

Madsen.appellant@gmail.com

--

Kurt Madsen,

Madsen.appellant@gmail.com