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BY SUSAN L. CARLSON

CLERK (United States District Court, Western District of Washington, Case No. C18-1173RSL (Consolidated with Case No. C18-1254RSL))
Supreme Court No. 96931-1

SUPREME COURT
OF THE STATE OF WASHINGTON

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

KRISTA PEOPLES,
Appellee/Plaintiff,

v.

UNITED SERVICES AUTOMOBILE ASSOCIATION, ET AL.
Appellant/Defendants

AND

JOEL STEDMAN, ET AL.
Appellees/Plaintiffs,

v.

PROGRESSIVE DIRECT INSURANCE COMPANY,
Appellant/Defendant.

**APPELLEES JOEL STEDMAN, ET AL.'S RESPONSE TO
AMICUS CURIAE BRIEF OF AMERICAN PROPERTY
CASUALTY INSURANCE ASSOCIATION (APCIA)**

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I. CERTIFIED QUESTIONS.

The United States District Court for the Western District of Washington certified two questions to this Court concerning the injury to “business or property” element of a Washington Consumer Protection Act (“CPA”) claim.

1. With regards to the injury to “business or property” element of a CPA claim, can insureds in Ms. Peoples’ and/or Mr. Stedman’s circumstances, who were Physically injured in a motor vehicle collision and whose Personal Injury Protection (“PIP”) benefits were terminated or limited in violation of WAC 284-30-330, bring a CPA claim against the insurer to recover out-of-pocket medical expenses and/or to compel payments to medical providers?

2. With regards to the “injury to business or property” element of a CPA claim, can insureds in Ms. Peoples’ and/or Mr. Stedman’s circumstances, who were physically injured in a motor vehicle collision and whose Personal Injury Protection (“PIP”) benefits were terminated or limited in violation of WAC 284-30-330, bring a CPA claim against the insurer to recover excess premiums paid for the PIP coverage, the costs of investigating the unfair acts, and/or the time lost complying with the insurer’s unauthorized demands?

II. INTRODUCTION AND SUMMARY OF THE ARGUMENT.

Appellees Joel Stedman and Karen Joyce will rely on their briefing in Response to Appellant Progressive’s Opening Brief with respect to the first certified question. Appellees Stedman and Joyce also concur with and adopt the arguments set forth in the Brief of Amicus Curie Washington State Association for Justice (“WSAJ”). In particular, WSAJ’s arguments

regarding the statutory construction of RCW 48.30 et seq. and the CPA – pointing out that claims under these statutes do not result in a categorical exclusion for breach of contract even when the contractual promise is to indemnify for medical expenses – and that *Ambach v. French* is taken out of context, the instant matter is not a case where the Appellees are dressing up a personal injury claim as a claim for bad faith.

Regarding the second certified question, Amici American Property Casualty Insurance Association (“APCIA”), raised, for the first time, the argument that Appellees cannot recover excess premiums paid for PIP coverage after the risk attached and Progressive became liable to pay valid claims. Brief of APCIA, at 8. APCIA’s argument is unsupported by Washington law.

III. ARGUMENT.

APCIA argues that “[i]t is a fundamental tenet of insurance law that an insured cannot retroactively recover earned insurance premiums paid after the risk has attached and the insurer becomes liable to pay valid claims.” Brief of APCIA, at 8. APCIA cites *Couch on Insurance* as well as two Washington cases for this proposition. *Id.* The Washington cases do not support this argument. Both cases are inapplicable to the issue in this matter, as neither involves the return of a premium as an aspect of

damages. Rather, both cases, and the body of law to which APCIA refers, deal with arguments of the insurer about there being no coverage, either by reason of the policy's effective date, or an insured's fraud or misrepresentation. In citing only these two irrelevant cases, for the reasons discussed in detail below, APCIA fails to present any Washington law to support its argument.

First, in *Stanton*, PEMCO was paid premiums for underinsured motorist coverage and sought to avoid its coverage obligations by making an unsuccessful argument about the effective date of the policy. *Stanton v. Public Employees Mut. Ins. Co.*, 39 Wn. App. 904, 908-9, 697 P.2d 259 (1985). "The Stantons paid for the coverage and it was not until long after this action was commenced that the refund [of premiums] was tendered to the Stantons." *Id.* 39 Wn. App. at 909. This situation resulted in the Court of Appeals reasoning that an insurance company cannot avoid covering a loss by returning the premium. *Id.* ("Once the company accepts and retains payment of the premium covering the period when the accident happened, it cannot deny coverage existed[.]" citing *Glandon v. Searle*, 68 Wn.2d 199, 412 P.2d 116 (1966); *Neat v. United States Fid. & Guar. Co.*, 170 Wn. 625, 17 P.2d 32 (1932). In short, *Stanton* stands for the unremarkable proposition that returning an insurance premium to the insured does not free an insurer of its coverage obligations.

Second, APCIA relies on *Queen City Farms* in arguing that CPA damages are not appropriate for a return of premium, that the appropriate action is a breach of contract. However, the holding to which APCIA refers is that “where the insurer claims the policy was never effected due to the insured’s fraud or misrepresentation, then as a condition precedent to this defense, the insurer must tender back the premium.” *Queen City Farms v. Cent. Nat’l Ins. Co. of Omaha*, 64 Wn. App. 838, 870, 827 P.2d 1024 (1992) (citing *Glandon v. Searle*, 68 Wn.2d 199, 412 P.2d 116 (1966)). The holding was that misrepresentation defenses should have been struck because the return of premiums did not occur as a condition precedent to voiding the insurance policy. There is nothing in *Queen City Farms* that would prevent an insured from being awarded the return of his or her premium under the CPA. *Queen City Farms* does not even mention the CPA.

APCIA has taken an out of context quotation from an insurance treatise and tried to marry it to Washington law. No such marriage exists. The quote from Couch on Insurance argues that once the risk has attached an insurer does not have to return a premium, even if it was unearned. Brief of APCIA, at 8. To the contrary, both *Queen City Farms* and *Stanton* involved an insurer returning premiums in an effort to avoid covering a loss. Neither case, nor Couch on Insurance, support the argument that

return of an insurance premium is not a cognizable “injury to business or property” under the CPA.

The rule regarding earned premiums is inapplicable to the instant case. Appellees paid premiums for their PIP coverage. Maximum Medical Improvement (“MMI”) was not a basis for an insurer to limit or deny PIP claims under WAC 284-30-395. Appellant Progressive’s utilization of MMI in adjusting PIP claims means the Appellees paid for less PIP coverage than they were entitled to receive by statute. APCIA’s argument is fundamentally flawed because the Appellant did not earn the premium based on the coverage required by the statute.

IV. CONCLUSION.

The Court should answer “Yes” to both certified questions. The rule regarding earned premiums has no application to this case.

Respectfully submitted this 3rd day of September, 2019.

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CERTIFICATE OF SERVICE

I declare that on September 3, 2019, I caused a true copy of the foregoing **APPELLEES JOEL STEDMAN, ET AL.'S RESPONSE TO AMICUS CURIAE BRIEF OF AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION (APCIA)**, to be served on the following via the Appellate Court's Portal:

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