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

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.

**APPELLANT PROGRESSIVE DIRECT INSURANCE
COMPANY'S RESPONSE TO WASHINGTON STATE
ASSOCIATION FOR JUSTICE FOUNDATION AMICUS CURIAE
BRIEF**

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TABLE OF CONTENTS

| | Page |
|--|-------------|
| CERTIFIED QUESTIONS | 1 |
| STATEMENT OF THE CASE..... | 1 |
| ARGUMENT | 1 |
| I. The Association’s statutory and regulatory analysis adds nothing substantive to the question presented regarding what types of injuries are recoverable under the CPA. | 1 |
| II. An insured who is wrongfully denied PIP benefits is not injured in his or her business or property. | 3 |
| A. Ascertaining the nature of the claimed injury does not require considering the conduct that allegedly caused the injury. | 3 |
| B. Insurance contracts do not create a property interest out of a personal injury. | 5 |
| C. The issue here is not about exempting anyone from the CPA. The issue is solely about the types of injuries for which the CPA provides a remedy, and the CPA is unambiguous in only providing a remedy for injuries to “business or property.” | 8 |
| III. <i>Ambach</i> precludes CPA recovery of medical expenses resulting from personal injuries and <i>Williams</i> is consistent with <i>Ambach</i> . .. | 10 |
| IV. The Court should follow the federal cases analyzing the identical injury to business or property requirement in the federal RICO statute. | 12 |
| CONCLUSION..... | 14 |

TABLE OF AUTHORITIES

| Cases | Page(s) |
|---|----------------|
| <i>Ambach v. French</i> , 167 Wn.2d 167, 216 P.3d 405 (2009)..... | <i>passim</i> |
| <i>Brown v. Ajax Paving Indus., Inc.</i> , 752 F.3d 656 (6th Cir. 2014) | 12, 14 |
| <i>City of Fed. Way v. Koenig</i> , 167 Wn.2d 341, 217 P.3d 1172 (2009)..... | 7 |
| <i>Coleman v. Am. Commerce Ins. Co.</i> , 2010 WL 3720203 (W.D. Wash. Sept. 17, 2010)..... | 7 |
| <i>Coppinger v. Allstate Ins. Co.</i> , 2018 WL 1121327 (W.D. Wash. Mar. 1, 2018) | 6 |
| <i>Dees v. Allstate Ins. Co.</i> , 933 F. Supp. 2d 1299 (W.D. Wash. 2013)..... | 7 |
| <i>Frias v. Asset Foreclosure Servs., Inc.</i> , 181 Wn.2d 412, 334 P.3d 529 (2014)..... | 6 |
| <i>Goodman v. Boeing Co.</i> , 127 Wn.2d 401, 899 P.2d 1265 (1995)..... | 5 |
| <i>Haley v. Allstate Ins. Co.</i> , 2010 WL 4052935 (W.D. Wash. Oct. 13, 2010), <i>on</i> <i>reconsideration in part</i> , 2010 WL 5224132 (W.D. Wash. Dec. 14, 2010)..... | 7 |
| <i>Hangman Ridge Training Stables, Inc. v. Safeco Title Ins.</i> <i>Co.</i> , 105 Wn.2d 778, 719 P.2d 531 (1986)..... | 3 |
| <i>Heide v. State Farm Mut. Auto. Ins. Co.</i> , 261 F. Supp. 3d 1104 (W.D. Wash. 2017)..... | 6, 7 |

| | |
|---|------------|
| <i>Jackson v. Sedgwick Mgmt. Servs., Inc.</i> , 731 F.3d 556 (6th Cir. 2013) | 12, 13, 14 |
| <i>Kovarik v. State Farm Mut. Auto. Ins. Co.</i> , 2016 WL 4555465 (W.D. Wash. Aug. 31, 2016) | 7 |
| <i>Reese v. Sears, Roebuck & Co.</i> , 107 Wn.2d 563, 731 P.2d 497 (1987) | 4, 5 |
| <i>Sadler v. State Farm Mut. Auto. Ins. Co.</i> , 2008 WL 4371661 (W.D. Wash. Sept. 22, 2008) <i>aff'd</i> , 351 F. App'x 234 (9th Cir. 2009) | 7 |
| <i>Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.</i> , 122 Wn.2d 299, 858 P.2d 1054 (1993) | 3 |
| <i>Williams v. Lifestyle Lift Holdings, Inc.</i> , 175 Wn. App. 62, 302 P.3d 523 (2013) | 10, 11, 12 |
| <i>Wright v. Lyft, Inc.</i> , 189 Wn.2d 718, 406 P.3d 1149 (2017) | 9 |
| Statutes | |
| 18 U.S.C. § 1964(c) | 12, 13 |
| RCW 19.86.020 | 2 |
| RCW 19.86.090 | 2 |
| RCW 19.86.920 | 13 |
| RCW 48.01.030 | 2 |
| Other Authorities | |
| WAC 284-30-395 | 2 |

CERTIFIED QUESTIONS

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?*

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?*

(emphasis added).

STATEMENT OF THE CASE

Progressive incorporates the Statement of the Case from its Opening Brief.

ARGUMENT

- I. The Association’s statutory and regulatory analysis adds nothing substantive to the question presented regarding what types of injuries are recoverable under the CPA.**

Much of the Washington State Association for Justice Foundation’s (the “Association”) amicus curiae brief is a recitation of insurance statutes and regulations that stand for the uncontroversial premise that insurance is

a matter of public interest, insurance companies are subject to the CPA, and the Office of Insurance Commissioner has been given authority to regulate insurance. *See* Ass’n Br. 6-10. None of this lengthy discussion of the insurance regulatory scheme adds anything substantive to the question at issue here: what type of *injuries* give rise to a recovery under the CPA?

The CPA provides that: “Any person who is injured *in his or her business or property* by a violation of RCW 19.86.020 ... may bring a civil action in superior court to enjoin further violations to recover the actual damages sustained by him or her, or both ...” RCW 19.86.090 (emphasis added).

The Association’s statutory argument to skirt the CPA’s injury to “business or property” requirement is as follows: (1) RCW 48.01.030 creates a broad legislative mandate that the business of insurance is vital to the public interest; (2) the Insurance Commissioner enacted unfair claims settlement regulations for PIP carriers in WAC 284-30-395; (3) the general rule is that violations of the insurance regulations are subject to the CPA; (4) the legislature did not create an exception to the CPA for PIP carriers; and (5) therefore, violations of PIP regulations must be a violation of the CPA, regardless of the nature of the alleged injury. *See* Ass’n Br. at 6-10.

The Association’s statutory analysis unravels, however, because the critical question is not whether PIP carriers—or any other insurers—are somehow exempted from the CPA. The critical question here turns on the statutory language governing *who can seek relief* under the CPA. The legislature expressly limited recoverable CPA damages to injuries to

“business or property.” This injury element “retains restrictive significance as to the damages recoverable.” See *Washington State Physicians Ins. Exch. & Ass’n v. Fisons Corp.*, 122 Wn.2d 299, 318, 858 P.2d 1054 (1993) (citation omitted); *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780, 719 P.2d 531 (1986) (element four of CPA claim is “injury to plaintiff in his or her business or property.”). The Association’s argument that the legislature did not create an exception to the CPA for PIP carriers is immaterial to the question of what types of injuries are recoverable, regardless of who the defendant is.

II. An insured who is wrongfully denied PIP benefits is not injured in his or her business or property.

The Association argues that *all* insurance transactions create a legally protected interest in an insureds’ property and are subject to the enforcement provisions of the CPA. Ass’n Br. at 8-18. The Court should reject this overreaching argument.

- A. Ascertaining the nature of the claimed injury does not require considering the conduct that allegedly caused the injury.

Citing the common law definition of “injury,” the Association first argues that, in order “[t]o determine the relevant ‘injury,’ ... it is necessary to ascertain the ‘legally protected interest’ the plaintiff asserts that the defendant ‘invaded.’” Ass’n Br. at 11. From that premise, the Association posits that ascertaining the legally protected interest somehow “requires the Court to examine the causal link between the unfair practice and the

resultant harm.” *Id.* With this argument, the Association aims to create the illusion that the nature of “resultant harm” (i.e., the injury) transforms depending on how the injury was caused.

Although different causal factors may produce different types of injuries, the Association rests on logical fallacy to conclude that this means different causal factors cannot produce the same injury, or that the same injury becomes something different merely depending on which causal lens one views it through. Indeed, taking the Association’s argument to its conclusion would write out the injury to “business or property” element of a CPA claim. If the Association were correct that the cause of an injury dictates the nature of the injury—and that injuries caused by CPA-prohibited conduct always qualify as injuries to “business or property” because of that causation—there would be no need for the separate injury element because it would be met whenever a plaintiff alleges CPA-prohibited conduct (i.e., the other elements of the claim).

The cases the Association relies upon for this causation-dictates-nature-of-injury argument are inapposite. For example, the Association relies on *Reese v. Sears, Roebuck & Co.*, 107 Wn.2d 563, 571-72, 731 P.2d 497 (1987) for the argument that different injuries arise if they have different causal factors. But *Reese* does not stand for the proposition that different causal factors necessarily result in different injuries. The Supreme

Court determined in *Reese* that the plaintiff had suffered two separate injuries: a workplace injury and management discrimination as a result of her disability. 107 Wn.2d at 565. Although the Supreme Court noted that the injuries required different causal factors, it did not find them to be separate injuries for that reason, instead recognizing that the injuries were “of a different nature,” apart from any consideration of causation. *Id.*; accord *Goodman v. Boeing Co.*, 127 Wn.2d 401, 405, 899 P.2d 1265 (1995). Here, by contrast, there is only one injury—medical expenses resulting from personal injuries. The singular injury of medical expenses cannot become two injuries “of a different nature” merely based on which party (tortfeasor or insurer) caused it by failing to pay the medical expenses.

B. Insurance contracts do not create a property interest out of a personal injury.

Next, the Association argues that insurance contracts create a property interest in financial compensation upon the occurrence of a triggering event. Ass’n Br. at 11-13. However, accepting this argument would create an untenable legal fiction under which the exact same injury, which always involves the financial consequences of resulting medical expenses, would be a personal injury if the medical expenses are owed by a tortfeasor but a property injury if the medical expenses are owed by an insurance company.

The Jury Instruction the Association cites does not support the Association's accompanying argument that personal injuries become property injuries when the "insured suffers a financial loss." Ass'n Br. at 12-13. Although the jury instruction's reference to "financial loss" could be erroneously read in isolation to suggest that personal injuries can become property injuries when there is an associated "financial loss," this Court has definitively stated otherwise. *Ambach v. French*, 167 Wn.2d 167, 175, 216 P.3d 405, 409 (2009) ("[P]ayment for medical treatment, like Ambach's payment for surgery, does not transform medical expenses into business or property harm."); *Frias v. Asset Foreclosure Servs., Inc.*, 181 Wn.2d 412, 431, 334 P.3d 529 (2014) ("The financial consequences of such personal injuries are also excluded" as cognizable CPA injuries to business or property.). Thus, contrary to the Association's argument, the jury instruction's reference to "financial loss," must mean something *other than* the financial loss of medical expenses resulting from personal injuries, which is the only injury claimed here. *See id.*

Moreover, contrary to the Association's position that insureds may recover medical expenses resulting from personal injury from their insurers under the CPA, Washington federal cases have held since 2009 that insureds may not do so. *See Coppinger v. Allstate Ins. Co.*, 2018 WL 1121327, at *1-2 (W.D. Wash. Mar. 1, 2018); *Heide v. State Farm Mut. Auto. Ins. Co.*,

261 F. Supp. 3d 1104, 1110 (W.D. Wash. 2017); *Kovarik v. State Farm Mut. Auto. Ins. Co.*, 2016 WL 4555465, at *3 (W.D. Wash. Aug. 31, 2016); *Dees v. Allstate Ins. Co.*, 933 F. Supp. 2d 1299, 1310-12 (W.D. Wash. 2013); *Haley v. Allstate Ins. Co.*, 2010 WL 4052935, at *8 (W.D. Wash. Oct. 13, 2010), *on reconsideration in part*, 2010 WL 5224132 (W.D. Wash. Dec. 14, 2010); *Coleman v. Am. Commerce Ins. Co.*, 2010 WL 3720203, at *4 (W.D. Wash. Sept. 17, 2010); *Sadler v. State Farm Mut. Auto. Ins. Co.*, 2008 WL 4371661, at *8-9 (W.D. Wash. Sept. 22, 2008) *aff'd*, 351 F. App'x 234, 236 (9th Cir. 2009).

Despite a decade of federal cases holding that insureds may not bring CPA claims against insurers to recover medical expenses resulting from personal injuries, the Legislature has never amended the CPA to change the injury to “business or property” requirement or otherwise make personal injury medical expenses CPA-recoverable. “This court presumes that the legislature is aware of judicial interpretations of its enactments and takes its failure to amend a statute following a judicial decision interpreting that statute to indicate legislative acquiescence in that decision.” *City of Fed. Way v. Koenig*, 167 Wn.2d 341, 348, 217 P.3d 1172, 1175 (2009). The Legislature’s failure to amend the CPA is legislative acquiescence in the federal cases interpreting the CPA to bar claims against insurers seeking to recover medical expenses resulting from personal injuries.

- C. The issue here is not about exempting anyone from the CPA. The issue is solely about the types of injuries for which the CPA provides a remedy, and the CPA is unambiguous in only providing a remedy for injuries to “business or property.”

Next, the Association argues that there is no evidence of legislative intent to treat PIP insurers differently from other insurers under the CPA. Ass’n Br. at 13-14. Preliminarily, this argument relies on a fiction that there is such a thing as a “PIP insurer” in an effort to make it seem like this case is about excluding an entire class of insurers from the scope of the CPA. But as the Association’s own argument effectively concedes, there is no such thing as a “PIP insurer” because *all* automobile insurers in Washington are required to offer PIP coverage.

This does not mean, however, that a ruling in Progressive’s favor would exclude all, or even any, Washington automobile insurers from the CPA’s ambit. It is not about an exclusion for “PIP insurers,” for automobile insurers, or for any other class of potential defendants. It is about the type of injuries the CPA is designed to remedy. With the limitation to injuries to “business or property,” the Legislature intended to distinguish CPA claims from routine tort claims, as this Court has already reasoned. *See Ambach*, 167 Wn.2d at 179, n. 6. Regardless of the defendant sued, the CPA is not designed to provide a remedy for personal injuries and their resulting medical expenses. *Id.* at 175.

The Association's reliance on *Wright v. Lyft, Inc.*, 189 Wn.2d 718, 406 P.3d 1149 (2017) is misplaced. In *Wright*, this Court addressed the Legislature's adoption of the Consumer Electronic Mail Act, which made sending spam email a per se violation of the CPA but did not do the same for text messages. 189 Wn.2d at 730. The Court examined the statutory language of CEMA and determined that there was no indication that the legislature intended to regulate text messages and emails differently and thus treated the sending of text messages the same as emails. *Id.* The Association relies on *Wright* to argue that because there is essentially no express exclusion in the CPA for PIP carriers, the Court should hold medical expenses are recoverable from PIP carriers. Ass'n Br. at 13-15. The critical difference between *Wright* and here, however, is that the legislature has expressly spoken regarding the types of *injuries* that are recoverable under the CPA, which only includes injuries to business or property, regardless of who the defendant is.

In the Association's final twist on its effort to paint this case as being about reading "into the statute an exemption from CPA actions for PIP insurers," it argues that if the Court concludes the statutory schemes are reasonably susceptible to two different interpretations and are therefore ambiguous, the Court should hold that all insurance transactions, including those involving PIP coverage, are subject to the enforcement provisions of

the CPA. Ass'n Br. At 15-16. Setting aside the false premise that the question here involves an "exemption" for any class of defendants, there is no ambiguity in the CPA's express requirement for injuries to "business or property." The duties the CPA imposes, and the consumer protections those duties are designed to support, are not undercut in any sense by reading the statute *as written* to properly limit what the CPA's duties are designed to protect consumers from—only injuries to business or property. All insurance transactions, including those involving PIP coverage, are already subject to the CPA's enforcement mechanisms, but only when they involve the types of injuries for which the CPA is designed to provide a remedy.

III. *Ambach* precludes CPA recovery of medical expenses resulting from personal injuries and *Williams* is consistent with *Ambach*.

The Association relies on *Williams v. Lifestyle Lift Holdings, Inc.*, 175 Wn. App. 62, 302 P.3d 523 (2013) to argue that the denial of PIP benefits can be an injury to property and that *Williams* is "not contradicted by" *Ambach*. Ass'n Br. at 16-18. In *Ambach*, this Court held that personal injury damages do not constitute injury to business or property and thus are not compensable under the CPA. *Ambach*, 167 Wn.2d at 173. In *Williams*, the court of appeals held that the cost of a surgery could be an injury to business or property where the surgery was deceptively marketed, even though the surgery also caused a personal injury. 175 Wn. App. At 64. The

Court of Appeals focused on the fact that Williams was not claiming to be physically and economically injured by one act because the act that caused the alleged personal injury to Williams was the surgery itself, whereas the acts that caused her alleged consumer injury were the advertising and sales techniques leading her to purchase the surgery. *Id.* at 73. Here, the Association argues that the holding in *Williams* should apply because Ms. Peoples and Mr. Stedman are not claiming to be physically and economically injured by one act. Ass'n Br. at 18.

However, *Williams* addressed a different question than that posed in this case, and if anything, it undercuts the Association's argument. The cost of surgery at issue in *Williams* is not analogous to the damages that plaintiffs seek to recover in this case, which are damages to reimburse plaintiffs for physical injuries themselves. The cost of surgery at issue in *Williams* was not the cost to reimburse the plaintiff for physical injuries. Instead, the only physical injuries at issue in *Williams* were those that *resulted from* the alleged deceptively marketed surgery. Notably, the court in *Williams* did not allow CPA recovery for those personal injuries, only for the cost of the alleged deceptively marketed surgery. 175 Wn. App. at 73-74.

Unlike in *Williams*, where the plaintiff sought to recover certain medical expenses that did not result from personal injuries in any sense, Ms. Peoples and Mr. Stedman are not seeking to recover any medical expenses

that did not result from their personal injuries. And nothing in either *Ambach* or *Williams* suggests that the causal link between the personal injuries and resulting medical expenses disappears through subsequent events like a denial of insurance benefits for the *same personal injuries*. See Part IV below. Because Ms. Peoples and Mr. Stedman were physically and economically injured by the same act that caused their personal injuries, the CPA does not provide a remedy.

IV. The Court should follow the federal cases analyzing the identical injury to business or property requirement in the federal RICO statute.

Finally, the Association argues that federal cases interpreting the federal RICO statute's injury to "business or property" requirement, 18 U.S.C. § 1964(c), should be rejected because the courts' decisions there were grounded in federalism concerns of plaintiffs using the federal RICO statute to collaterally attack state workers' compensation schemes. Ass'n Br. at 19-20. However, in one of the cases, the Sixth Circuit resorted to federalism principles merely to "confirm[]" its statutory interpretation that there had been no injury to business or property. *Jackson v. Sedgwick Mgmt. Servs., Inc.*, 731 F.3d 556 (6th Cir. 2013). In the other case, there was no discussion of federalism at all. See *Brown v. Ajax Paving Indus., Inc.*, 752 F.3d 656, 658 (6th Cir. 2014).

The Legislature dictates that Courts interpreting the CPA are to “be guided by final decisions of the federal courts ... interpreting the various federal statutes dealing with the same or similar matters...” RCW 19.86.920. Here, RICO civil actions have the exact same limitation as the CPA, requiring an “injury to business or property.” *See* 18 U.S.C. § 1964(c). Because this is the *same* language, the Legislature mandates that the CPA be interpreted the same as the RICO cases.

In *Jackson*, the Sixth Circuit rejected exactly the arguments the Association advances here. 731 F.3d at 563-66. There, the plaintiffs argued that a RICO property injury existed because they alleged “injury to a promise of benefits or wages made after a personal injury” rather than the personal injuries themselves. *Id.* at 566. The court observed that the no-fault workers’ compensation insurance there—like the no-fault PIP insurance here—“provides a framework in which the employee may obtain compensation for a ‘personal injury.’” *Id.* The court then reasoned that the intervening insurance did not change the nature of the injury because “those [insurance] benefits merely reflect the pecuniary losses associated with the personal injury” and “the losses [plaintiffs] allege are simply a shortcoming in the compensation they believed they were entitled to receive for a personal injury.” *Id.*

After determining that the plaintiffs had not alleged an injury to business or property, the Sixth Circuit explained: “Our interpretation of the statute is *confirmed* by the principle that Congress typically does not upset the established distribution of power between federal and state governments without a clear statement of its intent to do so.” *Id.* at 566-67 (emphasis added). Thus, the *Jackson* court did not base its statutory interpretation on issues of federalism. Rather, issues of federalism confirmed and strengthened the court’s interpretation. There is no reason to suggest that the Sixth Circuit’s statutory interpretation would be any different absent the federalism issue present in *Jackson*. Indeed, in *Ajax*, the Sixth Circuit came to the same conclusion as in *Jackson*, with no discussion regarding federalism. *See* 752 F.3d 656. Because neither the Association nor any party has cited a single federal case contrary to the RICO cases Progressive cited, the Court should follow those cases as the Legislature has directed.

CONCLUSION

As explained herein and in Progressive’s Opening and Reply Briefs, the Court should answer both of the certified questions “No.”

Respectfully submitted this 3rd day of September, 2019.

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