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NO. 96931-1
IN THE SUPREME COURT
FOR THE STATE OF WASHINGTON

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

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.

APPELLEE/PLAINTIFF KRISTA PEOPLES' RESPONSE TO AMICUS BRIEFS

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I. SUMMARY OF RESPONSE

Respondent, Plaintiff Peoples and the certified class of Washington insureds of the Defendant USAA insurance companies (“USAA”) respond to the amicus briefs of the American Property Casualty Insurance Association (“Insurance Association”) and the Washington State Association for Justice Foundation (“Washington Association”).

Undercutting its professed interest in whether *Washington* insureds should be permitted to sue their insurer for not paying *Washington* providers on medical expense bills submitted on *Washington* Personal Injury Protection (“PIP”) claims under the *Washington* Consumer Protection Act (“CPA”), the Insurance Association advises this Court that it is a “global” entity representing 60% of the property and casualty insurance market in the United States. Amicus Brief at 1. Perhaps, predictably then, the global Insurance Association provides truncated arguments that contain a superficial analysis of Washington authority. It fails to address the key issue, i.e. what is the proper statutory construction of the Washington CPA?

The statutory language, RCW 19.86.090, is clear on its face and grants a cause of action to “any person” who alleges injury to

“business or property” caused by an unfair or deceptive practice, i.e. a practice that violates RCW 19.86.020. Ms. Peoples and her certified class allege just that. They allege USAA engaged in an unfair CPA practice that violated the applicable WAC regulations and the PIP statute’s mandate to pay “*all reasonable*” medical expenses submitted on a PIP claim and in doing so caused them economic loss in the form of an underpayment of their provider bills and a loss of the full benefit of their PIP premium dollar. Peoples’ Brief at 1-3; 23-25.

Not only does the Insurance Association’s brief fail to address the CPA’s plain language, it fails to discuss the relevant legislative intent that informs the Act. And it fails to address Washington’s “*strong public policy in favor of full compensation of medical benefits for victims of road accidents*” reflected in the PIP statute and WAC 284-30-395 that informs the specific statutory claim made by Peoples and the certified class.¹

Nor does the global Insurance Association discuss the insured’s *property interest* in his or her PIP insurance benefits that were purchased by payment to USAA of a separate PIP policy

¹ See, *Durant v. State Farm Mut. Auto Ins.*, 191 Wn.2d 1, 14 (2018) emphasis added.

premium. Peoples Brief at 36; 41-42. It fails to say why that interest is not diminished – even if minimally – by USAA failing to pay PIP benefits to cover reasonable medical expenses submitted by the insured’s provider on a PIP claim. Nor does it say why that diminution of that property interest does not sufficiently state a claim for “injury to property” and thereby meets the *plain language* of the CPA.

Indeed, because USAA fails to pay PIP benefits to cover the reasonable medical expenses submitted by providers for treating its insured, the insured is left “holding the bag” for the difference between what it paid and what it should have paid and subjects the insured to “balance billing” and possible collection actions by the provider. Ms. Peoples, for example, paid her provider when USAA did not. Peoples brief at 19.

In contrast, the brief of the Washington Association (WSAJ) gives the Court a thorough, informed and compelling analysis of the legislative history and intent that informs the Washington Consumer Protection Act and is the “touchstone” of statutory interpretation of the Act. WSAJ Brief at 5-13. It also provides the Court with a compelling argument for the absence of legislative intent that auto insurers and PIP claims should be beyond the purview of the

protections afforded by the CPA for violations of the PIP statute and WAC regulations. WSAJ Brief at 13-16. The Washington Association's analysis leads to a reasonable construction of the CPA and the appropriate conclusion that the CPA should be construed as permitting an insured to recover for the economic loss caused by the insurer's violations of the WAC fair claims handling regulations and the PIP statute's mandate to pay "all reasonable and necessary" medical expenses on PIP claims. RCW 48.22.005(7), emphasis added.

The Washington Association's brief also provides a compelling analysis of the insured's claim for diminution of the insured's property interest in the PIP insurance benefits that is caused by USAAs unfair denial of payment of the insured's PIP claim. Brief at 8-12. Perhaps, because Washington law is clear that insureds have a "property interest" in their insurance policy benefits and the diminution of that interest, even if minor, is "injury" under the CPA, the brief of the "global" Insurance Association does not address the argument that Respondents Peoples and Stedman have set forth a legally cognizable claim of CPA "injury" based on USAA's unfair practice of denying payments of PIP claims in violation of the PIP statute and WAC.

As the Washington Association points out, the briefs of USAA and Progressive also fail to address the insureds' property interest in their PIP benefits. The insurers fail to explain why that diminution of that interest is not CPA "injury" to property. They fail to address the argument that the diminution of the insured's property interest proximately caused by their failure to pay PIP benefits to cover reasonable and necessary medical expenses satisfies the "injury" and "causation" elements of a CPA claim.

Because that the diminution of that property interest in insurance benefits alone distinguishes this case from *Ambach* and *Frias*, which the global Insurance Association relies on heavily, the Insurance Association's arguments for excluding an insurer's wrongful and unfair denial of PIP claims from the protections of the CPA based on this authority is unpersuasive. Even so, as the Washington Association's brief makes clear *Ambach* is distinguishable from the facts and claim asserted by Ms. Peoples and Mr. Stedman and consistent with the court's decision in *Williams v. Lifestyle Lift Holdings, Inc.*, 175 Wn. App. 62 (2013) that permitted a CPA claim premised on loss of money due to the deceptive marketing of a facial surgery procedure even though the plaintiff also alleged a medical negligence claim against the

defendant physician relating to the surgery. WSJA Brief at 16-18.

The Insurance Association does not address *Williams*.

Finally, the Insurance Association's brief confuses a number of issues in its argument against considering the effect on the insured's loss of "*full compensation of medical benefits*" caused by the insurer's violation of the WAC, PIP statute and CPA as "injury to property." Brief at 8-9. The Insurance Association characterizes this "excess premium" claim as a demand for *return* of all premiums paid for PIP coverage. But as Ms. Peoples's brief explains, the district court's question was the flipside of what she was claiming as *injury to her property*, i.e. that her insurer's wrongful denial of payment of her provider's bill in full resulted in a *loss of value* of her PIP benefits and diminished her property interest in those benefits. Peoples brief at 41-41. She is not asking for a return of premiums paid but is asking for the full value of the PIP benefits she purchased.

As Peoples pointed out, the district court's question *in context* is about what types of economic effects caused by the insurer's practice meet the "*injury*" element of the CPA. *Id.* Peoples claims that the insurer's *practice* of denying payment of PIP claims without first conducting a reasonable investigation or making a

determination that the provider's charge is not reasonable or the treatment is not necessary *before* denying payment of the provider's bill diminishes her property interest in the PIP benefits she purchased. The measure of her "damages" for that diminution may be the amount of benefits not paid relative to the amount of premium she paid for coverage.² But the *measure* of damages has nothing to do with whether *diminution in the value* of her PIP insurance benefits is in fact CPA injury to property. Because she has a recognized property interest in her PIP benefits, diminution in the value of those benefits is CPA injury. Indeed, this Court has said CPA injury to property may exist even if that injury is "unquantifiable." See, *Panag v. Farmers Ins. Co. of Wash.*, 167 Wn.2d 38 (2009) ("Injury' is distinct from 'damages.' *Nordstrom*, 107 Wash.2d at 740, 733 P.2d 208. Monetary damages need not be proved. Unquantifiable damages may suffice.")

The Insurance Association's brief does not say otherwise. And the Washington Association's brief confirms Peoples position.

² The PIP statute mandates at least \$10,000 in PIP premiums. RCW 48.22.095. But insurers can and do offer higher PIP benefits. For example, Ms. Peoples purchased \$35,000 in PIP benefits presumably for a higher PIP policy premium than USAA charges for the minimum \$10,000.

Finally, The Washington Association distinguishes *Ambach* by the legal rights being invade which it describes as the difference between the right to be secure in your person from negligent physical harm in *Ambach* and the contractual right to be paid PIP benefits here. This same distinction Peoples noted by stating that she alleged USAA's claims handling practices caused only harm to her pocketbook not harm to her body. Peoples brief at 5. But while Peoples claim does arise from her decision and act of purchasing PIP benefits from USAA rather than the unfortunate act of having decided to drive enter the Highway 99 tunnel where she was rear-ended and injured, her rights being invade by USAA's unfair practice are not merely contractual but statutory and regulatory. She has a statutory right under the PIP statute to be paid "*all reasonable*" expenses. RCW 48.22.005(7) emphasis added. She has a regulatory right to have USAA make an individualized investigation of the reasonableness of her provider's fee for the services billed *before* denying payment under WAC 284-30-330. And she has a regulatory right to have USAA make an actual determination that the amount billed by the provider as his/her fee was not *in fact* reasonable before denying payment under WAC 284-30-395.

After all the PIP statute does *not* require that insurers *provide* PIP coverage. It requires that the insurer *offer* the coverage. See, RCW 48.22.095, insurer must offer PIP coverage that will pay a minimum of \$10,000 in “medical and hospital benefits” and RCW 48.22.005(7) defining “medical and hospital benefits” to mean “payments for all reasonable and necessary” expenses submitted on a PIP claim.

Indeed, many insureds do not want to pay the extra premium charged by insurers for PIP coverage. They chose to rely instead on health insurance which has deductibles and co-pays to pay for treatments sustained in a car accident. PIP coverage does not have deductibles or co-pays. And those who choose to buy PIP benefits are guaranteed by the PIP statute payment of *all* reasonable bills not just those below an arbitrary 80th percentile database limit even if that limit is in the insurance policy. See *Durant*, supra.

Insureds, who have purchased PIP benefits, are also guaranteed a right to a particular claims handling process that is fair as defined by the WAC. It is unfair for USAA to deny and reduce payment of a PIP claim without a reasonable investigation. It is unfair for USAA to deny and reduce payment of a bill without first determining it is unreasonable. While the right to a claims

handling practice that is fair is premised on the insured's act of purchasing PIP benefits, USAA's claim handling practices also invade the rights of insureds who purchased PIP benefits of a fair claims handling practice mandated by regulation. The insured's property interest in PIP benefits implicates more than just an invasion of a contractual right to be paid the benefits.

II. CONCLUSION

For the above stated reasons, Ms. Peoples respectfully submits that the Court consider the analysis set out in the brief of the Washington Association relating to the legislative history and intent of the Washington Consumer Protection Act as protecting insureds from unfair denials and reductions of their PIP benefits by their auto insurers.

DATED: September 3, 2019

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the state of Washington that on this date I electronically filed the attached document via the Washington State Appellate Courts' Portal and caused service on all counsel of record via the Portal.

DATED this 3rd day of September, 2019, at Seattle,
Washington.

s/ Nerissa Tigner
Nerissa Tigner, Paralegal

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