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Supreme Court No. 96931-1
(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 REPLY BRIEF**

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REPLY ARGUMENT

- I. The Court should answer the first certified question “No” because the CPA does not allow recovery of personal injury medical expenses from insurers any more than it allows recovery of those damages from any other defendant.**

In taking the position that they can recover “all damages” from their insurer under the CPA, the Insureds here are trying to erase the line the Legislature and this Court have drawn between CPA-recoverable injuries to “business or property” and non-CPA-recoverable personal injuries and pecuniary losses flowing from them. The Court should reject the Insured’s arguments and maintain the line as drawn. The CPA was not designed to provide plaintiffs asserting personal injuries with an alternative and duplicative avenue to recover damages for those injuries under a different legal theory. Regardless of whether the CPA defendant is the tortfeasor who caused the personal injuries, an insurer, or someone else, the CPA does not provide a remedy for personal injuries. The Court should answer the first certified question “No.”

- A. The CPA’s general applicability to insurance companies (and all companies) does not mean that it uniquely allows claims against insurers to recover medical expenses resulting from personal injuries.

The overarching theme of the Insureds’ Response Brief relies on the following flawed syllogism: (1) premise one: the Washington Consumer Protection Act (“CPA”) can support a cause of action against insurance

companies as it can against any other business; (2) premise two: Progressive is an insurance company; (3) conclusion: the CPA allows the Insureds to recover “all damages proximately caused by the breach”—including medical expenses resulting from personal injuries—from Progressive. Resp. Br. at 1, 3-4, 15-18.¹

The logical flaw in this argument is apparent. The mere fact that insurance companies may be sued under the CPA does nothing to answer the certified question presented: whether medical expenses resulting from personal injuries can somehow be CPA injuries to “business or property.” And the overreaching conclusion that insureds can recover “all damages” from their insurers under the CPA ignores this Court’s decisions making clear that the 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”).

¹ Unless otherwise indicated, “Resp. Br.” cites to Respondents Joel Stedman and Karen Joyce’s Response Brief. Citations to the consolidated USAA briefs or record are so indicated.

The first certified question concerns what injuries the CPA protects against, not what types of businesses may be sued under the CPA. When the Insureds argue that “No business is immune to the scope of the CPA,” that “the CPA applies to every business, without exception,” and that “Progressive is asking this Court to find an exception to that rule,” they are attacking a strawman. Resp. Br. at 3, 15-18 (capitalizations omitted).² Progressive has not argued that the insurance business is categorically immune to CPA claims. Rather, the argument is that the same “business or property” limitation applies to the injury element for insurance defendants as it does for any other defendant.

By arguing that the CPA allows insureds to recover personal injury medical expenses from their insurers, despite the CPA not allowing recovery for those exact same injuries from any other defendant, it is the Insureds—not Progressive—who are asking for an exception to a well-established rule. The Court should reject the Insureds’ attempts to reframe this into a dispute over a categorical industry exception to the CPA. It is a

² The Insureds’ arguments at pages 12-13 and 15-18 of their Response Brief are entirely irrelevant discussions about the CPA’s purpose and other elements, and about Washington insurance regulations. They amount to nothing more than the Insureds repeatedly telling the Court the obvious—that they have sued Progressive for allegedly doing something unlawful. The Court should ignore those arguments because they have no bearing on the CPA injury to “business or property” questions presented here.

narrow dispute about only the injury to “business or property” element of CPA claims.

- B. Holding that the CPA does not allow insureds to recover personal injury medical expenses from their insurers will not leave Washington insureds without a remedy against their insurers.

The Court should also reject the Insureds’ suggestions throughout their Response Brief that answering the first certified question “No” in Progressive’s favor would leave Washington insureds without a remedy against their insurance companies. Even without CPA claims being available to recover medical expenses resulting from personal injuries, insureds can seek redress under Washington’s Insurance Fair Conduct Act (“IFCA”), RCW 48.30.015, common law breach of contract and good faith and fair dealing claims, and the common law tort of insurance bad faith. *See, e.g., St. Paul Fire & Marine Ins. Co. v. Onvia, Inc.*, 165 Wn.2d 122, 129-30, 196 P.3d 664 (2008) (common law bad faith). Indeed, the Insureds here asserted IFCA, good faith and fair dealing, and common law bad faith claims in addition to their CPA claim. Am. Compl., Dkt. 11 at 10-12; *see* Resp. Br. at 5 (“The gravamen of this case concerns claims of insurance bad faith.”).

Moreover, an insured’s entitlement to policy benefits is controlled by the terms and conditions of the policy. The policy as written either

provides recovery for those losses or it does not. Allowing a CPA claim to recover money for personal injuries under an insurance policy injects a vague and unnecessary inquiry into the question of whether the insured is contractually entitled to recover for those injuries. It would either require the courts to read new requirements into contract-based claims or provide an arbitrary shortcut around the express terms of the policy and relevant statutory law.

Ultimately, if an insured believes that they are entitled to additional policy benefits, they can seek declaratory judgment or bring a breach of contract action. Allowing the same recovery under the CPA is superfluous and unnecessary. A decision in Progressive's favor would only ensure consistency in application of the CPA's injury to "business or property" requirement and keep the CPA's scope properly limited to its intended purposes—it would not deprive Washington insureds of a remedy against their insurers.

- C. The mere fact that Washington cases exist where insureds have sought personal injury medical expense damages from their insurers under the CPA does not mean that those damages are viable CPA injuries to "business or property" post-*Ambach*.

The Insureds devote much of their Response Brief to discussing Washington cases that have no bearing on the issue presented in the first certified question. *See* Resp. Br. at 18-22, 25-26. As Progressive already

explained in its Opening Brief, all but one of those cases were either decided before *Ambach v. French*, 167 Wn.2d 167, 216 P.3d 405 (2009) or involved situations in which the defendant did not challenge the recovery of damages for medical expenses resulting from personal injuries, so the courts did not resolve the question presented in this case. *See* App. Br. at Section I.D.

The only case the Insureds cite that even addressed *Ambach's* limitation on CPA claims to recover expenses for personal injuries is *Williams v. Lifestyle Lift Holdings, Inc.*, 175 Wn. App. 62, 70-74, 302 P.3d 523 (2013). Resp. Br. at 25-26. But the only point the Insureds argue from *Williams* is that medical expenses are not “categorically excluded” as CPA damages, a position Progressive has not taken. *See* App. Br. at Section I.C. *Williams* merely stands for the proposition that medical expenses may be recoverable damages under the CPA *when they do not result from personal injuries*. *See* App. Br. at Section I.C. The *Williams* court allowed CPA recovery of the cost of a deceptively marketed surgery, but it denied CPA recovery of the medical expenses the plaintiff sought for treatment of the personal injuries the surgery caused (*i.e.*, it denied CPA recovery of the medical expenses *resulting from* personal injuries). *Id.* The only analogous facts in *Williams* are those pertaining to the injuries for which the court in that case refused to permit CPA recovery. *Williams* does not support the Insureds' arguments here because the personal injury medical expenses they

seek are the same type of personal injury damages for which *Williams* did not allow recovery under the CPA.³

D. The “nature of the claim” is irrelevant to the question presented in this case, which turns on the nature of the injury.

The insureds argue that the “nature of the claim” as seeking to remedy alleged violations of insurance regulations transforms their injury into something other than unpaid medical expenses resulting from personal injuries. *See* Resp. Br. at 15 (“[T]he nature of the claims asserted against Progressive seek to hold Progressive responsible for violating Washington law and claims handling regulations.”).

This argument confuses the plaintiffs’ self-serving characterization of their cause of action with the CPA’s limitations on the types of injuries for which the CPA allows a recovery. It cannot be squared with *Ambach* or any of the other cases precluding CPA claims seeking to recover medical expenses resulting from personal injuries. *See* App. Br. at Section I.A. If

³ The Court should disregard the Insureds’ discussion of *Panag v. Farmers Ins. Co. of Washington* at pages 27-28 of their Response Brief. 166 Wn.2d 27, 35, 204 P.3d 885 (2009). Neither *Panag* nor the Insureds’ discussion of it addresses the question presented in the first certified question regarding medical expenses resulting from personal injuries because the *Panag* plaintiffs sought recovery from a collections agency that tried to enforce an insurer’s subrogation interest against them only for “expenses incurred in investigating the true legal status of the alleged debt, including out-of-pocket expenses for driving, parking, postage, and consulting an attorney.” *Id.* at 34-35. Not having addressed medical expenses resulting from personal injuries, *Panag* is irrelevant to the first certified question.

it were true that alleging violations of Washington insurance regulations under the CPA—or any other CPA-actionable conduct—transformed personal injury medical expenses into CPA-recoverable injuries to business or property, it would write out the injury to “business or property” element and the “restrictive significance” of that element because *any* injury would be recoverable simply by virtue of the plaintiff suing under the CPA. *See id.*; *Fisons*, 122 Wn.2d at 318.

The Insureds also make no meaningful attempt to distinguish the on-point and persuasive federal RICO cases rejecting the argument that if the claim sounds in fraud or unfair or unlawful conduct, the court can ignore the separate requirement of injury to “business or property.” *See Jackson v. Sedgwick Claims Mgmt. Servs., Inc.*, 731 F.3d 556, 566 (6th Cir. 2013) (en banc) (holding that “*racketeering activity* leading to a loss or diminution of benefits the plaintiff expects to receive under a workers’ compensation scheme does not constitute an injury to ‘business or property’ under RICO”) (emphasis added); *Fisher v. Halliburton*, 2009 WL 5170280, at *5 (S.D. Tex. Dec. 17, 2009) (“Plaintiffs confuse the issue by arguing that their ‘injury to property’ was not caused by personal injuries, but rather by Halliburton’s alleged predicate acts: mail fraud and wire fraud.”).

RCW 19.86.920 of the CPA expressly mandates that courts follow federal guidance in interpreting the CPA. The Insureds’ only response is

that the Court should not follow those cases because the purposes behind the federal RICO statute and the CPA are different. Resp. Br. at 30. The laws may be designed to some extent to remedy different types of conduct, but each statute limits the types of injuries covered in exactly the same way: only injuries to “business or property” are compensable. *See* 18 U.S.C. § 1964(c); *see Jackson*, 731 F.3d at 563 (noting that RICO’s injury to “business or property” requirement “has its origins in the antitrust laws”). Because the injury requirement is identical in RICO and the CPA, the Court should follow the reasoning of the RICO cases here.

- E. It is irrelevant that the Insureds seek to recover insurance contract benefits from their PIP insurer rather than tort personal injury damages from a tortfeasor because their claimed injury is still a shortcoming in compensation for personal injuries.

The Insureds argue that “the fact that these claims are asserted against an insurance carrier does make a difference.” Resp. Br. at 13 (capitalization omitted). Their argument in support of that proposition tries to divorce the PIP coverage from the underlying personal injuries by saying that their personal injuries are “one step removed” from the insurance contract’s promise to indemnify and their allegations of bad faith in handling their insurance claim. *See* Resp. Br. at 14-15 (arguing that “the ‘personal injury’ aspect of the underlying claims is separate and distinct from the claims Plaintiffs have asserted against their insurance carrier.”).

The Sixth Circuit Court of Appeals rejected a nearly identical argument in *Jackson*. 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.* It 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,” even assuming the plaintiffs had an “entitlement” to receive insurance benefits. *Id.*; *see also Brown v. Ajax Paving Indus., Inc.*, 752 F.3d 656, 658 (6th Cir. 2014) (finding that RICO’s “applicability turns on the nature of the *injury*—that the plaintiff was ‘injured in his business or property.’ . . . It does not turn on the nature of the defendant.”) (emphasis in original); App. Br. at Section I.E.

This reasoning is consistent with *Ambach* and inconsistent with the Insureds’ attempt to distinguish *Ambach* on grounds that their claims here are “not dependent on, or a derivative of, proving the insurer is liable for

the underlying injuries giving rise to the insurance claim.” *See* Resp. Br. at 24. Just as *Jackson* barred the RICO claim against the insurer despite the insurer not being liable in tort for the personal injuries, the *Ambach* Court barred the CPA claim because the plaintiff’s alleged damages *were for personal injuries*—not because the CPA claim depended on simultaneous proof of tort liability against the CPA defendant for those same personal injuries. *See* 167 Wn.2d at 174, 178-79. Regardless of tort liability for the personal injuries, both cases reasoned that the plaintiff did not have an injury to “business or property” because the fundamental nature of the injury was compensation for personal injury expenses, whether that compensation was direct from a tortfeasor or the result of an insurance or indemnity obligation. This is especially true here, where the underlying claims against Progressive are based on the allegation that it failed to apply the proper standard in evaluating whether the Insureds’ personal injuries required continuing treatment. *See, e.g.,* Am. Compl., Dkt. 11 ¶ 1.2.

The Insureds’ attempt to divorce the PIP coverage from their underlying personal injuries is also inconsistent with PIP insurers’ rights to subrogation and reimbursement against tortfeasors responsible for the same personal injuries for which the PIP insurer may be responsible to pay. *See* Resp. Br. at 14. When an insurance company like Progressive pays claimants like the Insureds for their auto accident personal injury medical

expenses under PIP coverage, the insurance company has a right to recoup those payments under subrogation principles either directly from the driver who caused them by asserting the insured's personal injury claim or through a lien against the proceeds of the insured's personal injury claim against that driver. *See, e.g., Mahler v. Szucs*, 135 Wn.2d 398, 412-13, 957 P.2d 632 (1998), *order corrected on denial of reconsideration*, 966 P.2d 305 (Wash. 1998). This subrogation right to insureds' personal injury claims only confirms that the PIP coverage cannot be seen as separate or distinct from the underlying personal injuries.⁴

The Court should answer the first certified question "No."

II. The Court should decline to answer the second certified question because the record is insufficiently developed, or should answer its three components "No" as abstractly presented.

The Insureds focus on federal pleading standards to argue that the Court can answer all three components of the second certified question simply because they included a request for "all damages" in their complaint. Resp. Br. at 30, 32-33. But federal pleading standards and the request for "all damages" do not aid the Court in answering the second certified question because they do not give the Court sufficient factual detail to

⁴ Under the Insureds' reasoning, they could receive a duplicate recovery for the same personal injury damages by recovering them from the other driver in tort and again from Progressive under the CPA.

answer it with anything other than abstract and hypothetical answers. The Insureds may or may not ultimately amend their complaint and flesh out the factual details of the alternative damage theories in the second certified question, but the fact remains for present purposes that the Court lacks sufficient factual detail to answer the question without giving a hypothetical advisory opinion.

- A. The Court should decline to address the investigative expenses portion of the second certified question or answer it “No” as abstractly presented.

The Insureds do not contest Progressive’s arguments that the viability of recovering investigation expenses under the CPA depends on the timing, nature, and causal relationship of the expenses to the claimed CPA violation. *See* App. Br. at Section III.B citing *Panag v. Farmers Ins. Co. of Washington*, 166 Wn.2d 27, 62-65, 204 P.3d 885 (2009). The Insureds also do not contest that the consolidated case records lack any facts about the timing or nature of any investigative expenses, or their causal relationship to the alleged CPA violations. Instead, the records contain only factually devoid references to “investigative expenses” and “investigative costs.” *See* App. Br. Section II.B.⁵

⁵ The Response Brief in the USAA case does not point to any factual detail about the investigative expenses Ms. Peoples claims to have incurred. Ms. Peoples points only to her complaint, which contains only factually devoid references to

As Progressive has already explained, the only answer the Court could give to the abstract question of whether investigation expenses can be recoverable under the CPA is “it depends on facts not in the record.” *See* App. Br. at Section III.B. Such an answer would do nothing to advance either this case or the USAA case and would only repeat this Court’s existing precedent on the issue. *See id.* The Court should therefore decline to answer the investigation expenses portion of the second certified question or answer it “No, as presented without the necessary facts.”

- B. The Court should decline to address the lost time portion of the second certified question or answer it “No” as abstractly presented.

The Insureds focus the bulk of their argument regarding the second certified question on the lost time component. Yet their only counter to Progressive’s argument that the record is insufficient to decide the question is that the Court does not need to know the amount of time the Insureds spent at their independent medical examinations (“IMEs”) or the dollar amount of damages they claim to have incurred as a result in order to determine if lost time is compensable. *See* Resp. Br. at 31, 36. It may be

“investigative expenses” and “investigative costs,” and to her six-paragraph declaration, which contains no facts about investigating or investigation expenses at all. *See* Peoples Resp. Br. at 13 n.20 (citing complaint, USAA Dkt. 1-1) and 19 n.31 (citing declaration, USAA Dkt. 33 at ¶¶ 1-6). Likewise, the Insureds here do not even ask the Court to “infer” facts about claimed investigation expenses. *See* Resp. Br. at 8-11. And even if they had, there would be no basis for the Court to speculate by inferring the factual detail necessary to decide the question presented.

true that the amount of time and associated dollar amount goes to quantifying damages rather than deciding whether that type of injury is compensable under the CPA. But in narrowly focusing on that one missing fact, the Insureds are trying to sidestep the other facts that the Court indisputably *would* need to know to decide if lost time is compensable under the CPA here.

In its Opening Brief, Progressive explained that the record lacks any information to determine if the Insureds' IMEs actually took longer than they otherwise would have because of the alleged consideration of Maximum Medical Improvement ("MMI"). App. Br. at Section II.C. The Insureds do not contest this, except by asking the Court to "infer" that they lost time caused by the alleged unlawful consideration of MMI. *See* Resp. Br. at 11, 30.

There is no basis to infer that fact because it is not a reasonable or natural inference to speculate that an IME took any longer because the doctor allegedly considered MMI. Indeed, in the context of an IME evaluating whether future treatment would be reasonable, necessary, and related to an auto accident, the more reasonable inference is that the doctor also considering whether the Insureds reached MMI would be subsumed within the same examination and add no extra time. Because it is essential to causation for the Insureds to prove that the alleged unlawful consideration

of MMI actually *caused* them to lose time, the Court should decline to base its answer on a speculative inference that it did here. *See* App. Br. at Section III.A; *Panag*, 166 Wn.2d at 57 (injury element satisfied by proof that the plaintiff’s “property interest or money is diminished *because of the unlawful conduct*”) (emphasis added).

More importantly, the Insureds entirely sidestep Progressive’s argument that to determine if lost time is compensable, the Court would need to know whether any lost time resulted in lost profits or income and whether the Insureds are small business owners who took time away from their business because of the alleged consideration of MMI in their IMEs. *See* App. Br. at Sections II.C, III.A. The Insureds offer no authority contrary to the many cases Progressive cited demonstrating that lost personal time, unconnected to business or lost income, is not compensable under the CPA or otherwise. *See id.* Their only retort is to note that one of the many authorities Progressive cited for that proposition is unpublished. *See* Resp. Br. at 34. But since that unpublished case was decided in 2017, there was nothing improper about Progressive citing it, and the Court can give it “such persuasive value as [it] deems appropriate” as a companion to the other authorities standing for the same proposition. G.R. 14.1(a).

The Court cannot determine from the record whether the Insureds are impermissibly seeking to recover for lost personal time because the

Insureds continue to frame their argument as an either-or hypothetical that “Progressive was requiring these claimants to spend time away from *business or family* in order to address their PIP coverage in a way that violated WAC 284-30-395.” Resp. Br. at 11 (emphasis added). Because lost personal time is not compensable and because the Court cannot determine from the record whether the Insureds seek to recover for lost personal time or lost business time, the Court should decline to answer the lost time portion of the second certified question on the Insureds’ abstract either-or hypothetical or should answer it “No, as presented without the necessary facts.”

- C. The Court should decline to address the premium-based damages portion of the second certified question or answer it “No” as abstractly presented.

The Insureds entirely fail to respond to Progressive’s argument that the record is insufficient to determine what damages the Insureds would seek based on their vague statement that their damages “relate to” premiums. *See* App. Br. at Section II.A. Instead, the Insureds argue that the filed-rate doctrine as articulated in *McCarthy Finance, Inc. v. Premera*, 182 Wn.2d 936, 347 P.3d 872 (2015) does not apply because they are not seeking damages that would require evaluation of approved insurance rates. Resp. Br. at 36-37.

But the Insureds have not explained what damages they would seek that “relate to” premiums but that would somehow not attack agency approved rates. Because of this, any answer could only reiterate that general proposition from *Premera* without saying anything about unknown damages the Insureds would actually seek here. The Court should therefore decline to answer the premium damages portion of the second certified question or answer it “No, unless the damages ‘related to’ premiums do not attack agency approved rates,” which is the same thing *Premera* already says in dictum and would not advance resolution of the consolidated cases. 182 Wn.2d at 938.

Because each of the three components of the second certified question is insufficiently developed on the record here, the Court should decline to answer the second certified question or answer it “No” as abstractly and hypothetically presented.

CONCLUSION

The Court should answer each of the certified questions “No.” The CPA does not allow recovery of medical expenses resulting from personal injuries, regardless of the “nature of the claim” or the defendant’s identity as an insurance company. The three components of the second certified question lack sufficient factual development for the Court to answer them in anything but a hypothetical and advisory manner. The Court should

therefore decline to answer the second certified question or answer it “No”
as abstractly presented on the bare record here.

Respectfully submitted this 20th day of June, 2019.

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