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8 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 KATHRYN COX, et al.,

11 Plaintiffs,

12 v.

13 CONTINENTAL CASUALTY
COMPANY,

14 Defendant.
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CASE NO. C13-2288 MJP

ORDER DENYING MOTIONS FOR
RECONSIDERATION

16 THIS MATTER comes before the Court on Continental's Motion for Reconsideration of
17 various discovery issues (Dkt. No. 68) and the Cox Plaintiffs' Motion for Reconsideration (Dkt.
18 No. 70) of the Court's Order (Dkt. No. 56) on Continental's Motion to Dismiss (Dkt. No. 13).
19 Having considered the motions and all related papers, the Court hereby DENIES both motions
20 for reconsideration.

21 **Background**

22 This case was brought by the Cox Plaintiffs, assignees of Dr. Duyzend, against Dr.
23 Duyzend's insurer, Continental Casualty Company, alleging bad faith and related issues with
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1 respect to Continental’s failure to settle claims by the Cox Plaintiffs and other patients in their
2 dental malpractice suit against Dr. Duyzend. On May 16, this Court issued an order granting in
3 part and denying in part Continental’s Motion to Dismiss (Dkt. No. 13) and disposing of various
4 discovery issues. (Dkt. No. 56.) Continental now brings a Motion for Reconsideration
5 challenging two discovery issues (Dkt. No. 68), and the Cox Plaintiffs bring a Motion for
6 Reconsideration challenging the Court’s dismissal of their Insurance Fair Conduct Act claim
7 (Dkt. No. 70.)

8 **Discussion**

9 I. Legal Standard

10 Pursuant to Local Rule 7(h)(1), motions for reconsideration are disfavored, and will
11 ordinarily be denied unless there is a showing of (a) manifest error in the ruling, or (b) facts or
12 legal authority which could not have been brought to the attention of the court earlier, through
13 reasonable diligence.

14 II. Continental’s Motion

15 Continental recycles two arguments from its initial motion to dismiss. First, Continental
16 argues that causation expands the scope of relevancy in a bad faith claim so that documents
17 relating to the parties’ willingness to settle become “vital” even though subjective attitudes
18 toward settlement play no part in the conduct giving rise to liability. (Dkt. No. 68 at 2–3.) The
19 Court previously analyzed this exact question. (Dkt. No. 56 at 12–13.) Continental cites no new
20 authority on this question, but merely insists that this Court’s conclusion that the proximate
21 cause of the excess judgment can be adequately proven or disproven using non-privileged
22 communications amounted to manifest error. Moreover, Continental fails to wrestle with the only
23 9th Circuit case on point, Home Indem. Co. v. Lane Powell Moss & Miller, 43 F.3d 1322, 1326–
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1 27 (9th Cir. 1995), which applied Alaska law to hold in the face of an explicit causation
2 argument that subjective willingness to settle is not sufficiently vital to meet the third prong of
3 the issue injection test where there was evidence that the plaintiff made an offer to settle—as an
4 attorney representing a plurality of Dr. Duyzend’s patients did here. Continental’s argument fails
5 to reveal manifest error in the Court’s ruling.

6 Second, Continental contends the Court erroneously failed to address its argument
7 regarding a waiver of attorney-client privilege that allegedly occurred when Continental told
8 Plaintiffs to acquire attorney-client privileged materials from Dr. Duyzend’s attorneys and Mr.
9 Harper handed over the documents. The Order did not address the waiver argument because
10 regardless of any waiver, documents sought to be compelled must first be relevant and
11 reasonably calculated to lead to the discovery of admissible information. Fed. R. Civ. P. 26(b).
12 Mr. Harper’s allegedly privileged documents are not, for reasons discussed in the initial Order.
13 (Dkt. No. 56 at 14–15.) Continental does not attempt explain how the documents might have
14 newly acquired relevance a few weeks later. Continental further misapprehends the reason the
15 Court discussed the Pappas standard for issue injection—it was because Continental relied on
16 that standard in its “alternative argument” (Dkt. No. 56 at 15; see Dkt. No. 48 at 11–13), not
17 because the Court believed vital importance was the standard for either discoverability or waiver
18 by disclosure. The Court need not modify the original Order on the grounds suggested by
19 Continental.

20 III. Cox Plaintiffs’ Motion

21 The Cox Plaintiffs argue that in the absence of any standing argument from Continental
22 with respect to the IFCA claim, they did not have a chance to argue that “first party claimant” as
23 used in the IFCA can apply to an insured with a third-party insurance contract as long as the
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1 party bringing the claim is a first party with respect to the contractual rights (via assignment from
2 the original insured, for example). (Dkt. No. 70 at 2–4.) Plaintiffs take advantage of the Motion
3 for Reconsideration to propound this argument. But their contention is easily answered by resort
4 to the text of the statute, which defines “[f]irst-party claimant” as “an individual, corporation,
5 association, partnership or other legal entity asserting a right to payment as a covered person
6 under an insurance policy or insurance contract or insurance contract arising out of the
7 occurrence of the contingency or loss covered by such a policy or contract.” RCW 48.30.015(4)
8 (emphases added). As the Court previously noted in the Order on the Motion to Dismiss (Dkt.
9 No. 56), Washington law clearly distinguishes between first and third-party insurance: “Third-
10 party coverage ‘indemnif[ies] an insured for covered claims which others [third-party claimants]
11 file against him.’ By contrast, first-party coverage ‘pay[s] specified benefits directly to the
12 insured when a “determinable contingency” occurs,’ ‘allow[ing] an insured to make her own
13 personal claim for payment against her insurer.’” Mut. of Enumclaw Ins. Co. v. Dan Paulson
14 Const., Inc., 161 Wn.2d 903, 914 n.8 (2007) (citing Thomas W. Harris, Washington Insurance
15 Law § 1.2 (2d ed. 2006)). Plaintiffs contend the Court has conflated “first party claimant” with
16 first party coverage—“i.e., a claim that must be paid directly to the insured such as property
17 damage under a homeowner[’]s policy” (Dkt. No. 70 at 3)—but they fail to recognize that the
18 text of the IFCA defines “first party claimant” in a narrow way that applies only to first-party
19 insurance. In the definition, the IFCA requires the claimant to hold a policy requiring the insurer
20 to “pay[]” benefits to that individual or entity upon the occurrence of a “contingency or loss.”
21 See RCW 48.30.015(4). Third-party insurance such as a malpractice policy does not conform to
22 this definition, which is why it seemed awkward to say that Dr. Duyzend was ever denied a
23 “payment of benefits” by Continental. RCW 48.30.015(1).

1 Plaintiffs cite Trinity Universal Ins. Co. of Kansas v. Ohio Cas. Ins. Co., 176 Wn. App.
2 185, 200–01 (2013) to argue the “first party” phrase in the IFCA merely requires claims to be
3 brought by the insured or the insured’s assignee, rather than a third party. The definition of “first
4 party claimant” does so limit the class of persons who may bring suit under the IFCA, according
5 to Trinity. But that fact does not mean the class is not further limited, and the definition
6 concerning the insured’s “right to payment” and insurance coverage triggered by the “occurrence
7 of [a] contingency or loss” narrows the class to first-party insurance policies as well.

8 Plaintiffs also cite Tim Ryan Constr., Inc. v. Burlington Ins. Co., 2012 WL 6567586
9 (W.D. Wash. Dec. 17, 2012), as an example of a court applying the IFCA provision at issue to a
10 third-party insurance contract. While the federal district court in Tim Ryan did apply the IFCA to
11 a third-party insurance contract, it did not discuss whether the insured in that case qualified as a
12 “first party claimant” as the IFCA defines the term.

13 Finally, Plaintiffs point out that the WAC’s enumerated “specific unfair claims settlement
14 practices” constitute a per se violation of paragraphs (2) and (3) of the IFCA. See RCW
15 48.30.015(5). However, the standing requirement that the party be a “first party claimant” is
16 found in paragraph (1), and the definition of “first party claimant” is found in paragraph (4).
17 Paragraphs (2) and (3) do not give rise to liability under the IFCA in the absence of the standing
18 conferred by paragraph (1), and the fact that parties may encounter WAC violations that fall
19 short of IFCA violations is not statutory surplusage merely because some plaintiffs lack
20 standing under other, nonwaivable requirements of the IFCA.

1 **Conclusion**

2 Because neither Plaintiffs nor Defendant has shown manifest error or new facts or
3 authority mandating reconsideration, the Court DECLINES to reconsider either the dismissal of
4 the IFCA claim or the discovery issues discussed above.

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6 The clerk is ordered to provide copies of this order to all counsel.

7 Dated this 6th day of June, 2014.

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10 Marsha J. Pechman
11 Chief United States District Judge