

FILED

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HEARINGS UNIT
OFFICE OF
INSURANCE COMMISSIONER

STATE OF WASHINGTON
OFFICE OF THE INSURANCE COMMISSIONER

In the Matter of:

Michael R. Marinelli and Insurance
Appraisal Services,

Appellants.

Agency No. 16-0155

OIC'S REPLY TO APPELLANTS'
RESPONSE TO OIC'S PARTIAL
MOTION TO DISMISS

REPLY

The Office of the Insurance Commissioner (OIC) maintains that partial dismissal is appropriate because this tribunal lacks jurisdiction over the subject matter, because Appellants have brought these claims in an improper venue, and because Appellants have failed to state claims upon which this tribunal may grant relief. This tribunal has the power to hear and decide matters within the scope of the Insurance Code, Title 48 RCW. The award of monetary damages for loss of business opportunity, interference with business relationships, and harm to personal and professional reputation are not matters within the scope of the Insurance Code – no Insurance Code provision even implies that these matters are properly before this tribunal.

In Appellants response to the OIC's partial motion to dismiss, Appellants do not and cannot identify a single Insurance Code provision that speaks to the award of monetary damages for loss of business opportunity, interference with business relationships, and harm to personal and professional reputation. Instead, Appellants rely on a century-old case that merely says the Insurance Commissioner has the "discretion to inquire and absolve." *Am. Sur. Co. v. Fishback*, 95 Wash. 124, 131, 163 P. 488 (1917). But that much is obvious, as this tribunal's role is to inquire into the relevant issues and determine whether or not to absolve a person of wrongdoing. Like the Insurance Code, the acts of inquiry and absolution do not implicate the award of

1 monetary damages for loss of business opportunity, interference with business relationships,
2 and harm to personal and professional reputation.

3 Because Appellants find no substantive argument in the Insurance Code, they turn to a
4 case with a more general discussion of subject matter jurisdiction. The case stands for the
5 proposition that a tribunal lacks subject matter jurisdiction if it attempts to decide a “type of
6 controversy” over which it does not have authority. *Singletary v. Manor Healthcare Corp.*, 166
7 Wn. App. 774, 782, 271 P.3d 356 (2012). Appellants take an extremely broad view of “type of
8 controversy,” loosely identifying the types at issue here as the “acts of the Insurance
9 Commissioner” and that “they have been aggrieved and harmed by those acts.” Appellants’
10 Response at 9-10. A more reasonable view of the “type of controversy” at issue is “the award of
11 monetary damages for tort claims” – a “type of controversy” over which this tribunal lacks
12 authority. *See* Chapter 4.92 RCW (dictating the requirements for bringing tort actions against
13 the state); *Reninger v. Dep’t of Corrs.*, 79 Wn. App. 623, 637, 901 P.2d 325 (1995) (finding that
14 “there will always be a disparity between the relief available in a tort lawsuit as compared to
15 that available following an administrative appeal”); *Reninger v. Dep’t of Corrs.*, 134 Wn.2d
16 437, 459, 951 P.2d 782 (1998) (Sanders, J., dissenting) (finding that an agency “had no
17 jurisdiction to even consider a cause of action for tortious interference with business
18 expectancy, much less provide a remedy in damages”). Appellants cannot break free of the
19 Insurance Code to seek whatever remedy they want for whatever harm they choose to allege –
20 there are limits. *See, e.g., Bare v. Gorton*, 84 Wn.2d 380, 383, 526 P.2d 379 (1974) (finding that
21 “[a]n administrative body does not have authority to determine the constitutionality of the law it
22 administers”).

23 Furthermore, Appellants need not exhaust administrative remedies before bringing tort
24 actions where “there is no showing that those claims were initially cognizable by the [agency]
25 alone, were within its special expertise, or that the [agency] could provide the relief sought.”
26 *Milligan v. Thompson*, 90 Wn. App. 586, 597, 953 P.2d 112 (1998). There is no showing that
Appellants’ tort claims are cognizable by this tribunal – Appellants haven’t even identified the
elements necessary for those claims or followed the required tort claims procedure in Chapter
4.92 RCW. There is also no showing that Appellants’ tort claims are within the special expertise
of this tribunal. And this tribunal cannot provide the relief Appellants seek. Appellants’ citation

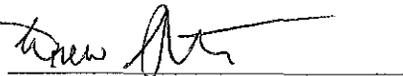
1 to *Laymon v. Dep't of Natural Resources*, 99 Wn. App. 518, 994 P.2d 232 (2000), does not
2 change this analysis. That case equated exhaustion of administrative remedies to the
3 requirement that a party alleging negligence must mitigate damages – so a party alleging that
4 the State acted negligently must try to overturn the act at the administrative level first. *Id.* at
5 525. The case does not stand for the proposition that an administrative tribunal can award
6 monetary damages for tort claims or even hear those claims. Rather, the court stated that a party
7 who alleges negligence must “employ *available* legal remedies.” *Id.* (emphasis added).

8 Here, Appellants may seek legal remedies available from this tribunal – namely, this
9 tribunal’s power “to inquire and absolve” them of wrongdoing – not awards of monetary
10 damages for loss of business opportunity, interference with business relationships, and harm to
11 personal and professional reputation. Appellants must take their tort claims elsewhere, and this
12 tribunal should dismiss them.

13 REQUEST

14 The OIC respectfully requests that the presiding officer issue an order dismissing
15 Appellants’ alleged issues relating to the award of monetary damages for loss of business
16 opportunity, interference with business relationships, and harm to personal and professional
17 reputation.

18 DATED this 27th day of October 2016, at Tumwater, Washington.

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21 Drew Stillman
22 Insurance Enforcement Specialist
23 Legal Affairs Division
24 Office of the Insurance Commissioner
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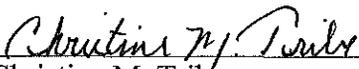
CERTIFICATE OF MAILING

The undersigned certifies under the penalty of perjury under the laws of the state of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the state of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below I caused to be filed and served the foregoing Reply to Appellants' Response to OIC's Partial Motion to Dismiss on the following individuals listed below in the manner shown:

<p>OIC Hearings Unit William Pardee, Presiding Officer 5000 Capitol Blvd. SE Tumwater, WA 98501</p> <p><i>By hand delivery.</i></p>	<p>Michael Marinelli and Insurance Appraisal Services c/o Brian Kreger, Attorney for Appellants 999 Third Ave., Suite 3000 Seattle, WA 98104-4088</p> <p>bk@kregerbeeghly.com</p> <p><i>By email and by depositing in the U.S. mail via state Consolidated Mail Service with proper postage affixed.</i></p>
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Dated this 27th day of October, 2016, at Tumwater, Washington.


Christine M. Tribe
Paralegal
Legal Affairs Division