

FILED
SUPREME COURT
STATE OF WASHINGTON
4/18/2022 4:34 PM
BY ERIN L. LENNON
CLERK

100846-5

No. 38017-3

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

JOANN CASKEY, Petitioner,
vs.
OLD REPUBLIC SURETY COMPANY, INC., Respondent.

PETITION FOR REVIEW

Attorneys for Petitioner

BRIAN G CAMERON, WSBA #44905
Cameron Sutherland, PLLC
421 W. Riverside Ave., Ste 660
Spokane, WA 99201
TEL. (509) 315-4507

KIRK D. MILLER, WSBA #40025
Kirk D. Miller, P.S.
421 W. Riverside Ave., Suite 660
Spokane, WA 99201
TEL. (509) 413-1494

TABLE OF CONTENTS

A. IDENTITY OF PETITIONER.....1

B. COURT OF APPEALS DECISION..... 1

C. ISSUES PRESENTED FOR REVIEW3

D. STATEMENT OF THE CASE.....3

E. ARGUMENT WHY REVIEW SHOULD BE
ACCEPTED.....7

 1. The Legislature Intended to Establish Special Protections
 for Owners and Occupants of Mobile/Manufactured
 Homes.....7

 2. The Lower Court’s Ruling Affects a Significant Number
 of Persons in Vulnerable Populations. 10

 3. The Lower Court’s Ruling Will Lead to Confusion,
 Inefficiency, and Inconsistency Among the Lower
 Courts 11

 4. The Lower Court’s Ruling Affects the Standing of All
 Licensing Bond Claimants to Seek Relief Under IFCA.13

 5. Ms. Caskey is Entitled to an Award of Costs and Fees..15

F. CONCLUSION 15

APPENDICES 18
Caskey v. Old Republic Surety Co. No. 38017-3-III, 2022 WL
803811 (Wash. Ct. App. March 17, 2022).A-1

TABLE OF AUTHORITIES

Cases

Caskey v. Old Republic Surety Co. No. 38017-3-III, 2022 WL
803811 (Wash. Ct. App. March 17, 2022) 1,2

Statutes

RCW 18.27 et, seq. 1
RCW 18.27.117(3)..... *Passim*
RCW 19.86 et, seq. 1,6
RCW 18.27.117 *Passim*
RCW 18.27.040(3)..... 2,6,10
RCW 48.30 et, seq. 2,3,6
RCW 48.30.015(4)..... 3,13
RCW 18.27.040(1)..... 5,14
RCW 18.27.040. 5,9
RCW 59.20.300 8
RCW 18.27.040(4)(b)..... 9
RCW 19.86.020 9
RCW 46.70.070 10,11
RCW 42.45.200(4)..... 14
RCW 18.16.140(1)(d)..... 14
RCW 19.16.190(1)..... 14

RCW 19.86.090 15

Rules

RAP13.4(b)(4) 7

A. IDENTITY OF PETITIONER

Petitioner JoAnn Caskey asks this Court to accept review of the Division III Court of Appeals' decision designated in Part B herein.

B. COURT OF APPEALS DECISION

Ms. Caskey asks this Court to review the Division III Court of Appeals published Opinion, *Caskey v. Old Republic Surety Co.*, No. 38017-3-III, 2022 WL 803811 (Wash. Ct. App. Mar. 17, 2022), which presents an issue of first impression concerning the duty of sureties that issue licensing bonds under Washington's Contractor Registration Act (CRA), RCW 18.27, *et seq.*, to "reasonably and professionally investigate and resolve claims" made by mobile and manufactured home occupants under RCW 18.27.117(3).

In this case, the lower court ruled that it is a *per se* violation of the Consumer Protection Act (CPA), RCW 19.86, *et seq.*, "when a bonding company's failure to reasonably and professionally investigate and resolve claims made by injured

parties causes a safety risk or severely hinders the use of [a mobile or manufactured] home,” *Caskey*, No. 38017-3-III at *1, which is consistent with the plain language of the statute. RCW 18.27.117. However, the lower court also ruled that “a claim against the bond is not made unless and until a lawsuit is filed in superior court using the substitute process procedures required by RCW 18.27.040(3).” *Id.* Therefore, the lower court concluded, a surety does not “an obligation to reasonably and professionally investigate and resolve the claim” until after a lawsuit is filed, after which point the investigation and resolution of claims is governed by discovery rules and trial procedures. *Id.*

Finally, the Court of Appeals ruled that Ms. Caskey asserting a claim for payment from the bond under any circumstances did not make her a “first-party claimant” under Washington’s Insurance Fair Conduct Act (IFCA), RCW 48.30, *et seq.* That is, she was not “asserting a right to payment as a covered person under an insurance policy or insurance

contract,” and therefore had no standing to bring an IFCA claim against the surety. RCW 48.30.015(4); WAC 284-30-320(7).

After hearing oral arguments on December 10, 2021, the lower court published its Opinion on March 17, 2022. Mr. Caskey now petitions this Court for final review.

A copy of the appellate court’s published Opinion is in the Appendix herein at pages A-1 through A-7.

C. ISSUES PRESENTED FOR REVIEW

1. Is an aggrieved party required to file a lawsuit in Superior Court against a contractor and its bond before a surety company’s duty to “reasonably and professionally investigate and resolve claims” under RCW 18.27.117(3) arises?
2. Is an aggrieved party asserting a claim for payment from a licensing bond a “first party claimant” under RCW 48.30, *et seq.*?

D. STATEMENT OF THE CASE

On or about August 9, 2017, Petitioner JoAnn Caskey purchased a brand-new manufactured home, which was to be

delivered to a private park community in Kettle Falls, Washington, for installation by a third-party contractor, Bud's & Doug's Mobile Home Service, LLC ("B's & D's") (*Id.* at ¶¶ 4.2, 4.3, 4.5). Ms. Caskey paid B's & D's the initial sum of \$7,594 for the installation and set-up of her home, plus additional charges of \$430.40 for "blocking and skirting." (*Id.* at ¶ 4.8). On or about December 7, 2017, B's & D's arrived at the community park site to begin installation of Ms. Caskey's new home. (*Id.* at ¶¶ 4.9 – 4.10). B's and D's set Ms. Caskey's home on bare ground, without any pad, gravel leveling, skirting, or stairs to access the unit, ultimately failing to complete the installation and prepare the home for its final permit inspection. (CP 7 ¶¶ 4.11 – 4.12).

Over the next month or more, B's & D's faulty installation caused numerous problems in Ms. Caskey's home, including but not limited to gaps in windows and doors, exposure of living spaces to weather elements, cracks and separations between walls and ceilings, misaligned doors that

could not be fully opened or closed, frozen pipes and plumbing fixtures, defective sewage lines that leaked under the home, and many others. (*Id.* at ¶ 4.13). Not surprisingly, the installation failed to pass its permit inspection. (*Id.* at ¶ 4.14). In March 2018, Ms. Caskey began hiring other contractors to complete the installation of her home and resolve the various defects and deficiencies caused by B's & D's faulty installation. (CP 8 ¶ 4.19). The governors of B's & D's dissolved their limited liability company in January 2019.

On April 11, 2019, Ms. Caskey sent Respondent ORSC, which issued B's & D's bond pursuant to RCW 18.27.040(1), a claim for compensation under the bond. (*Id.* at ¶¶ 4.20, 4.22). In response, ORSC notified Ms. Caskey on April 19, 2019, that it refused to investigate her claim unless she filed a lawsuit for breach of contract against B's & D's and ORSC in Superior Court. (*Id.* at ¶ 4.23). Specifically, ORSC's standardized notice to Ms. Caskey asserts that "[RCW 18.27.040] states that to have a proper claim under the bond, suit *must* be filed

against the Principal and Surety in Superior Court,” (CP 15) (emphasis added), as its sole basis for refusing to investigate her claim. (CP 8 ¶¶ 4.24-4.25; CP 15).

In reality, and contrary to the assertion in ORSC’s form denial letter, the statute actually states that “[a]ny person, firm, or corporation *having a claim* against the contractor ... *may bring suit* against the contractor and the bond or deposit in the superior court ...” RCW 18.27.040(3) (emphases added). That is, a “claim” against the bond exists prior to and separate from a “suit” that may or may not be brought by an aggrieved person.

Following ORSC’s categorical refusal to investigate, resolve, or even consider her claim, Ms. Caskey filed a Verified Complaint in Spokane County Superior Court alleging derivative and direct violations of Washington’s CPA, RCW 19.86, *et seq.*, as well as IFCA, RCW 48.30, *et seq.*

Following Division III’s published Opinion on March 17, 2022, which generally affirmed the Superior Court’s ruling, Ms. Caskey now petitions this Court for final review.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

This Court should accept review for this reason because Court of Appeals decision involves an issue of substantial public interest that should be determined by the Supreme Court under RAP 13.4(b)(4).

1. The Legislature Intended to Establish Special Protections for Owners and Occupants of Mobile/Manufactured Homes.

In 1987, Washington’s Legislature amended the CRA to include a new section with special provisions pertaining to “Violations relating to mobile/manufactured homes.” RCW 18.27.117; CONTRACTORS—REGISTRATION, 1987 Wash. Legis. Serv. Ch. 313 (S.H.B. 5814) (WEST). These special provisions included enhanced rights and remedies for owners and occupants of mobile/manufactured homes, as well as additional obligations for mobile/manufactured home installers, dealers, manufacturers, warrantors, and any “bonding company that issues a bond under chapter 18.27 RCW or chapter 46.70

RCW.” RCW 18.27.117(3). The establishment of special statutory provisions for mobile/manufactured home owners and occupants is nothing new in Washington. This is because the Legislature has long recognized that owners and occupants of mobile/manufactured home represent an unusually vulnerable population:

Many tenants who reside in manufactured/mobile home communities are low-income households and senior citizens and are, therefore, those residents most in need of reasonable security in the siting of their manufactured/mobile homes because of the adverse impacts on the health, safety, and welfare of tenants forced to move due to closure, change of use, or discontinuance of manufactured/mobile home communities.

RCW 59.20.300 Findings – Intent 2008 c 116.

The fact that Washington’s Legislature imposed special obligations upon sureties to “reasonably and professionally investigate and resolve claims made by injured parties,” RCW 18.27.117(3), in the context of mobile/manufactured home installations and maintenance is wholly consistent with this broader public policy and Legislative intent.

It is also significant that the special provisions of RCW 18.27.117 appeal to the “*occupants* of a mobile/manufactured home,” regardless of ownership status, while the provisions of RCW 18.27.040 are limited to what the Department identifies as “(1) laborers; (2) *property owners alleging breach of contract*; (3) subcontractors and suppliers providing material and equipment; and (4) state taxing authorities.” (Amicus Br. 4) (citing RCW 18.040(4)) (emphases added).

Because RCW 18.27.040 applies only to “[c]laims for breach of contract by a party to the construction contract,” mobile/manufactured home occupants, who may not be parties to such contracts, have no cause of action under that section. RCW 18.27.040(4)(b). At the same time, RCW 18.27.117 clearly and separately provides that “occupants of a mobile/manufactured home” are entitled to have their “claims” appropriately investigated and resolved, as well as a cause of action under RCW 19.86.020 when “[a] bonding company ... does not reasonably and professionally investigate and resolve”

those claims. RCW 18.27.117(3). In these respects, RCW 18.27.117 provides special rights, remedies, and obligations to a vulnerable population who might not otherwise have any recourse under RCW 18.27.040(3).

2. The Lower Court’s Ruling Affects a Significant Number of Persons in Vulnerable Populations.

While it is virtually impossible to pinpoint the number of disputes that arise each year between mobile/manufactured home owners/occupants and their manufacturers, retailers, and installers each year, Washington’s Department of Licensing estimates that there are 1,600 annual “actions against the bond” under RCW 18.27.040(3). (Amicus Br. 7). Add to this the untold number of claims made under Washington’s Automobile Dealer Practices Act (ADPA), RCW 46.70.070, which is also implicated in RCW 18.27.117(3)¹, and the number of claims affected by the lower court’s ruling is substantial and ongoing.

¹ RCW 18.27.117(3) applies to any bonding company “that issues a bond under chapter 18.27 RCW *or chapter 46.70 RCW* ...” (emphasis added).

2. The Lower Court's Ruling Will Lead to Confusion, Inefficiency, and Inconsistency Among the Lower Courts.

The lower court's ruling also presents confounding circumstances to mobile/manufactured home owners/occupants making claims against bonds issued to manufacturers and retailers under RCW 46.70.070, because the ruling would require bond claimants to sue a trade or construction contractor licensed under the CRA before a bonding company's duty arose under RCW 18.27.117(3), when the basis of the claim may involve a vehicle manufacturer or retailer licensed under the ADPA, which is a completely different statutory scheme that may never involve trade and construction contractors licensed under the CRA.

Finally, Division III's ruling renders RCW 18.27.117(3) pointless, because it holds that no surety's duty to "reasonably and professionally investigate and resolve claims" arises until after the bond gets sued, after which point the investigation and resolution of claims is governed by discovery rules and trial

procedures, not the bonding companies. This effectively transfers the obligations imposed by RCW 18.27.117(3) from the bonding companies to the Superior Courts.

Under Division III's ruling, an "injured party" would have to file and fund a civil lawsuit, proceed through discovery and trial, and vindicate his or her claims to establish that a bonding company had failed its obligations under RCW 18.27.117(3). *Caskey*, No. 38017-3-III.

This confusion and inconsistency cannot be what the Legislature intended when it required bonding companies to simply "reasonably and professionally investigate and resolve claims made by injured parties" under RCW 18.27.117. It is the purview of this Court to fully and finally resolve reconcile these problems not only for the benefit of mobile/manufactured home owners/occupants and their manufacturers, retailers, and installers, but also for the courts that must administer disputes between them.

3. The Lower Court’s Ruling Affects the Standing of All Licensing Bond Claimants to Seek Relief Under IFCA.

IFCA provides that “[a]ny first party claimant to a policy of insurance who is unreasonably denied a claim for coverage or payment of benefits” is entitled to bring an action against an insurer. RCW 48.30.015(1). A “first party claimant” is defined as “an individual ... asserting a right to payment as a covered person under an insurance policy or insurance contract arising out of the occurrence of the contingency or loss covered by a policy or contract.” RCW 48.30.015(4); WAC 384-30-320(7). “Insurance policies” and “insurance contracts” include suretyships such as those existing under RCW 18.27, *et seq.* WAC 384-30-320(9).

RCW 18.27.117(3) specifically provides that mobile/manufactured home owners, occupants, and other “injured persons” are entitled to have their bond claims “reasonably and professionally investigate[d] and *resolve[d]*” by bonding companies that issue licensing bonds under the

CRA and ADPA. RCW 18.27.117(3). This establishes that that (a) claimants under RCW 18.27.117(3) are “covered” by the bond and (b) may have a right to some “payment” within the monetary limits of that coverage. *Id.*

Notwithstanding these provisions, the lower court ruled that Ms. Caskey “is a third-party claimant because she is asserting a claim against the contractor and against the contractor's bond.” *Caskey*, No. 38017-3-III at *7. Because the same could be said about a person making a claim against virtually any licensing bond, the appellate court’s decision will have far-reaching and potentially determinative impacts on dozens of licensing bonds, from contractors and vehicle dealers to notaries, cosmetology schools, collection agencies, and more. RCW 18.27.040(1); RCW 47.70.070; RCW 42.45.200(4); RCW 18.16.140(1)(d); RCW 19.16.190(1). Such a decision warrants a full and final review by this Court.

4. Ms. Caskey is Entitled to an Award of Costs and Fees.

Pursuant to RCW 19.86.090 and RCW 48.30.015(1), Ms. Caskey is entitled to recovery of her costs and fees as the prevailing party in this action, including her appeal. Pursuant to RAP 18.1, she requests that this Court authorize such an award consistent with RCW 19.86.090 and RCW 48.30.015(1).

F. CONCLUSION

Based upon the authorities and arguments herein, Mr. Silver petitions this Court to accept final review of this matter.

G. WORD COUNT CERTIFICATION

The undersigned hereby certifies that the foregoing content, not including cover page, tables, and this certification and signature, consists of approximately 2,246 words.

///

///

///

///

RESPECTFULLY SUBMITTED this 18th day of April,
2022.

s/ Brian G. Cameron

Brian G. Cameron, WSBA #44905

Attorney for Petitioner

Cameron Sutherland, PLLC

421 W. Riverside Ave., Ste. 660

Spokane, WA 99201

TEL. (509) 315-4507

Email:

bcameron@cameronsutherland.com

CERTIFICATE OF SERVICE

I hereby declare upon penalty of perjury under the laws of the state of Washington that on the date stated below I served a copy of this document in the manner indicated:

Paul K. Friedrich
WILLIAMS, KASTNER &
GIBBS, PLLC
2 Union Square
601 Union Street, Suite 4100
Seattle, WA 98101

- First Class U.S. Mail
- E-Mail
- Hand Delivery
- Next Day Air

Aaron D. Dunham,
WOLFF, HISLOP &
CROCKETT, PLLC
12209 E. Mission Ave., Ste. 5
Spokane Valley WA 99206

- First Class U.S. Mail
- E-Mail
- Hand Delivery
- Next Day Air

DATED this 18th day of April, 2022.



Teri A. Brown, *Paralegal*

APPENDICES

APPENDIX A

Silver v. Rudeen Mgmt. Co., 10 Wn. App. 2d 676 (2019).....A-1

APPENDIX B

App. B: University of Washington, Washington Center for Real Estate Research, *Washington Apartment Market Spring 2019* B-1

<http://realestate.washington.edu/wp-content/uploads/2019/06/2019SpringApartmentMarketReport.pdf>

APPENDIX C

See United States Census Bureau, Washington QuickFacts from the US Census Bureau, <http://quickfacts.census.gov/qfd/states/5300.html>..... C-1
<https://www.census.gov/quickfacts/fact/table/WA#>

APPENDICES

2022 WL 803811

Only the Westlaw citation is currently available.
Court of Appeals of Washington, Division 3.

Joann CASKEY, an individual, Appellant,

v.

OLD REPUBLIC SURETY COMPANY,
a Wisconsin corporation, Respondent.

No. 38017-3-III

I

FILED MARCH 17, 2022

Synopsis

Background: Mobile home owner filed action against surety that issued licensing bond for contractor that set up her mobile home, alleging that surety failed to investigate her claim that set up her mobile home incorrectly, and asserting claims for violations of the Insurance Fair Conduct Act (IFCA) and the Consumer Protection Act (CPA). The Superior Court, Spokane County, Michelle D. Szambelan, J., 2021 WL 4471340, granted summary judgment in favor of surety. Mobile home owner appealed.

Holdings: The Court of Appeals, Staab, J., held that:

demand letter sent by owner to surety was not valid “claim” under CPA, and

owner was not “first-party claimant” of licensing bond, as required to support IFCA claim.

Affirmed.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

Appeal from Spokane Superior Court, Docket No: 20-2-01810-9, Honorable Michelle D. Szambelan, Judge

Attorneys and Law Firms

Brian Cameron, Attorney at Law, 421 W Riverside Ave., Ste. 660, Spokane, WA, 99201-0410, for Appellant.

Paul Keane Friedrich, Williams Kastner & Gibbs, PLLC, 601 Union St., Ste. 4100, Seattle, WA, 98101-2380, for Respondent.

Angie Lee, Attorney at Law, 1105 S Boyle Ave., Los Angeles, CA, 90023-2109, for Amicus Curiae on behalf of Department of Labor and Industries.

PUBLISHED OPINION

Staab, J.

*1 ¶ 1 While a surety company is generally not liable for tort damages to a third party, the legislature has carved out a specific exception for the setting up and siting of mobile homes. Under RCW 18.27.117(3), it is a per se violation of the Consumer Protection Act (CPA), chapter 19.86 RCW, when a bonding company’s failure to reasonably and professionally investigate and resolve claims made by injured parties causes a safety risk or severely hinders the use of the mobile home. Joann Caskey hired a bonded contractor to set up her new mobile home. Ms. Caskey contends that the contractor set up her mobile home incorrectly resulting in damages. Approximately a year after the contractor stopped working, Ms. Caskey’s attorney wrote a letter to Old Republic, the surety company that issued the contractor’s licensing bond, demanding the bond proceeds. By response letter, Old Republic informed Ms. Caskey’s attorney that claims against the bond must be brought by way of a lawsuit in superior court pursuant to RCW 18.27.040.

¶ 2 Ms. Caskey did not file suit against the contractor or the bond. Instead, two-and-one-half years after the contractor stopped working on her home, she filed a complaint directly against Old Republic, alleging violations of the Washington “Insurance Fair Conduct Act” (IFCA), RCW 48.30.010-.015, and the CPA. On Old Republic’s motion, the superior court dismissed all of Ms. Caskey’s causes of action on summary judgment.

¶ 3 On appeal, we hold that RCW 18.27.117(3) creates a duty for surety companies who issue licensing bonds under the “Registration of Contractor’s Act” (RCA), chapter 18.27 RCW, to reasonably and professionally investigate claims made by injured parties when their mobile homes are not set up correctly. For purposes of this statute, the injured party’s “claim” is a claim against the bond. A claim against the bond is not made unless and until a lawsuit is filed in superior

court using the substitute process procedures required by RCW 18.27.040(3). Once a claim against the bond is made by filing suit, the surety has an obligation to reasonably and professionally investigate and resolve the claim.

¶ 4 In this case, since Ms. Caskey never filed suit against the bond, she did not make a claim against the bond, and Old Republic's duty to investigate under RCW 18.27.117(3) did not ripen. For the same reason, Ms. Caskey's independent CPA claim, based on Old Republic's response letter, was not misleading or an unfair and deceptive trade practice. Finally, we also reject Ms. Caskey's claim that Old Republic's actions violated the IFCA because Ms. Caskey was not a first-party claimant and did not qualify for protection under RCW 48.30.015. We affirm the superior court's dismissal on summary judgment.

BACKGROUND

¶ 5 The relevant facts are not in dispute. Joann Caskey bought a manufactured home for her and her sister. She paid Bud's & Doug's Mobile Home Service LLC (Contractor) to install the mobile home on property in Kettle Falls. The contractor was registered with the Department of Labor & Industries (Department) and bonded through Old Republic Surety Company (Old Republic), for \$12,000.

*2 ¶ 6 Ms. Caskey alleges that in December 2017, shortly after beginning the project of setting up her mobile home, the contractor breached the installation contract. She asserted that the contractor caused significant damage to the home by installing the mobile home with defective skirting on bare ground without any pad, gravel, leveling, or access stairs. The home failed inspection and was denied an occupancy permit in January 2018. The contractor requested additional funds to effect repairs. Ms. Caskey resolved the mobile home's alleged defects through the manufacturer and the dealership by hiring other contractors. The existence of the contract and the allegations of breach against the contractor are asserted but not proven. The parties concede that Ms. Caskey did not file suit against the contractor.

¶ 7 In January 2019, the contractor dissolved its limited liability company. In April 2019, Ms. Caskey's attorney sent Old Republic a demand letter for payment under the contractor's bond. In the letter, Ms. Caskey asserted that she was directly "entitled to recover much more than the \$12,000 limit of Bud's and Doug's contractor bond issued by your

company. Please consider this correspondence to be a formal claim to the limits of the bond #YLI230029 that was issued to Bud's and Doug's." Clerk's Papers (CP) at 78.

¶ 8 Old Republic responded to Ms. Caskey's letter with its own letter, informing her that any claim against the contractor's bond must be made by filing a lawsuit in superior court. The specific language of the letter provided:

This is to acknowledge receipt of your correspondence, which was received in this office on April 15, 2019, asserting a claim under the above-captioned bond.

From reviewing the information received, it would appear that your client is experiencing problems with the above referenced contractor [Buds & Dougs Mobile Home Service]. Unfortunately, to have a proper claim under this bond, your client must comply with the provisions of RCW 18.27.040. *This statute specifically states that to have a proper claim under the bond, suit must be filed against the Principal and Surety in Superior Court.* There are specific requirements for service of the suit and the timeframes for filing same. Therefore, this means that we will be unable to be of any further assistance to your client at this time.

Please do not construe this letter as a waiver of any rights of the surety. Any and all rights and defenses are hereby specifically reserved.

CP at 15, 80 (emphasis added).

¶ 9 Ms. Caskey did not file suit against the contractor and the bond. Instead, in July 2020, she filed suit against Old Republic raising several causes of action, including violations of the CPA and the IFCA. Ms. Caskey claimed to be the obligor of the surety as a " 'first-party claimant.' " CP at 10. She claimed to have a per se violation of the CPA based on RCW 18.27.350 and RCW 18.27.117. Ms. Caskey appeals from the superior court's order dismissing all of her causes of action by summary judgment.

ANALYSIS

A. STANDARD OF REVIEW

¶ 10 Summary judgment rulings are reviewed de novo, undertaking the same inquiry as the trial court. *Safeco Ins. Co. of Am. v. Butler*, 118 Wash.2d 383, 394, 823 P.2d 499 (1992). When the record demonstrates no genuine issue of material fact, summary judgment is appropriate when reasonable

persons could reach but one conclusion and the moving party is entitled to judgment as a matter of law. *Id.* at 394-95, 823 P.2d 499; CR 56(c). Facts and reasonable inferences are made in the light most favorable to the nonmoving party. *Safeeco Ins. Co. of Am.*, 182 Wash.2d at 394-95, 341 P.3d 280. Once this initial burden is established, the nonmoving party must rebut the moving party's contentions by setting forth specific facts showing there is a genuine issue for trial. *Seven Gables Corp. v. MGM-UA Entm't Co.*, 106 Wash.2d 1, 13, 721 P.2d 1 (1986); CR 56(c).

*3 ¶ 11 Likewise, the interpretation of a statute is a question of law subject to de novo review. *Cosmopolitan Eng'g Grp., Inc. v. Ondco Degremont, Inc.*, 159 Wash.2d 292, 298, 149 P.3d 666 (2006).

B. OVERVIEW OF LICENSING BONDS

¶ 12 The RCA is a comprehensive chapter regulating contractor business practices. The express purpose of the RCA is to “afford protection to the public” from “unreliable, fraudulent, financially irresponsible, or incompetent contractors.” RCW 18.27.140. The RCA requires contractors to be registered with the Department. *Int'l Com. Collectors, Inc. v. Carver*, 99 Wash.2d 302, 304, 661 P.2d 976 (1983). The RCA also requires contractors to maintain a continuous bond or provide proof of a security deposit. *Id.* at 304, 661 P.2d 976; RCW 18.27.040(1). For general contractors, the surety bond amount is \$12,000; for specialty contractors, the surety bond amount is \$6,000. RCW 18.27.040(1).

¶ 13 The bond required by RCW 18.27.040(1) is considered a noncontractual license bond.¹ It is a type of performance bond. 33 DAVID K. DEWOLF & MATTHEW C. ALBRECHT, WASHINGTON PRACTICE: CONSTRUCTION LAW MANUAL § 13.4 (2d ed. 2018). Like other sureties, a licensing bond creates a tripartite relationship between the surety, the principal (contractor), and the obligee. *See Colorado Structures, Inc. v. Ins. Co. of the W.*, 161 Wash.2d 577, 605 n.15, 167 P.3d 1125 (2007) (plurality opinion). The obligee of the license bond issued under this chapter is the state of Washington. RCW 18.27.040(1).

¶ 14 Washington's licensing bond is continuous with several conditions, including that the contractor “will pay all amounts that may be adjudged against the contractor by reason of breach of contract including improper work in the conduct of the contracting business.” RCW 18.27.040(1). When a

bonded contractor fails to pay a judgment for damages covered by the bond, the extent of a surety's liability is limited to the penal amount of the bond. RCW 18.27.040(4).

¶ 15 Performance bonds are similar but distinct from insurance policies. While Washington recognizes that insurance companies have a good faith obligation to investigate and handle claims of their insureds, this duty of good faith has never been extended to sureties. *See Tank v. State Farm Fire & Cas. Co.*, 105 Wash.2d 381, 394, 715 P.2d 1133 (1986). Even in the context of direct insurance (as opposed to surety), our Supreme Court has repeatedly held that third-party claimants may not sue insurance companies directly for alleged breach of the duty of good faith. *See id.* at 393, 715 P.2d 1133.

¶ 16 In this case, Old Republic is a surety, not an insurance company. Ms. Caskey is not a party to the bond. And yet she has filed a tort action, alleging that Old Republic violated a duty to investigate her claim. While this claim would generally be summarily decided on the case law set forth above, Washington recognizes a surety's duty of good faith in the very narrow circumstances presented by Ms. Caskey.

C. DERIVATIVE CPA CLAIM

*4 ¶ 17 Under RCW 18.27.117, the legislature has declared that the “setting up and siting mobile/manufactured homes must be done properly for the health, safety, and enjoyment of the occupants:”

Therefore, when any of the following cause a health and safety risk to the occupants of a mobile/manufactured home, or severely hinder the use and enjoyment of the mobile/manufactured home, a violation of RCW 19.86.020 shall have occurred:

(1) The mobile/manufactured home has been improperly installed by a contractor registered under chapter 18.27 RCW, or a mobile/manufactured dealer or manufacturer licensed under chapter 46.70 RCW;

(2) A warranty given under chapter 18.27 RCW or chapter 46.70 RCW has not been fulfilled by the person or business giving the warranty; and

(3) A bonding company that issues a bond under chapter 18.27 RCW or chapter 46.70 RCW does not reasonably and professionally investigate and resolve claims made by injured parties.

RCW 18.27.117.

¶ 18 The parties disagree on whether this statute creates a private cause of action under the CPA. To answer this question, we must interpret the statute. In doing so, our primary goal is to carry out the legislature's intent. *Subcontractors & Suppliers Collection Servs. v. McConnachie*, 106 Wash. App. 738, 741, 24 P.3d 1112 (2001) (citing *Cockle v. Dep't of Labor & Indus.*, 142 Wash.2d 801, 807, 16 P.3d 583 (2001)). Legislative intent is derived primarily from the statutory language in the context of the overall legislative scheme. *Id.* If the statute's meaning is plain on its face, then the court must give effect to that plain meaning as the expression of legislative intent. *Christensen v. Ellsworth*, 162 Wash.2d 365, 372-73, 173 P.3d 228 (2007).

¶ 19 To determine whether the legislature intended to imply a private right of action, a reviewing court applies a three-part test established in *Bennett v. Hardy*, 113 Wash.2d 912, 920-21, 784 P.2d 1258 (1990). *Wright v. Lyft, Inc.*, 189 Wash.2d 718, 727, 406 P.3d 1149 (2017). “First, we determine whether the plaintiff is within the class for whose ‘especial’ benefit the statute was enacted; second, whether the explicit or implicit legislative intent supports creating or denying a remedy; and third, whether implying a remedy is consistent with the underlying purpose of the legislation.” *Id.*

¶ 20 RCW 18.27.117 states that it benefits “occupants of a mobile/manufactured home.” However, RCW 18.27.350 governing CPA violations states, “The surety bond shall not be liable for monetary penalties or violations of chapter 19.86 RCW.” LAWS OF 1986, ch. 197, § 11. Together, these statutory provisions suggest that damages for violations of the CPA will be imposed against the surety and not the bond. Otherwise, the legislature's explicit intent to create a per se CPA violation is clear from the statute's language.

¶ 21 Despite the unambiguous language in RCW 18.27.117, Old Republic contends that third-party tort actions against an insurance company or surety are not recognized in Washington, citing *Tank*. As noted above, *Tank* held that under common law “third party claimants may not sue an insurance company directly for alleged breach of duty of good faith under a liability policy.” 105 Wash.2d at 391, 715 P.2d 1133. *Tank* was decided in 1986. RCW 18.27.117 did not become law until 1987. See LAWS OF 1987, ch. 313, § 2. Old Republic fails to cite any authority suggesting that the legislature may not carve out a statutory exception to the common law rule precluding third-party tort claims against

an insurer or surety. Instead, Old Republic contends that according to *Tank*, any right of enforcement created by RCW 18.27.117 rests exclusively with the Washington Insurance Commissioner (Commissioner). This argument misconstrues the holding in *Tank*.

*5 ¶ 22 *Tank* held that the Commissioner has the authority to develop comprehensive unfair practice regulations under the Washington Administrative Code. 105 Wash.2d at 393, 715 P.2d 1133. The regulations adopted by the Commissioner did not give third-party claimants the right to enforce the regulations. Whether such a right should be granted under the regulations “should be the province of the Insurance Commissioner, not individual third party claimants.” *Id.* But nothing in *Tank* suggests that the legislature has no authority to carve out a statutory exception to the regulations.

¶ 23 Having determined that RCW 18.27.117 creates a private cause of action for a CPA violation, the next question is whether Ms. Caskey is entitled to bring this claim. The statute provides a per se violation of the CPA when “A bonding company that issues a bond under chapter 18.27 RCW or chapter 46.70 RCW does not reasonably and professionally investigate and resolve *claims made by injured parties.*” RCW 18.27.117(3) (emphasis added). Old Republic argues that even if the statute creates a private right of action, Ms. Caskey's action fails because she never made a claim against the bond.

¶ 24 To determine if Ms. Caskey's demand letter qualified as a claim made by an injured party, we must determine (1) against whom or what the claim is made, and (2) how the claim is made. To answer these questions, we must interpret the statute. Statutory interpretation includes context. Like any statute, the contractor registration statute should be read as a whole. *Pope & Talbot, Inc. v. Productization, Inc.*, 74 Wash. App. 197, 201, 872 P.2d 78 (1994).

¶ 25 In the context of recovering against a “bonding company that issues a bond,” the “claims” referenced in RCW 18.27.117(3) can only mean a claim against the bond as opposed to a claim against the contractor. The surety bond required by RCW 18.27.040 only covers specific claims against a contractor. See *Athen v. Barnes*, 158 Wash. App. 343, 354, 242 P.3d 35 (2010) (holding that substitute service procedure required by RCW 18.27.040 does not convey personal jurisdiction for claims against a contractor that are not covered by bond). For instance, a homeowner alleging breach of a contract would have six years to file against the

contractor but only two years to bring an action upon the bond. See RCW 4.16.040; RCW 18.27.040(3) (two-year statute of limitation on actions against bond).

¶ 26 A homeowner may have a claim against both the bond and the contractor, but a claim against the contractor will ripen before a claim against the bond. See RCW 18.27.040(3) (“Any person, firm, or corporation having a *claim against the contractor* for any of the items referred to in this section may bring suit against the contractor and the bond or deposit in the superior court.”) (Emphasis added.) While all claims against the contractor do not necessarily include a claim against the bond, all claims against the bond require a claim against the contractor. See *Cosmopolitan Eng'g Grp.*, 159 Wash.2d at 300, 149 P.3d 666 (“[A]n action against the bond must also necessarily claim that a contractor breached a contract or failed to pay.”).

¶ 27 In this case, Old Republic is the surety who issued the contractor's licensing bond. As the surety, Old Republic would have no obligation to investigate or resolve a claim against the contractor that is not covered by the bond. Because Old Republic's duty to investigate only arises from claims against the bond, the “claim” referenced in RCW 18.27.117(3) is a claim against the bond.

¶ 28 Having determined that RCW 18.27.117(3) imposes a duty on a surety to investigate claims against the bond, we must next determine how a claim against the bond is made. Our review of the RCA convinces us that the only way to file a claim against a licensing bond is to file a lawsuit pursuant to the procedures set forth in RCW 18.27.040.

*6 ¶ 29 While licensing bonds are a type of performance bond, they are unique in their nature. The purpose of the licensing bond is to protect the public as opposed to a specific obligee. The bond accomplishes this purpose by providing a guarantee for adjudicated claims that are left unsatisfied, and by providing the Department with a means to suspend a contractor's registration and notify the public of claims against the contractor and the bond. The process set forth in RCW 18.27.040 provides the only means for notifying the Department of actions against the bond and the only means for the Department to direct payments from the bond toward an unsatisfied judgment.

¶ 30 As noted above, the RCA requires contractors to register with the Department and show proof of securing a bond. RCW 18.27.040. The bond's obligee is the State of Washington.

RCW 18.27.040(1). The Department is responsible for maintaining contractors' licenses and publishing information to the public, including bond status and complaints against the bond. RCW 18.27.040(3), .120.

¶ 31 The bond is conditioned upon the contractor paying all amounts “adjudged” against the contractor for breach of contract. RCW 18.27.040(1). In other words, a bond is a guarantee that if a contractor fails to pay an adjudicated claim, the bond can be applied toward the judgment amount. 33 DEWOLF, *supra*, § 13:1; 12 AM. JUR. 2d *Bonds* § 25 (2019). If a plaintiff prevails in a lawsuit and receives payment that impairs the bond, the Department will suspend the contractor's license, post the suspension on its public website, and notify the contractor of the suspension. RCW 18.27.040(7), .060(3), .120.

¶ 32 When suit is filed against the surety for a claim against the bond, service of process is made exclusively through the Department. RCW 18.27.040(3). The plaintiff must serve three copies of the summons and complaint on the Department, who then serves the contractor and the surety. RCW 18.27.040(3). “Unless the suit is filed in a superior court, the department will not be able to direct payment on an unsatisfied final judgment against a secured contractor.” WAC 296-200A-080(1). In Washington, the only way to bring an action upon a bond is to file a lawsuit in superior court, naming the principal/contractor and the surety. RCW 18.27.040; 33 DEWOLF, *supra*, 13.8 (“A residential homeowner who seeks to recover on the bond must file a summons and complaint within two years from the date of substantial completion of the project.”). As the amicus curiae points out, using the proscribed bond claim process allows the Department to fulfill its duties to regulate contractors and provide information to the public. Amicus Br. at 1-2.

¶ 33 Ms. Caskey argues that filing a claim against the bond can be accomplished with a demand letter. She does not cite any authority for this position, nor does she refer us to any examples where a demand letter was used to resolve a claim against a bond. Instead, she argues that this alternative is not foreclosed by RCW 18.27.040(3), which reads:

Any person, firm, or corporation having a claim against the contractor for any of the items referred to in this section may bring suit against the contractor and the bond or deposit in

the superior court of the county in which the work was done or of any county in which jurisdiction of the contractor may be had.

Ms. Caskey focuses on the word “may” and argues that filing a lawsuit is discretionary. She asks this court to interpret the word “may” as a choice between filing a lawsuit and other unspecified recovery methods. Old Republic and amicus argue that “may” refers to the choice of venue and not discretion in how to make a claim against the bond.

*7 ¶ 34 “Words in a statute must be given their usual and ordinary meaning unless a contrary intent appears.” *Stenge v. Clarke*, 89 Wash.2d 23, 28, 569 P.2d 60 (1977) (district court possesses jurisdiction to hear consumer protection claims). The word “may” conveys the idea of choice or discretion. *Id.* In *Stenge*, the petitioner argued that the word “may” in the phrase “may bring a civil action in the superior court” or district court indicated that an injured party is under no compulsion to sue at all. 89 Wash.2d at 28-29, 569 P.2d 60. However, the court disagreed, holding that the word “may” merely permits the petitioner to make a choice of forum because a prospective litigant may always choose whether or not to pursue civil action. *Id.* Under *Stenge*, Ms. Caskey’s argument is not persuasive.

¶ 35 In addition, Ms. Caskey’s argument that a demand letter suffices as a claim against the bond is not workable because a letter fails to trigger the collateral ramifications of an action against the bond. Assuming the surety was able to resolve a claim made by demand letter, the surety is required by statute and bond to pay the obligee, the State of Washington. Without a lawsuit, there is no procedure for the State of Washington to direct those funds to the claimant. *See* WAC 296-200A-080(1). In addition, the lawsuit provides notice to the Department and triggers an automatic suspension of the contractor’s license if the bond is used against an unpaid judgment. If more than one person has a claim against the bond pending, the procedures set forth in RCW 18.27.040 establish the priority in the event the bond is insufficient to pay all the claims.

¶ 36 We hold that RCW 18.27.117(3) creates a derivative cause of action for a consumer protection violation against a surety separate from the bond. The surety’s duty to investigate “claims made by injured persons” requires the surety to investigate claims made against the bond. A claim against the

bond requires a lawsuit according to the procedures set forth in RCW 18.27.040(3). Once the Department serves the surety, the claimant can provide its information to the surety, and the surety has an obligation to perform a reasonable investigation and resolve the case.

¶ 37 Since Ms. Caskey did not file a claim against the bond, Old Republic did not have a duty to investigate her claim against the contractor. Thus, the trial court did not err in dismissing Ms. Caskey’s derivative CPA claim on summary judgment.

D. IFCA VIOLATION

¶ 38 Ms. Caskey also alleges that Old Republic’s refusal to investigate and resolve her claim constituted a violation of the IFCA. Specifically, she argues that she is a first-party claimant of an insurance policy (the license bond), and Old Republic unreasonably denied her claim to the bond in violation of RCW 48.30.015(1).

¶ 39 Ms. Caskey’s cause of action for violation of the IFCA fails because she is not a first-party claimant to the contractor’s licensing bond. A “first-party claimant” is “an individual ... asserting a right to payment as a covered person under an insurance policy or insurance contract arising out of the occurrence of the contingency or loss covered by such a policy or contract.” RCW 48.30.015(4); WAC 284-30-320(7). Ms. Caskey was not a party to the bond. As such, she was not a “covered person under an insurance policy or insurance contract.” Instead, she is a third-party claimant because she is asserting a claim against the contractor and against the contractor’s bond. *See* WAC 284-30-320(17) (A third-party claimant is “any individual ... asserting a claim against any ... corporation ... or other legal entity insured under an insurance policy or insurance contract of the insurer.”).

E. INDEPENDENT CPA CLAIM

¶ 40 Ms. Caskey also filed a cause of action for violating the CPA, alleging that Old Republic’s response letter, advising her she must file a lawsuit to make a claim against the bond, was misleading and constituted an unfair and deceptive act or practice under RCW 19.86.020. She acknowledges, however, that if we hold that the only way to file a claim against the contractor’s bond is to file a lawsuit under RCW 18.27.040, then Old Republic’s letter was not misleading and would not provide a factual basis for an independent CPA violation.

CONCLUSION

*8 ¶ 41 We affirm the superior court's summary dismissal of Ms. Caskey's causes of action against Old Republic. As such, we deny Ms. Caskey's request for attorney fees.

WE CONCUR:

Siddoway, C.J.

Fearing, J.

All Citations

--- P.3d ----, 2022 WL 803811

Footnotes

- 1 "There are two general categories of surety bonds: contract bonds and noncontract bonds. Contract bonds include bid bonds, performance bonds, payment bonds, maintenance bonds, advance payment bonds, and supply bonds. Noncontract bonds include: judicial bonds, license and permit bonds." KEVIN L. LYBECK ET AL., THE LAW OF PAYMENT BONDS 1 n.1 (2d ed. 2011) (citing 1 JOHN B. FITZGERALD, RAY H. BRITT & DANIEL D. WALDORF, PRINCIPLES OF SURETYSHIP, ch. 2 n.13 (1991))

CAMERON SUTHERLAND PLLC

April 18, 2022 - 4:34 PM

Filing Petition for Review

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: Case Initiation
Appellate Court Case Title: State of Washington, Respondent v. Royale Tyrell-Scott Thornton, Appellant (770781)

The following documents have been uploaded:

- PRV_Petition_for_Review_20220418163010SC286391_2285.pdf
This File Contains:
Petition for Review
The Original File Name was Petition for Review 041822.pdf

A copy of the uploaded files will be sent to:

- CBORN@CAMERONSUTHERLAND.COM
- adunham@whc-attorneys.com
- angiek928@gmail.com
- pfriedrich@williamskastner.com
- tbracken@cameronsutherland.com

Comments:

Sender Name: Brian Cameron - Email: bcameron@cameronsutherland.com
Address:
421 W RIVERSIDE AVE STE 660
SPOKANE, WA, 99201-0410
Phone: 509-315-4507

Note: The Filing Id is 20220418163010SC286391