No. 95867-0

SUPREME COURT
OF THE STATE OF WASHINGTON

MOUN KEODALAH and AUNG KEODALAH, husband and wife,

Respondents,

v.

ALLSTATE INSURANCE COMPANY, a corporation, and TRACEY SMITH and JOHN DOE SMITH, husband and wife,

Petitioners.

RESPONDENTS' ANSWER TO AMICUS CURIAE MEMORANDUM OF AMERICAN INSURANCE ASSOCIATION, NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES, AND PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA IN SUPPORT OF PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

A. INTRODUCTION

American Insurance Association, National Association of Insurance Companies, and Property Casualty Insurers Association (Amici) fail to show that this Court's review of Division I's decision is appropriate. This Court should, thus, deny review, as it recently did on a similar request in *Merriman v. American Guarantee & Liability Insurance Co.*, 198 Wn. App. 594, 396 P.3d 351 (2017), *review denied*, 189 Wn.2d 1038, 413 P.3d 565.

First, Amici's policy arguments fail to demonstrate review is proper. Contrary to their allegation, adjuster liability does advance insured interests. For example, it provides a vital deterrent device to prevent conduct that later necessitates bad-faith and CPA actions. Moreover, despite their argument, Amici fail to show adjuster liability will cause the negative industry impacts they allege will occur. Thus, review is not proper on these policy grounds.

Second, although Amici argue—without citation to authority—that Division I misinterpreted RCW 48.01.030's term "representative", they fail to show Division I's decision is contrary to this Court's precedent, contrary to other Court of Appeals' decisions, or that it improperly applied statutory-interpretation principles. Thus, review is not appropriate on this ground.

Finally, this Court should reject Amici's attempt to infuse a *Bennett v. Hardy*, 113 Wn.2d 912, 784 P.2d 1258 (1990), analysis into the action. This argument is raised solely by Amici and is not, in any event, necessary.

This Court has already stated RCW 48.10.030 imposes an actionable good-faith duty. *Ellwein v. Hartford Acc. & Indem. Co.*, 142, Wn.2d 766, 775, 15 P.3d 640 (2001), *overruled on other grounds by Smith v. Safeco Ins.*, 150 Wn.2d 478, 484, 78 P.3d 1274 (2003). Amici fail to demonstrate this Court should grant review to overturn that statement.

B. ARGUMENT WHY REVIEW SHOULD BE DENIED

RAP 13.4 sets forth the conditions under which this Court will review a Court of Appeals decision terminating review. Because Amici fail to show Division I's decision involves an issue of substantial public import that this Court must decide or that Division I's decision is contrary to this Court's or other Court of Appeals' decisions, the Court should deny review.

1. Amici's speculative public policy arguments do not demonstrate this Court should grant review.

Amici largely base their support of adjuster Tracey Smith's petition on speculative, unsupported arguments that allege adjuster liability will not advance insureds' interests and will cause detriment to the industry. These allegations fail to demonstrate this Court should grant review.

a. *Adjuster liability advances insureds' interests*.

Amici argue that adjuster liability will provide no benefit to insureds because claims against insurance adjusters would not increase the bad-faith and CPA damages available to insureds. Even if that argument were true—and it is not clear that it is—bad-faith and CPA claims and remedies do not

exist only to compensate insureds. They also serve a vital preventive role to deter harmful conduct. *Davis v. Baugh Indus. Contractors*, 159 Wn.2d 413, 419-20, 150 P.3d 545 (2007) (abandoning the "completion-and-acceptance doctrine" in part because it "undermines the deterrent effect of tort law.").[1]

Insureds are entitled to be treated fairly and honestly, and they want their claims to be properly paid. This has long been a staple of Washington public policy. *E.g.*, RCW 48.01.030. And, while both bad-faith and CPA suits ultimately do provide a remedy when that does not occur, foreclosing such conduct before bad-faith or CPA suits are ever necessary is a primary goal. Adjuster liability provides a valuable deterrent safeguard that aims to avoid bad-faith and CPA litigation, protect insureds interests, and promote proper claims handling before a need to initiate bad-faith or CPA litigation.

Further, while Amici also briefly argue that safeguards already exist, prior safeguards have failed. For example, despite Amici's argument that insurers may punish adjusters who engage in bad-faith behavior, insurers have, in the past, also encouraged adjusters to engage in bad-faith conduct through incentive programs. *See, e.g.*, *Niver v. Travelers Indem. Co.*, 433 F.

[1] Amici also argues that adjusters would not, in any event, be able to financially respond to damages imposed. Amici Brief at 3-4. However, the fact that adjusters may not always have the financial ability to respond to a lawsuit is not a reason to eliminate a legitimate cause of action. *E.g.*, *Cramer v. Van Parys*, 7 Wn. App. 584, 594, 500 P.2d 1255 (1972) ("Financial hardship cannot be an excuse for failing to perform a duty undertaken for economic benefit."). Tortfeasors often are incapable of personally responding to damages.

Supp. 2d 968, 980-82 (N.D. Iowa 2006). In such cases, both insurers and employees are motivated to engage in bad-faith conduct. No institutional incentive, *i.e.*, adverse employment consequences, exist to deter bad-faith conduct in those types of scenarios. Civil liability can act as an additional deterrent to an adjuster engaging in bad-faith conduct.

b. *Amici's speculative industry-impact arguments fail*.

Amici also advance several unsupported and speculative arguments as to negative consequences they predict will befall our insurance industry if Division I's decision stands. They argue adjuster liability will encourage litigation against adjusters, increase litigation costs and complexity, drive individuals away from adjuster jobs, drastically slow claim handling, and cause "a proliferation of bad-faith suits that will unduly burden the courts". Amici Brief at 4, 6. However, Amici cite to no facts that suggest that these speculative impacts would occur. Moreover, two sister states permit actions against individual adjusters personally, *O'Fallon v. Farmers Ins. Exch.*, 260 Mont. 233, 859 P.2d 1008 (Mont. 1993); *Taylor v. Nationwide Mutual Ins. Co.*, 214 W. Va. 324, 589 S.E.2d 55 (W. Va. 2003), and Amici—all "leading national trade associations" presumably familiar with these jurisdictions—cite to no evidence to indicate this has occurred in those states.[2]

[2] Amici also argues that counsel may forum shop by adding an in-state adjuster to defeat diversity jurisdiction. Amici Brief at 4. However, there is clearly no argument that counsel here improperly added Smith for forum-shopping purposes. Amici readily admits Smith's

2. Amici's merits-based argument fails to show Division I's decision is contrary to this Court's or other Court of Appeals' decisions.

Amici also argue this Court should grant review because Division I interpreted RCW 48.01.030's term "representative" too broadly. *See* Amici Brief at 7-8. However, they fail to provide any legal authority, fail to address Division I's statutory-interpretation reasoning, and fail to show Division I's decision is contrary to this Court's or other Court of Appeals' decisions. This Court should deny review on this ground.

Division I's decision relied on statutory interpretation. The key goal in statutory interpretation is to both discern and implement the Legislature's intent. *In re Parental Rights to KJB*, 187 Wn.2d 592, 596, 387 P.3d 1072 (2017). To determine the intent, a court must first look to the statute's plain language, considering the provision's text, context, related provisions, and statutory scheme as a whole. *Guillen v. Pearson*, 195 Wn. App. 464, 471, 381 P.3d 149 (2016), *cert. denied*, 187 Wn.2d 1005, 386 P.3d 1093 (2017). Courts give undefined terms their plain and ordinary meaning unless a contrary legislative intent is indicated. *State v. Ervin*, 169 Wn.2d 815, 820, 239 P.3d 354 (2010). Plain, unambiguous language needs no construction. *KJB*, 387 P.3d at 597.

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conduct was unacceptable. *Id.* at 2. Moreover, even if one were to assume that adding a legitimate defendant to a lawsuit to defeat diversity jurisdiction was an improper litigation tactic, as Amici suggests, the possibility that some may engage in a particular tactic is no reason to eliminate legitimate state-court claims against legitimate defendants.

The Legislature included in Title 48 a blanket, statutory good-faith duty owed by ***all persons***, including both insurers ***and their representatives***:

> The business of insurance is one affected by the public interest, requiring that ***all persons*** be actuated by good faith, abstain from deception, and practice honesty and equity in all insurance matters. Upon the insurer, the insured, their providers, and ***their representatives*** rests the duty of preserving inviolate the integrity of insurance.

RCW 48.01.030 (emphasis added). It broadly defined the term "person" in Title 48 to include an individual. Id. 48.01.070.

Division I properly applied the statutory-interpretation principles set forth above. It looked to RCW 48.01.030's plain, unambiguous language, determined Smith was a "person" as RCW 48 defined that term, determined the term "representative" included insurance adjusters, and determined that Smith, as an adjuster and representative, owed an actionable good-faith duty under the statute. Pet. App. 4-6. This is correct.

Amici do not address Division I's statutory-interpretation analysis. They also do not argue that Division I's decision is contrary to other Court of Appeals' decisions. Nor could they. Division III recently held corporate adjusters owe a good-faith duty under the statute using the same reasoning Division I did here. *Merriman*, 198 Wn. App. 594. Finally, Amici fail to argue Division I's decision is contrary to this Court's precedent. Thus, this Court should deny review on this ground.

3. The implied cause-of-action argument that only Amici make do not warrant review.

Amici finally argue that Division I should have engaged in a *Bennett v. Hardy*, 113 Wn.2d 912, analysis. The parties have thoroughly briefed the adjuster liability issue to the US District Court for the Western District of Washington, King County Superior Court, and Division I. In none of those courts did Smith raise the *Bennett* argument that Amici now try to infuse here. Nor did she raise the issue in her petition to this Court.

As the Court has stated, it need not consider an issue that only amicus curiae raises to the Court. *Ruff v. Cty. of King*, 125 Wn.2d 697, 704 n.2, 887 P.2d 886 (1995). Because the issue was not briefed below and only Amici raise the issue, this Court should not grant review on that basis. Moreover, this Court has already stated RCW 48.01.030 imposes an actionable good-faith duty. *E.g.*, *Ellwein*, 142 Wn.2d at 775 ("RCW 48.01.030 imposes a duty to act in good faith upon insurers, and violation of that duty may give rise to a tort action for bad faith."). As this Court has held, "*Stare decisis* promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *State v. Johnson*, 188 Wn.2d 742, 756, 399 P.3d 507 (2017). This Court, therefore, does not lightly set precedent aside; it requires a clear showing that the rule is both incorrect and

harmful. *Id.* at 757; *Deggs v. Asbestos Corp. Ltd.*, 186 Wn.2d 716, 381 P.3d 32 (2016). Amici have made no such showing here.

C. CONCLUSION

For the foregoing reasons, this Court should deny Smith's petition for review.

Respectfully submitted this 20th day of August, 2018.

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CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that on this date I caused to be served in the manner noted below a true and correct copy of the foregoing as follows:

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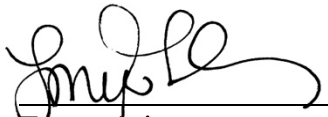

Tonya Arico

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