

FILED  
SUPREME COURT  
STATE OF WASHINGTON  
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BY ERIN L. LENNON  
CLERK

SUPREME COURT  
OF THE STATE OF WASHINGTON

SEATTLE TUNNEL PARTNERS  
and WASHINGTON STATE  
DEPARTMENT OF  
TRANSPORTATION,

Petitioners,

v.

GREAT LAKES REINSURANCE  
(UK) PLC, a foreign insurance  
company; et al.,

Respondents.

No. 100168-1

REPLY ON  
MOTION TO STRIKE  
STP/WSDOT'S  
JOINT REPLY

A. INTRODUCTION

The joint opposition of petitioner Seattle Tunnel Partners (“STP”) and the Washington State Department of Transportation (“WSDOT”) to the Insurers’ motion to strike their improper RAP 13.4(d) reply is remarkable for its ever-shifting position on the Insurers’ answer to their petitions for review and the place of contingent issues under RAP 13.4(d). Nothing in the petitioners’ opposition should dissuade this Court from striking the STP/WSDOT RAP 13.4(d) reply.

Reply on Motion to  
Strike Joint Reply - 1

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## B. PETITIONERS' CHARACTERIZATION OF THE INSURERS' POSITION

After illegitimately characterizing Insurers' position on review as seeking "cross-review," reply at 1, which as this Court knows is a term of art, the petitioners now *abandon* such a position. They *nowhere* mention that characterization in their joint opposition. Nor could they. The Insurers *oppose* review by this Court, the critical requirement of "cross-review."

Additionally, the petitioners asserted in their reply at 1 that by raising issues contingent on this Court granting review, which the Insurers *opposed*, the Insurers "effectively conceded" that issues of substantial public interest within the meaning of RAP 13.4(b)(4) were present in this case. The petitioners now abandon that mischaracterization of the Insurers' position, as they must. Insurers "concede" nothing, believing review should not occur here.

Finally, the petitioners have *no real answer* to the point raised in the Insurers' motion at 2-3 that raising issues

contingently in an answer to a petition for review, if, and only if, the Court grants review is a well-established aspect of Washington appellate practice, so well-established that it is recognized in our Bar Association's treatise on that subject.

C. PETITIONERS MISUNDERSTAND RAP 13.4(d)

Despite the foregoing retreat from their earlier mischaracterizations, the petitioners misapply RAP 13.4(d). Although they neglected to cite the rule at all in their improper reply, motion at 3, the purpose of the rule is unambiguous. This Court *discourages* replies under RAP 13.4 unless a party *affirmatively seeks review* by this Court of a Court of Appeals decision.

The operative language of the rule is: "A party may file a reply to an answer *only* if the answering party seeks review of issues not raised in the petition for review." (emphasis added). The drafters' comments to the 2006 amendments to RAP 13.4(d) confirm this analysis:

the amendment limits the scope of a reply to an answer to petition for review. Under the current rule, a party may not file a reply to an answer to a petition for review unless “the answer raises a new issue.” This provision has been subject to abuse by petitioning parties who attempt to cast an answering party’s arguments in response to a petition for review as “new issues” in order to reargue issues raised in the petition. The proposed amendment is intended to clarify the rule’s purpose by more clearly prohibiting a reply to an answer that is not strictly limited to responding to an answering party’s request that the Court review an issue that was not raised in the initial petition for review.

Karl B. Tegland, 3 *Wash. Practice Rules Practice* at 224.

Petitioners fail to address the *numerous cases* that recognize that issues may be raised contingently by a party opposing review like Insurers here, or the policy underlying why such review is appropriate. Motion at 3-5. Instead, the petitioners cite a review order in a single case where review of contingent issues was denied in a single sentence without elaboration.

Here, the contingent issues referenced in the Insurers’ opposition at 3 n.1, were briefed in detail by the parties, and addressed by Division I in its opinion. While this Court should

*deny* review, if it grants review it would be unfair to the Insurers and too restrictive for the Court, given RAP 1.2(a)'s imperative, not to review all the issues that bear meaningfully upon its decision.

D. CONCLUSION

The petitioners' RAP 13.4(d) reply is improper where the Insurers oppose review and do not affirmatively seek review of any issues unless the Court decides review is merited. The Court should strike the petitioners' reply and levy sanctions against them. RAP 10.7.

This document contains 670 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED this 24th day of November, 2021.

Respectfully submitted,

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Reply on Motion to  
Strike Joint Reply - 6

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DECLARATION OF SERVICE

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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: November 24, 2021, at Seattle, Washington.

/s/ Will Cummins  
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# TALMADGE/FITZPATRICK

November 24, 2021 - 9:36 AM

## Transmittal Information

**Filed with Court:** Supreme Court  
**Appellate Court Case Number:** 100,168-1  
**Appellate Court Case Title:** Seattle Tunnel Partners, et ano. v. Great Lakes Reinsurance (UK) PLC, et al.

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**Comments:**

Reply on Motion to Strike STP/WSDOT's Joint Reply

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