NO. 101924-6

SUPREME COURT
OF THE STATE OF WASHINGTON

TONY VARNEY, et al.,

Petitioners,

v.

CITY OF TACOMA

Respondents.

CITY OF TACOMA'S ANSWER TO PLAINTIFFS' MOTION FOR DISCRETIONARY FOR REVIEW

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

STATUES

COURT RULES

OTHER AUTHORITY

I. Introduction

In seeking review in this matter, Plaintiffs ask this Court to ignore its binding precedence, extend the reach of bad faith claims, and vitiate the attorney client privilege for tortious abuse of process claims. Plaintiffs offer no reasoned argument as to why this Court should revisit these long-standing and well-established bodies of law. Further, Plaintiffs offer no reasoned argument under RAP 13.4 as to why this Court should even grant review.

As outlined herein, there is no basis for this Court to accept review of this matter and the petition should be denied.

II. Issue for Review

Whether the decision by the Court of Appeals, that the Cedell fraud exception does not apply to Industrial Insurance Act (IIA) claims or to the Varneys' abuse of process claim, conflicts with decisional law, raises a constitutional issue or raises an issue of public significance requiring review.

III. Statement of the case

This tort litigation has its genesis in a 2009 Industrial Insurance claim filed by Tony Varney[1] with the City of Tacoma, a claim that resulted in protracted litigation between the parties over a period of nine years. Even though Tony Varney prevailed on his Industrial Insurance (IIA) claim, in 2019, Plaintiffs Tony and Geralyn Varney then sued the City for various tort claims, including abuse of process.

Varney was a long-time firefighter with the City of Tacoma.[2] CP 624; CP 646. On July 22, 2009, Varney suffered a

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[1] Geralyn Varney was not a party to the underlying Industrial Insurance claim. Therefore, for purposes of the Industrial Insurance litigation, Tony Varney is referenced as "Varney." Later use of the term "Plaintiffs" in this brief is intended to include both Tony and Geralyn Varney.

[2] For a concise recitation of the procedural history of this matter, the City would direct the Court to the Findings of Facts and Conclusions of Law and Judgment, entered by Pierce County Superior Court Judge Edmund Murphy on August 21, 2017, in Cause No. 16-2-04732-2. CP 676-681. This order was not challenged or reversed on appeal, and therefore, the superior court's findings of fact are verities on appeal. Tapper v. Employment Sec. Dep't, 122 Wn.2d 397, 405-07, 858 P.2d 494

hemorrhagic stroke a few hours after he completed his regular 24-hour shift with the Tacoma Fire Department; shortly thereafter, Varney filed a claim under the Industrial Insurance Act "IIA" (Title 51 RCW), asserting that the stroke was an occupational disease. CP 76; CP 646. In August of 2009, the Department of Labor & Industries (hereinafter Department) initially denied the claim, but later, on February 3, 2010, the Department reversed its position and allowed the claim. CP 84; CP 624. Varney's IIA claim was ultimately allowed and he received full coverage, including all time-loss compensation from the date of his claim (CP 679, Finding 1.11) to the date when his permanent disability pension was granted (CP 683), as well as attorney's fees and costs for those appeals on which he prevailed (CP 609; CP 673). Thus, Varney received the maximum available benefits on his IIA claim.

(1993), superseded by statute on other grounds as recognized by Markam Group, Inc. v. Employment Sec. Dep't, 148 Wn. App. 555, 200 P.3d 748 (2009).

During discovery in the tort litigation, the City produced more than 19,000 pages of documents, the entirety of all documents in the City's possession related to Mr. Varney's IIA claim, except those documents protected by the attorney-client privilege or the attorney work product doctrine. CP 387-389. For those documents withheld or redacted pursuant to a claim of privilege, the City produced privilege logs. CP 782 (privilege log for Tom Hall documents, dated 6/19/2020); CP 802 (privilege log for Eberle Vivian documents, dated 2/25/2021); CP 755 (privilege log for Angela Hardy documents, dated 2/26/2021). Additionally, because of the volume of documents to be produced and the likelihood of inadvertent disclosure of privileged documents, the City sought and obtained an agreed order governing the inadvertent production of privileged materials (hereinafter Claw Back Order); the agreed order was entered by the superior court on May 24, 2019. CP 50; CP 489.

Following production of the City's IIA claim files, Plaintiffs filed a motion to vitiate the City's attorney-client

privilege and cited the fraud exception as outlined in Cedell v. Farmers Ins. Co. of Wash., 176 Wn.2d 686, 295, P.3d 239 (2013), as the basis for their motion. CP 56; CP 71. At the same time, the City brought a motion to claw back two privileged documents that had been inadvertently produced and a motion to compel answers to the City's discovery requests[1]. CP 289; CP 315; CP 322. At the hearing on these motions, the superior court granted the City's motion for an *in camera* review of the two documents under the Claw Back Order (RP-2/26/21, p. 43-45), continued the City's motion to compel[3] (RP-2/26/21, p. 44), but appointed a special discovery master to review the City's assertions of privilege. RP-2/26/21, p. 44; CP 728-32.

The special master completed his review of the privileged documents and the superior court ordered production of the specific documents identified by the special master as not being

[3] Plaintiffs claimed that they could not answer the City's discovery requests until all privileged documents were produced to them. CP 368; CP 370-73.

protected by a privilege. CP 1000-01. Additionally, the superior court ordered production of two documents that were protected by the attorney-client privilege on the grounds that these documents were relevant to or could lead to the discovery of admissible evidence relevant to Plaintiffs' abuse of process claim. CP 1001. The superior court gave the City an opportunity to file exceptions to its order and after considering the City's exceptions, the superior court amended its order to remove certain documents from production[4]. CP 992-997.

The parties subsequently sought and obtained certification from the superior court under RAP 2.3(b)(4) on four legal questions/issues. CP 983. Division II granted the parties' respective motions for discretionary review on all four certified questions [5], but later determined that review had been

[4] The superior court's amended order, however, still required the City to produce two privileged documents to the Plaintiffs because those documents were allegedly relevant to or could lead to the discovery of evidence relevant to the Plaintiffs' abuse of process claim.

[5] The four issues certified by the superior court were:

improvidently granted on the first three questions (those sought by the City). Therefore, Division II addressed only the fourth certified question, which had been sought by the Plaintiffs.

On February 14, 2023, Division II issued its unpublished opinion in this matter. Varney v. City of Tacoma, No. 56174-3-II (Consolidated with 565187-5-II), 2023 Wash. App. LEXIS

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1. Whether a trial court can order disclosure of communications protected by the attorney-client and/or work product privileges where the court has not identified a recognized legal exception to the privileges, but instead, has found that such communications contain information relevant to or that could lead to the discovery of admissible evidence in support of a plaintiff's tortious abuse of process claim;

2. Whether internal communications between corporate employees and the corporation's agents about litigation strategy, where those communications are undertaken in response to advice given by the corporations litigation attorney, are protected from disclosure by the attorney-client privilege;

3. Whether communications between a corporation and its excess liability insurance carrier about litigation strategy, where those communications are undertaken in response to advice given b y the corporation's litigation attorney, are protected by a common interest privilege; and

4. Whether a partial or blanket waiver of attorney-client/work product privilege appliers under the fraud exception in the context of plaintiff's tortious abuse of process allegations in this case. CP 949-50

303, at *8-12, 2023 WL 1990553 (Wash. Ct. App., February 14, 2023). On March 3, 2023, Plaintiffs filed a motion for reconsideration, which was denied by Division II on March 24, 2023. The instant petition for review was then filed by Plaintiffs on April 21, 2023.

As outlined herein, Plaintiffs have not identified a basis for this Court's review under RAP 13.4. Moreover, Division II's opinion in this case applies and follows binding precedence from this Court. Thus, there is no basis on which this Court can grant review and Plaintiffs' petition should be denied.

IV. Argument

A. Plaintiffs have offered no argument on the criteria for review under RAP 13.4(b), and on that basis alone, this petition for review should be denied.

In support of their petition for review, Plaintiffs argue that this Court should accept review because the Court of Appeals committed both "obvious" and "probable" error that substantially alters the status quo and departs from the usual and accepted course of judicial proceedings. Petition for Review, p.

2; p. 21. Although Plaintiffs do not expressly cite to RAP 2.3(b), there is no question that their petition for review is based on the considerations applicable to a petition for discretionary review to an intermediary appellate court. RAP 2.3(b)(1-4). RAP 2.3(b) does not pertain to petitions for review in this Court, nor does it contain the criteria upon which this Court's decision to grant or deny review must be based.

RAP 13.4(b) sets forth the considerations governing review by this Court and the rule makes clear that review will be accepted *only* if one of the specified criteria is established. In the instant case, Plaintiffs did not cite to RAP 13.4(b), nor did they present any reasoned argument under any of the four criteria governing review. On this basis alone, Plaintiff's petition fails to establish a basis on which this Court can grant review. See RAP 13.4(c)(7)(requiring a petition to contain "[a] direct and concise statement of the reason why review should be accepted under one or more of the tests established in section (b), with argument."). Therefore, the instant petition must be denied.

B. The Court of Appeals decision does not conflict with decisional law, nor does it raise significant issues of law that warrant this Court's review under RAP 13.4(b).

Even if this Court were to ignore Plaintiffs' failure to establish a basis for review under RAP 13.4(b), the Court of Appeals decision in this case does not implicate any of the criteria upon which review can be granted.

RAP 13.4(b) provides for review when a Court of Appeals opinion is in conflict with an opinion from this Court or a published opinion from another intermediate appellate court, when there is a significant constitutional question or when there is an issue of substantial public interest that should be determined by this Court. As outlined below, none of these criteria are present in the instant case and therefore, Plaintiffs' petition for review must be denied.

In their petition for review, Plaintiffs complain that the Court of Appeals limited its review to whether the Cedell fraud exception could apply to Plaintiffs' abuse of process claim.

Petition for Review, p. 21-23 (citing Cedell v. Farmers Ins. Co. of Washington, 176, Wn.2d 686, 295 P.3e 239 (2013)). Plaintiffs argue that the Court of Appeals needed, but failed, to address whether "insurance bad faith" applied to the Varney's Industrial Insurance Act (IIA) claim. Id. Contrary to Plaintiffs' position, the Court of Appeals did address this issue and Division II's opinion is consistent with binding precedence.

In its opinion, Division II limited its review to the fourth question certified by the superior court: "Whether a partial or blanket waiver of the attorney[-]client/work product privilege applies under the fraud exception in the context of plaintiff's tortious abuse of process allegations in this case." Varney v. City of Tacoma, No. 56174-3-II (Consolidated with 565187-5-II), 2023 Wash. App. LEXIS 303, at *8-12, 2023 WL 1990553 (Wash. Ct. App., February 14, 2023). Plaintiffs argue that the Court of Appeals "re-framed the certified issue" by limiting its analysis to the Plaintiffs' abuse of process claim, *instead of analyzing the broader issue of whether a bad faith claim could*

arise in the context if an IIA claim. Petition for Review, p. 20; p. 23-30. Plaintiff's argument is flawed on both counts.

To begin, the Court of Appeals did not "re-frame the certified issue." Rather, the Court of Appeals addressed the question as certified by the superior court, which was based on the Varneys' abuse of process claim. See CP 947-952 (especially CP 950, setting forth the fourth certified issued for review). The issue of a "bad faith" claim was raised by the Varneys while seeking discretionary review in Division II. Varney, 2023 Wash. App. LEXIS at *9, n.4. See also CP 35-37. Before granting review, the Commissioner sought supplemental briefing from the parties on whether the Varneys had pled any bad faith insurance-related causes of action, such as those listed in Cedell[6].

[6] A review of Plaintiffs' complaint reveals that the words "bad faith" do not appear anywhere in the complaint. See CP 32-38. Instead, in Cause of Action C, Plaintiffs asserted a claim for "negligent claims handling." CP 36. Plaintiffs argued that negligent claims handling was the equivalent of bad faith, an argument that is foreclosed by Washington law.

Comm'r's Ruling (Dec. 16, 2021) at 8, n.1. Ultimately, the Commissioner concluded that *because the questions sought to be certified by both parties* and *because the questions/issues actually certified by the superior court all reference "abuse of process,"* the Court of Appeals' review would only address the privilege waiver issue in the context of the abuse of process claim. Id.

Division II did note, however, that the certified issue was not very clear and seemed to broadly ask whether the crime/fraud exception could apply to an abuse of process claim. Varney, 2023 Wash App. LEXIS at *10-11. The court found clarification in the Commissioner's order granting review. Id. In the order granting review, the Commissioner framed the issue by noting that *even*

In Washington, claims of negligence and bad faith are different claims, based on different legal theories, with different elements. First State Ins. v. Kemper Nat'l Ins.,94 Wn. App. 602, 612-13, 971 P.2d 953(1999)("Where courts have adopted standards of good/bad faith and ordinary care, as we have in Washington, the plaintiff is entitled to a jury verdict on theories of either negligence or bad faith, independent of each other because a party may fail to use ordinary care yet still not act in bad faith.").

if the Cedell waiver applied outside of a first-party insurance context, it had never been applied to an abuse of process claim. Varney, at *11 (emphasis added). Thus, based on the Commissioner's language, Division II construed the primary issue to be whether the Cedell waiver did, in fact, apply outside of a first-party insurance context. A necessary corollary to this analysis was resolution of whether there was a first-party insurance relationship between the City and Varney in the context of his IIA claim. Based on this Court's controlling precedence, Division II correctly concluded that there was no such relationship.

In addressing the first part of the analysis - whether the Cedell waiver could apply outside of a first-party insurance context – Division II reviewed and relied upon this Court's analysis in Cedell. In Cedell, this Court explained that a first-party bad faith claim "arises from the fact that the insurer has a quasi-fiduciary duty to act in good faith towards its insured." Cedell, 176 Wn.2d at 696. Thus, this Court reasoned that in the

context of a first-party insurance bad faith claim, "the insured is entitled to access to the claims file," unless the insurer is able to show that the insurer was "not engaged in a quasi-fiduciary function." Id. at 700.

In the instant case and consistent with this Court's decisions, Division II found that the Cedell waiver does not apply outside of a quasi-fiduciary relationship. The City was not an insurer of the Plaintiff and had no quasi-fiduciary relationship. Division II's analysis was premised, in part, on the fact that there was no insurance contract between the City and Varney. While the Plaintiffs characterize the lack of an insurance contract as a "red herring" (Petition for Review, p. 24), Division II's consideration of the absence of a contract is consistent with Washington law:

> The duty to act in good faith or liability for acting in bad faith generally refers to the same obligation. Indeed, we have used those terms interchangeably. However, regardless of whether a good faith duty in the realm of insurance is cast in the affirmative or the negative, *the source of the duty is the same*. *That source is the fiduciary*

> *relationship existing between the insurer and insured. Such a relationship exists not only as a result of the contract between insurer and insured, but because of the high stakes involved for both parties to an insurance contract and the elevated level of trust underlying insureds' dependence on their insurers*.

(emphasis added; internal citations omitted) Tank v. State Farm Fire & Cas. Co., 105 Wn.2d 381, 385, 715 P.2d 1133 (1986). See also Smith v. Safeco Ins. Co., 150 Wn.2d 478, 485, 78 P.3d 1274 (2003)("As a substantive matter, *an insurer has a duty of good faith to all of its policyholders* and, to succeed on a bad faith claim, a policyholder must show *the insurer's breach of the insurance contract* was "unreasonable, frivolous, or unfounded." (emphasis added)).

Division II also based its holding on the fact that the relationship between Varney and the City in the context of his IIA claim was adversarial, not quasi-fiduciary. Plaintiffs claim that Division II was wrong to so conclude, and that the relationship was both "adversarial **and primarily** fiduciary." (emphasis in original) Petition for Review, p. 23. Plaintiffs do

not explain this seemingly paradoxical statement, nor do they attempt to reconcile this assertion with this Court's analysis in Cedell[7]. Further, this statement is inconsistent with the industrial insurance scheme, as enacted. Under Title 51, the employer[8] does not make eligibility or benefits determinations. Rather, Labor & Industries (L&I) is expressly vested with the power to determine whether a claim should be allowed and if so, the amount to be paid. RCW 51.04.020. See also Chapters 51.32

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[7] In Cedell, this Court was careful to explain that because an insurer has a fiduciary duty to put the insured's interests ahead of the insurer's, there is a presumption of no attorney-client privilege in the context of a bad faith claim. Cedell, 176 Wn.2d at 700. When, however, the insurer overcomes this presumption and shows that it was not engaged in a fiduciary function, such as when litigating UIM claims (an adversarial process), the insurer can assert the attorney-client privilege. Id. In such a case, the insured can still pierce the privilege if the insured can establish the civil fraud exception, because "[i]in the context of first party insurance, bad faith may often be tantamount to civil fraud." Id. at 697 n.4.

[8] RCW 51.14.010 requires every employer to secure payment under Title 51, either by participating through the state fund, or by qualifying as a self-insurer. Qualification as a self-insured entity simply means establishing a sufficient financial ability to make all required payments under the title. RCW 51.14.020.

(Compensation), 51.36 (Medical Aid) and 51.52 (Appeals) RCW. As a self-insured entity, the City is required to submit a recommendation to L&I, and *L&I decides whether the claimant has a qualifying condition and whether benefits are to be paid*. WAC 296-15-420. If the City disagrees with L&I's decision, the City can appeal that decision to the Board of Industrial Insurance Appeals. RCW 51.52.060 (2023). In light of this statutory scheme, there is no question that the relationship between the employer and the employee is adversarial in the context of an IIA claim.

Finally, Division II relied upon this Court's prior holdings "that the Department is not an insurer," "that self-insured employers are not insurers," and that "Washington's public system of workers' compensation is not the equivalent of insurance." Varney, at *12 (citing Wash. Ins. Guar. Ass'n v. Dep't of Labor & Indus., 122 Wn.2d 527, 533, 859 P.2d 592 (1993); Stamp v. Dep't of Labor & Indus., 122 Wn.2d 536, 542-44, 859 P.2d 597 (1993); Durant v. State Farm Mut. Auto. Ins.

Co., 191 Wn.2d 1, 15, 419 P.3d 400 (2018)). Since the City is not an insurer and worker's compensation is not the equivalent of insurance, there is no way for the City to be a first-party insurer to Varney, and thus, no way to conclude that the City owed Varney an fiduciary duty. Absent that fiduciary duty and a first-party insurance relationship, there can be no legal basis for a bad faith claim. Thus, without a first-party insurance relationship and without the possibility of a bad faith claim, Division II's holding – that the Cedell waiver of privilege does not apply in the workers' compensation context and does not apply to Varney's abuse of process claim – is consistent with this Court's rulings.

Contrary to Plaintiffs' arguments in their petition for review, Division II did implicitly address the issue of whether a bad faith claim can arise in the context of an IIA claim and correctly concluded that it could not. This holding is consistent with this Court's decisions in Cedell, Wash. Ins. Guar. Ass'n and Stamp; thus, to the extent there was a significant public issue that

required this Court's intervention, this Court has already done so. Further, Plaintiffs have not identified any published cases from other intermediate appellate courts that conflict with Division II's holding in this case, which is hardly surprising, as this Court's jurisprudence forecloses any such conflict. There is simply no basis upon which this Court can, or should, grant review.

V. Conclusion

As outlined herein, Division II's holding and underlying analysis is wholly consistent with this Court's prior rulings. Moreover, Plaintiffs have not identified any conflicting opinions from the other intermediate appellate courts, nor have Plaintiffs identified a constitutional issue or issue of substantial public importance that this Court has not already addressed. Consequently, there is no basis upon which this Court can grant review under RAP 13.4(b). The instant petition must be denied.

Pursuant to RAP 18.7(c)(11), the undersigned hereby certifies that this brief was prepared using Times New Roman

14-point typeface, and contains 3652 words, excluding those elements excluded by the rule from the word count. This certificate was prepared in reliance on the word-count function of the word processing system (Microsoft Word) used to prepared the document.

DATED this 19th day of May, 2023.

By: */s/ William C. Fosbre*
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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on May 19, 2023, I filed with the Supreme Court of Washington and delivered through the Court's portal a copy of the foregoing City of Tacoma's Answer to Plaintiff's Petition for Review and this Certificate of Service by email pursuant to agreement to the following:

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