No. 339297

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

WILLIAM MERRIMAN AND COLLEEN MERRIMAN, husband and wife,

Plaintiffs-Respondents,

v.

AMERICAN GUARANTEE & LIABILITY INSURANCE COMPANY; YORK RISK SERVICES GROUP, INC.; PARTNERS CLAIM SERVICES INC.; BERND MOVING SYSTEMS, INC.; a Washington Corporation; DOUGLAS A. BERND AND JANE DOE BERND; and JOHN DOES 1-5,

Defendants-Petitioners.

ANSWER TO PETITION FOR REVIEW

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I. IDENTITY OF RESPONDENT

William and Colleen Merriman submit this Answer to the Petition for Review filed by York Risk Services Group, Inc. (York).

II. COUNTER-STATEMENT OF ISSUES PRESENTED

York provides insurance adjusting services to settle property claims. It was hired by American Guarantee & Liability Insurance Company (American Guarantee) and given the task of settling the claims of 39 property owners, all of whom lost property when a Yakima storage warehouse burned to the ground. Within two days of the fire, York determined that the American Guarantee policy provided not just liability coverage to the warehouse, but also first-party property coverage for property in the warehouse owner's "care, custody and control." App. A at 3.[1] York concealed this information from the owners. York instructed its representatives, when speaking with customers, to lie and say that York did not know if there was coverage.

The Court of Appeals correctly decided that the Merrimans stated valid claims against York and remanded them for trial. Properly framed, the issues York presents are as follows:

1. Whether York is subject to liability under established tort and statutory claims, where Division III's decision: (1) creates no conflict

[1] We refer to Appendix A to the Petition for Review, the Court of Appeals Opinion.

with a Division I opinion that considered different claims, against a different defendant, and whose reasoning has been partially overruled by this Court; (2) poses no threat to insurance adjusting firms that comply with Washington law; (3) is based on ordinary tort principles, in keeping with the independent duty doctrine; and (4) adheres to precedent holding that insurance bad faith and negligence are independent theories.

2. Whether RCW 48.01.030, which imposes a duty of good faith on "the insurer . . . and their representatives," applies to the insurer's representatives.

3. Whether an insurance adjuster may be liable under the Consumer Protection Act (CPA), RCW 19.86.010 to .920, for concealing insurance coverage, or is immune under the theory that such behavior is merely a reflection on the "quality of the services rendered." Pet. at 2.

III. STATEMENT OF THE CASE

York's statement of the case leaves out the most significant facts driving this litigation: York assumed all claims handling obligations by contract, knew of the owners' property coverage, hid that knowledge, and told its representatives to lie about it.

A. Bernd's insurer, American Guarantee, insured the property customers stored at the warehouse.

On August 5, 2012, a storage warehouse owned by Bernd Moving Systems, Inc. (Bernd) in Yakima, Washington, burned. In addition to the

warehouse, the belongings of 39 of Bernd's storage customers—including the Merrimans—were also destroyed. App. A at 2. Bernd's insurance policy covered "Business Personal Property." This term was defined to include "[p]ersonal property of others in your care, custody and control." *Id.* at 3. This provided first-party coverage for the owners' property.

B. York was hired to adjust all claims arising from the fire, but it told none of the owners about the relevant coverage.

"American Guarantee engaged York to not only adjust claims for the Bernd warehouse fire, but to more broadly administer the entire review, adjustment, settlement, and payment process under a preexisting third party administrator agreement between its parent company and York." *Ibid.* York also agreed to comply with "all applicable legal and regulatory requirements." *Id.* at 21–22.

York was given the insurance policy. Within two days of the fire, York knew the American Guarantee policy provided first-party coverage for "'[p]ersonal property of others in your care, custody and control.'" *Id.* at 3–4. But York did not disclose this coverage to any owner.

York did not interact directly with the customers. York hired Partners Claims Service (Partners) as its "'boots on the ground'" for the Bernd claims. *Id.* at 3. "York agreed that covered business personal property included customer property stored at the warehouse, but it did not

provide a copy of the policy to Partners nor inform Partners of coverage for those property owners." *Id.* at 4. "During discovery, York's CR 30(b)(6) designee admitted that in light of the limited information it provided to Partners, no property owner could expect to get a full explanation of the coverage provisions in Bernd's policy." *Id.* at 4–5.

Because York kept Partners in the dark, and instructed Partners to tell customers that it did not know about coverage (a lie), Partners left the Merrimans with the impression that they had no coverage and that their only source of recovery would be their homeowners' coverage, which covered only $15,000 of their more than $300,000 loss. *Id.* at 5.

No evidence ever surfaced that York disclosed to any customer the coverage for property in Bernd's care, custody, and control.

C. The Merrimans learned of the coverage for their property in discovery after filing a lawsuit against Bernd.

The Merrimans sued Bernd for negligence after learning the fire was likely caused by a discarded cigarette. *Id.* at 5. They sought production of Bernd's liability policy. Bernd produced the policy, which showed Bernd's liability coverage. But it also showed for the first time that the policy provided direct coverage to the owners for their property. The Merrimans then asserted claims in a separate lawsuit against American Guarantee, York, and Partners. *See id.* at 5–6.

The Merrimans settled with all parties except York. They amassed substantial evidence that York never made a good faith effort to adjust the claims. York attacks none of this evidence, but argues it should be immune from liability in spite of the evidence of its bad faith.

IV. ARGUMENT

The Court of Appeals remanded claims against York for bad faith, negligent misrepresentation, negligence, and violation of the CPA. In its petition, York does not analyze the elements of these claims. Instead, it lumps them together under the label "tort liability," and argues that it should be immunized from liability no matter what it did.

The standards of RAP 13.4 are not met. The Court of Appeals applied settled principles and remanded four established claims. No public policy of this state commands that insurance adjusters be accorded special protection when they hide coverage from innocent insureds.

A. Subjecting York to the same liabilities as other actors in the insurance industry does not warrant review.

1. The Court of Appeals decision does not create a conflict with International Ultimate warranting review.

Any conflict between the Court of Appeals decision and *International Ultimate, Inc. v. St. Paul Fire & Marine Insurance Co.*, 122 Wn. App. 736, 87 P.3d 774 (2004), does not warrant review. First, *International Ultimate* presented a different question than is presented in

this case. Second, the reasoning of *International Ultimate* has been superseded by decisions of this Court.

In *International Ultimate*, an insured brought bad faith, negligence, and CPA claims against its insurer, and its employee adjuster, Zeller. The court held that the CPA claim had to be dismissed because, "[t]o be liable under the CPA, there must be a contractual relationship between the parties," but the contract was with the insurance company, not Zeller. *Id.*. at 758. The court dismissed the negligence claim on the ground that corporate officers were personally liable only "where the tortfeasor was a corporate officer who actively participated in a conversion." *Ibid.* (citing *Dodson v. Economy Equipment Co.*, 188 Wash. 340, 62 P.2d 708 (1936)).

But *International Ultimate* did not further address whether an employee adjuster in Zeller's position owed any duty, let alone whether a separate corporate entity such as York—which undertook all of American Guarantee's claim handling duties—would owe a duty to the insured. And the case does not even hint that insurance adjusters, as such, are immune from liability. As a result, *International Ultimate* does not create a conflict warranting review by this Court.

The reasoning of *International Ultimate* has also been superseded by this Court. *International Ultimate* believed that CPA liability required a contractual relationship between the parties. As this Court has since held,

though, "contractual privity ordinarily is not required to bring a CPA claim." *Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 43 n.6, 204 P.3d 885 (2009). The Court of Appeals in this case was required to follow *Panag* and appropriately determined whether York could be liable under the CPA by applying the *Hangman Ridge* elements. *See Klem v. Washington Mutual Bank*, 176 Wn.2d 771, 787, 295 P.3d 1179 (2013). Review is not necessary where the Court of Appeals has applied this Court's precedent rather than superseded lower-court decisions.

Furthermore, York crafts its primary argument—that adjusters do not owe a tort duty of care—around an alleged conflict in the case law involving *International Ultimate*. This issue was not raised below. York cited *International Ultimate* exactly three times in its appellate briefing, each time solely with respect to the CPA. See Br. of Respondent York at 38, 43, and 46, COA No. 33929-7-III.

2. Holding York liable for its own acts does not "distort insurance services"; <u>not</u> holding it liable would be a distortion.

York's primary argument for review is the argument that it is a "distortion" to hold that York is liable for its own conduct. York argues that "policy considerations" show that York should not be held liable for its own bad faith, negligent misrepresentation, negligence, and unfair or deceptive acts. Pet. at 11. There are several problems with this argument.

The first is that York has made a highly selective review of the non-Washington "policy considerations" that supposedly give it impunity to hide insurance coverage. York relies on *Sanchez v. Lindsey Morden Claims Servs., Inc.*, 84 Cal. Rptr. 2d 799 (Ct. App. 1999), but overlooks that its home state of California "easily" found a duty to the insured by independent adjusters for conduct similar to York's in *Bock v. Hansen*, 170 Cal. Rptr. 3d 293, 302 (Ct. App. 2014). In *Bock*, an independent adjuster made false statements concealing applicable coverages. *Id.* at 297–98. The court rejected York's "policy considerations" (and specifically refuted the adjuster's reliance on *Sanchez*). The court held, based on traditional tort principles, "a cause of action for negligent misrepresentation can lie against an insurance adjuster." *Id.* at 304. California also has subjected independent adjusters to liability for statutory violations: "[I]t would do considerable violence to the statutory language to read as outside the reach of the Act, insurance adjusters who by definition conduct an important aspect of the business regulated." *Bodenhamer v. Superior Court*, 223 Cal. Rptr. 486, 489 (Ct. App. 1986).

In *Sanchez*, the California appellate court reached a different conclusion on a negligence claim where an independent adjuster allegedly delayed a claim payment with the result that the insured was sued by a third party. 84 Cal. Rptr. at 800. The adjuster in *Sanchez* had not made

extensive promises to adjust the claim for the benefit of the claimants as York did, the adjuster did not conceal coverage which was applicable, and the court did not consider Washington statutory and common law, Restatement (Third) of Torts § 6 (Tent. Draft. No. 2 2014), Restatement (Second) of Torts § 286 (1965), nor the case law supporting these sections. Neither *Sanchez* (nor any other authority) stands for the proposition that independent adjusters may never be sued no matter what they have done.

York's supposed "policy considerations" also do not warrant departure from the settled principles the Court of Appeals applied. York complains that making it responsible for properly handling the insurance claims of the owners—including disclosing applicable coverage—somehow creates a conflict between York and American Guarantee. Pet. at 10 (citing *Meineke v. GAB Business Servs., Inc.*, 991 P.2d 267, 271 (Ariz. 1999)). But a first-party property insurer in Washington is not in an adversarial posture towards the claimant, but "has a quasi-fiduciary duty to act in good faith toward its insured." *Cedell v. Farmers Ins. Co. of Washington*, 176 Wn.2d 686, 696, 295 P.3d 239 (2013). "Since the duty to comply with claims handling regulations could not require York to do anything that American Guarantee was not itself required to do, it cannot present a conflict between York and American Guarantee." App. A at 32.

York's next complaint is that holding York liable for its actions might reduce the offering of independent adjuster services in the marketplace. Pet. at 11. Again York cites *Sanchez* and ignores *Bock*. If holding adjusters liable for concealing insurance coverage impaired the market, the *Bock* and *Bodenhamer* decisions in York's home state of California would have done so long ago. They did not. On the contrary, holding a party responsible for its own misbehavior "safeguards against what might otherwise be an incentive for an unscrupulous insurer to engage an unscrupulous claims administrator who, by withholding information and cooperation, will prevent persons from ever discovering that insurance covers their loss." App. A at 32–33. One consequence of York's argument is that, in an appropriate case, an insurer could eliminate most or all liability for extra-contractual remedies by contracting with an independent contractor to perform its obligations.

Last, York does not demonstrate that any of its proposed "policy considerations" overcome the Washington statutory law holding York accountable for its own conduct. This Court applies the legislature's constitutional policy choices. Washington follows a rule of several liability directing that the trier of fact "shall" determine the percentage of fault "attributable to every entity which caused the claimant's damages." RCW 4.22.070(1). Washington declares actionable any "unfair or

deceptive acts or practices in the conduct of any trade or commerce." RCW 19.86.020 & .090. And Washington deems insurance a business "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." RCW 48.01.030. York's "policy considerations" do not justify departure from policy and law already settled in this state.

3. The Court of Appeals followed the independent duty doctrine.

Citing Justice Chambers' concurrence in *Eastwood v. Horse Harbor Foundation, Inc.*, 170 Wn.2d 380, 241 P.3d 1256 (2010), York claims that the Court of Appeals opinion will "sow confusion" over the scope of the independent duty doctrine. App. A at 12. The opinion, York says, allows it to be sued "in tort" while the owners previously asserted contract and tort claims against the insurer. Pet. at 1. In fact, the opinion faithfully follows this Court's independent duty case law.

In *Eastwood*, a lessor sued for damage a tenant had done to the leased premises. 170 Wn.2d at 384. The lessor sought remedies both for breach of the lease and for the tort of waste. *Ibid.* This Court unanimously held that the lessor was entitled to recover tort damages for waste even though the parties also had entered into the lease contract. *Eastwood* underscores that, if background tort principles support a duty, there is

nothing surprising in holding a party liable for breach of a tort or statutory duty even if the party also entered into a contract in the same transaction.

As *Eastwood* held, "[e]conomic losses are sometimes recoverable in tort, even if they arise from contractual relationships." *Id.* at 388. This Court has recognized overlapping tort and contract duties for "failure of an insurer to act in good faith," as well as "negligent misrepresentation," which is among the claims here. *Ibid.* (citing *American States Ins. Co. v. Symes of Silverdale, Inc.*, 150 Wn.2d 462, 469, 78 P.3d 1266 (2003) & *ESCA Corp. v. KPMG Peat Marwick*, 135 Wn.2d 820, 825, 959 P.2d 651 (1998)). The appropriate analysis is to apply "ordinary tort principles." *Id.* at 389. This includes, for negligent misrepresentation, the standards of Restatement (Second) of Torts § 552 (1977). *Ibid.* (quoting *Alejandre v. Bull*, 159 Wn.2d 674, 686, 153 P.3d 864 (2007)).

This is just what the Court of Appeals did. In considering the Merrimans' negligent misrepresentation claim, the court looked to the governing principles of that claim, including Section 552 of the Restatement (among other authority). App. A at 18. In determining whether the Merrimans had claims against York for bad faith, negligence, and violation of the CPA, the court looked the foundational principles of those claims. *Eastwood* holds that determining whether a tort duty is owed depends on the law defining the duty in question. This "careful, case-by-

case analysis" of whether an independent tort duty supports recovery is exactly what the Court of Appeals did. *Eastwood*, 170 Wn.2d at 296.

Justice Chambers' concurrence stands for nothing different. York claims that Justice Chambers wrote separately to advocate resort to the independent duty doctrine broadly "in commercial contexts involving business or other contractual relationships." Pet. at 12. In truth Justice Chambers' concurrence explained that the independent duty rule "was never a rule in the ordinary sense," and had only been applied "in cases involving product liability and claims arising out of construction or the sale of real estate." *Eastwood*, 170 Wn.2d at 406–07 (Chambers, J., concurring). Since the lead opinion held that the rule is to look to tort law to define tort duties, and since Justice Chambers' concurrence agreed and found the independent duty doctrine limited to product liability, construction, and real estate "based upon policy considerations unique to those industries," *id.* at 416, the Court of Appeals was correct look to traditional tort principles to evaluate each of the Merrimans' claims.

Indeed, York does not even argue that the independent duty doctrine applies to the Merrimans' bad faith and CPA claims. Nor could it. "RCW 48.30.010 has been amended three times since the CPA was enacted and yet the Legislature has not afforded the insurance industry immunity from CPA liability." *Industrial Indem. v. Kallevig*, 114 Wn.2d

907, 925, 792 P.2d 520 (1990). The independent duty doctrine "cannot be applied to bar a statutory cause of action." 170 Wn.2d at 404 (Madsen, C.J., concurring).

With respect to negligence—the one claim on which the Court of Appeals relies on York's contract with American Guarantee—the question is whether York's undertakings in the contract give rise to negligence liability to the Merrimans under "ordinary tort principles." *Eastwood*, 170 Wn.2d at 389. The Court of Appeals decision shows that they do. The Restatement (Third) of Torts states that one who "in the course of his business . . . performs a service for the benefit of others, is subject to liability for pecuniary loss caused to them by their reliance upon the service, if he fails to exercise reasonable care." App. at 26 n.10 (quoting Restatement (Third) of Torts § 6 (Tent. Draft No. 2 2014). This liability is both triggered by—and *limited* to—situations where loss has occurred "through reliance upon [the service] in a transaction that the actor intends to influence." *Ibid.* The Court of Appeals' reliance on York's contractual undertakings flowed from the traditional tort principles that determine whether a tort duty is owed. As both the Restatement and case law show, a tort duty may arise in part because the defendant undertakes to perform a duty with knowledge that the plaintiff will rely on the defendant to perform it properly. This is no novel rule calling for review by this Court,

but, according to Justice Cardozo, "'ancient learning'" in tort law. *Roth v. Kay*, 35 Wn. App. 1, 4, 664 P.2d 1299 (1983) (quoting *Glanzer v. Shepard*, 135 N.E. 275, 276 (N.Y. 1922)).

An independent basis for finding a duty sounding in negligence is Restatement (Second) of Torts § 286 (1965), which governs when a statutory duty gives rise to negligence liability. *Barrett v. Lucky Seven Saloon, Inc.*, 152 Wn.2d 259, 269, 96 P.3d 386 (2004); RCW 5.40.050. Because RCW 48.01.030 imposes a duty of good faith on York and, because the purpose of the duty of good faith is to protect those covered by insurance policies, York's failure to disclose the coverage terms supports liability under this tort doctrine also.

Review is not required because the Court of Appeals correctly performed the analysis this Court's decisions require.

4. Bad faith and negligence are independent theories.

York argues for the first time that the Court should take this case to decide if insurance bad faith and negligent claim handling are independent theories of recovery. Pet. at 14–15. York did not raise this issue below, and cannot raise it for the first time in a petition for review. *Fisher v. Allstate Ins. Co.*, 136 Wn.2d 240, 252, 961 P.2d 350 (1998).

Moreover, there is no confusion on this point. In *First State Ins. Co. v. Kemper Nat'l Ins. Co.*, 94 Wn. App. 602, 612, 971 P.2d 953 (1999),

the court held that an insured was entitled to instructions on both bad faith and negligence because "a party may fail to use ordinary care yet still not act in bad faith" and "each claim presents a different legal theory with different elements." *Tyler v. Grange Ins. Ass'n*, 3 Wn. App. 167, 175, 473 P.2d 193 (1970), explained that where a state has allowed recovery by the insured for either bad faith or negligence, "the finder of the fact is entitled to find liability on the part of the company on the theory of either negligence or bad faith, independent of the other."

York argues that this Court questioned this analysis in *Hamilton v. State Farm Ins. Co.*, 83 Wn.2d 787, 792, 523 P.2d 193 (1974), in which it noted that some commentators have called the negligence and bad-faith standards "interchangeable." But in *Hamilton*, the trial court instructed the jury on both the negligence and bad-faith standards, *id.* at 790, and this Court affirmed the jury's verdict for the claimant against the insurer, *id.* at 794. *Hamilton* approved instructing on both negligence and bad-faith standards, because an insurer's violation of either supports recovery. *Ibid.*

Because the decisions of the Court of Appeals and of this Court are consistent and in agreement, there would not be any need for review even if York had raised this issue below.

B. RCW 48.01.030 applies to York.

The Court of Appeals was correct to hold that RCW 48.01.030 applies to York as the insurer's representative because the statute specifically requires good faith by "all persons" in "all insurance matters," and places this obligation "[u]pon the insurer, the insured, their providers, and their representatives." York argues, however, that this statute cannot really mean that *York* had to exercise good faith, because the statute also applies to the insured, and, according to York, imposing a duty of good faith on the insured would be "absurd." Pet. at 18.

This case does not present an opportunity to address an insured's duty of good faith because there has never been any suggestion that the insured owners acted with anything other than good faith. Here, they were lied to, not the other way around. Nevertheless, Washington case law shows that the insured does have obligations in insurance transactions, and is subject to severe consequences for dishonesty. In *Mut. of Enumclaw Ins. Co. v. Cox*, 110 Wn.2d 643, 653, 757 P.2d 499 (1988), where the insured fraudulently claimed insurance for items he never owned, this Court not only voided his policy but held that the insured's fraud precluded recovery under his otherwise proven CPA claim. *Accord Ki Sin Kim v. Allstate Ins. Co.*, 153 Wn. App. 339, 356, 223 P.3d 1180 (2009).

The insured has duties, and the insurer has corresponding remedies in the event of breach. Washington law already defines these duties and remedies. This case does not call for reexamination of either. The question presented here is whether, where the insurer and the insured must act with honesty and good faith, an insurance adjuster must do so also. RCW 48.01.030 answers this question affirmatively.

C. The CPA applies to York.

Finally, the rule that professionals do not face CPA liability for matters involving professional judgment as opposed to "entrepreneurial" aspects of a professional practice does not aid York. This inquiry concerns the second element of a CPA claim, whether the defendant's act occurred in "trade" or "commerce." The "competence of and strategies employed by a professional" do not constitute "trade" or "commerce." *Michael v. Mosquera-Lacy*, 165 Wn.2d 595, 603, 200 P.3d 695 (2009).

And insurance contracts and the adjustment of insurance payments do constitute "trade" or "commerce." This Court has long recognized that "[i]n RCW 19.86.170, the Legislature expressly provided that violations of the insurance code are subject to the CPA." *Kallevig*, 114 Wn.2d at 924. The Insurance Commissioner has defined certain "unfair methods of competition" when resorted to by "the insurer." WAC 284-30-330. These "unfair" acts are considered per se violations of the CPA. The Court of

Appeals refused to allow the Merrimans to bring per se CPA claims because these regulations apply only to "the insurer." But the statutory authorization supporting these regulations is broader, and provides that "[n]o person engaged in the business of insurance shall engage in unfair methods of competition or in unfair or deceptive acts or practices." RCW 48.30.010. York is a "person engaged in the business of insurance," and as such acted in "trade" or "commerce." The Insurance Commissioner's regulation of the adjusting process as commerce demonstrates that York's activity did occur in "trade" or "commerce." Historically Washington courts have had little trouble concluding that activities such as adjusting insurance claims occur in "trade" or "commerce." *Cf. Aecon Bldgs., Inc. v. Zurich N. Am.*, 572 F. Supp. 2d 1227, 1238 (W.D. Wash. 2008) ("The second prong is satisfied where an action involves insurance contracts."). York's handling of the owners' claims occurred in "trade" or "commerce."

V. CONCLUSION

York fails to show that the Court of Appeals' faithful application of settled principles creates any question that this Court must resolve. Moreover, the Court of Appeals remanded four claims for trial. At this point judicial economy favors trying these claims to final judgment before further appellate review. Should this Court grant review, it has the discretion to specify the issues it will review. RAP 13.7(b). If the Court is

inclined to review any part of the Court of Appeals' analysis, it should exercise this discretion with liberality. The Court of Appeals did what York fails to do: evaluate each of the Merrimans' claims on their individual merits. In each case the Court of Appeals reached the correct result; but even if there is a question about one claim, that does not infect the resolution of another. The Merrimans respectfully ask that the Court deny the petition for review of the Court of Appeals decision.

RESPECTFULLY SUBMITTED this 9th day of June, 2017.

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CERTIFICATE OF SERVICE

I certify that on this 9th day of June 2017. I cause the foregoing to be filed in the Court of Appeals Division III, Spokane, Washington and a true and correct copy to be served on the following below via email per agreement.

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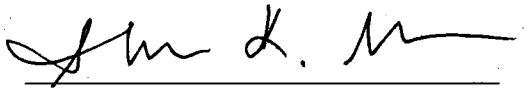

Shannon McKeon

KELLER ROHRBACK L.L.P.

June 09, 2017 - 2:57 PM

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Superior Court Case Number:	13-2-01732-5

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