Supreme Court No. 95867-0

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 75731-8-I

COURT OF APPEALS, DIVISION ONE
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.

PETITIONERS' 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

Gavin W. Skok, WSBA No. 29766
FOX ROTHSCHILD, LLP
1001 Fourth Avenue, Suite 4500
Seattle, Washington 98154
Telephone: (206) 624-3600
Facsimile: (206) 389-1708

Michael B. King, WSBA No. 14405
Jason W. Anderson, WSBA No. 30512
CARNEY BADLEY SPELLMAN, P.S.
701 Fifth Avenue, Suite 3600
Seattle, Washington 98104-7010
Telephone: (206) 622-8020
Facsimile: (206) 467-8215

Attorneys for Petitioners

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Washington Cases

Page(s)

Other State Cases

Federal Cases

Statutes

I. INTRODUCTION

Petitioners agree with and adopt the arguments in the memorandum in support of review filed by amici curiae American Insurance Association, National Association of Mutual Insurance Companies, and Property Casualty Insurers Association of America. Amici curiae state important reasons why personal liability for adjusters was not contemplated by our Legislature and is not warranted for any legitimate policy reason. Further, amici curiae correctly point out that the Court of Appeals failed to consider whether RCW 48.01.030 creates an actionable tort duty under the *Bennett* test.[1] This Court should grant review of the Court of Appeals' decision and reverse.

II. ANSWERING AUTHORITY AND ARGUMENT

A. Exposing individual adjusters to personal liability does not enhance the remedies available to insureds.

Amici curiae observe that holding adjusters personally liable fills no gap in the remedies available to insureds for bad-faith acts by insurers and the adjusters who act on their behalf. *Amicus Curiae Memo* at 3-4. Petitioners agree.

As discussed in the Petition for Review, an insurer's duty to its insured is nondelegable, meaning that the insurer is subject to liability for its agents' failure to act in good faith. *Petition for Review* at 12; *see Chicago Title Ins. Co. v. Wash. State Office of Ins. Comm'r*, 178 Wn.2d 120, 135-36, 309 P.3d 372 (2013). Exposing an individual adjuster to personal liability thus does nothing to enhance the remedies available to insureds

[1] *Bennett v. Hardy*, 113 Wn.2d 912, 784 P.2d 1258 (1990).

wronged by adjuster misconduct. Amici aptly observe that personal liability, at most, gives insureds unfair tactical advantages in litigation at an unwarranted, high personal cost to individual adjusters.

B. Holding adjusters personally liable for breach of Washington's broad good-faith duty would needlessly disrupt claims handling and impose unnecessary burdens on individual adjusters.

Amici curiae argue it is unreasonable to hold individual adjusters personally liable for breach of the broad duty of good faith imposed on insurers in Washington and that such exposure is not needed to deter bad-faith conduct. *Amicus Curiae Memo* at 5-6. Again, Petitioners agree.

This Court has observed that Washington's duty of good faith is significantly broader and more onerous than the duty imposed in some other jurisdictions. And this Court explained why: because the duty springs from a fiduciary relationship:

> The duty to refrain from bad faith or, alternatively, to use good faith is said in our state to be founded on what has been termed a fiduciary relationship existing between the insurer and the insured. *Murray v. Mossman*, [56 Wn.2d 909, 355 P.2d 985 (1960)].
>
> Some jurisdictions have attempted to define the liability of the insurer for bad faith to require an actual intent to mislead or deceive another and stated there would be no liability in a particular transaction unless there was conduct equivalent to fraud or actual bad faith. The basis of liability of the insurer is not this narrowly founded in Washington.

Phil Schroeder, Inc. v. Royal Globe Ins. Co., 99 Wn.2d 65, 73, 659 P.2d 509 (1983) (quoting *Tyler v. Grange Ins. Co.*, 3 Wn. App. 167, 173-74, 473 P.3d 193 (1970)).

Holding individual adjusters personally liable under our state's standards of good faith is unworkable and unreasonable. In the context of third-party claims, an insurer under Washington law must give "equal consideration" to the insured's interests. *Ellwein v. Hartford Accid. & Indem. Co.*, 142 Wn.2d 766, 779-81, 15 P.3d 640 (2001), *overruled on other grounds by Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 484, 78 P.2d 1274 (2003). The Court of Appeals' decision provides no guidance on how adjusters might give equal consideration to insureds' interests as their own, when adjusters have no personal stake in how any particular claim is resolved. In the context of a UIM claim, the insurer and insured are adverse and deal at arm's length, but the insurer must still "deal fairly" with the insured and not "overreach," and the insured need not prove intent to mislead or deceive to establish bad faith. *Ellwein*, 142 Wn.2d at 779-81. Again, the Court of Appeals' decision provides on how these standards might apply personally to an adjuster.

Even assuming those issues can be resolved, Petitioners agree that holding adjusters personally liable will needlessly discourage them from handling Washington claims by potentially exposing their personal assets. *See Amicus Curiae Memo* at 6. It may also delay claim resolution. And as pointed out by both amici curiae and Petitioners, other sufficient mechanisms exist to deter adjusters from unreasonable claim decisions. *Id.*; *Petition for Review* at 12. Moreover, an insurer must answer to its insureds for any wrongdoing of its agent—the adjuster—including breach of the duty of good faith. *See Chicago Title Ins.*, 178 Wn.2d at 135-36. Insureds are

thus well protected against harm, and ample remedies are available without holding adjusters personally liable to insureds.

C. As this Court's precedents confirm, there is no indication the Legislature intended RCW 48.01.030 impose personal liability on "all persons" involved in insurance matters.

Amici curiae identify examples of the concerning ramifications of holding "all persons" involved in insurance matters personally liable for breach of Washington's broad duty of good faith. *Amicus Curiae Memo* at 7-8. Even employees of repair contractors could find themselves facing *personal* liability to insurers or insureds for failing to satisfy exacting standards of good faith in all aspects of their work. This could affect the market for insurance-covered repairs and increase costs. Such unintended consequences are avoided by constraining liability to within the insurer-insured relationship, as this Court has always done.

The Court of Appeals premised an adjuster's duty exclusively on RCW 48.01.030. The statute undisputedly states a broadly applicable duty. But that does not mean the Legislature intended to impose personal liability on "all persons" for breach of the duty. And this Court's precedents rule out such an interpretation of the statute. Critically, this Court has repeatedly held that the duty imposed by RCW 48.01.030, just like the common-law duty, is a *fiduciary* duty. For instance, this Court stated in *Mahler v. Szucs*, "We have said *the statute* [RCW 48.01.030] creates a *fiduciary duty* for insurers running to their insureds." 135 Wn.2d 398, 414, 957 P.2d 632 (1998), *overruled on other grounds by Matsyuk v. State Farm Fire & Cas. Co.*, 173 Wn.2d 643,

272 P.3d 802 (2012) (citing *Indus. Indem. Co. of the Nw. v. Kallevig*, 114 Wn.2d 907, 916-17, 792 P.2d 520 (1990)) (emphasis added).[2]

The quasi-fiduciary relationship in the insurance context exists exclusively between the insurer and insured. That is because only the insurer and insured have a direct contractual and financial relationship, in which the insurer bears responsibility for representing and safeguarding certain financial interests of the insured. It is this responsibility that gives rise to the duty of good faith:

> The typical liability insurance policy contains no express provision requiring the insurer to settle and gives the company control over the defense of the claim and control of over the decision concerning opportunities of settlement within policy coverage. The existence of this control of defense and settlement is a necessity of insurance practice, but, with this power given the insurer, the courts have stated there is a duty sounding in tort (*Murray v. Mossman*, 56 Wn.2d 909, 355 P.2d 985 (1960)) requiring the insurer to give consideration to the interests of the insured, when negotiating a settlement.

Tyler, 3 Wn. App. at 172.

No one else in the insurance context—including an adjuster—has this direct responsibility. That is why this Court has consistently rejected the notion of a good-faith duty outside the quasi-fiduciary relationship, whether based on statute or common law. *See Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 395, 715 P.2d 1133 (1986); *Murray v. Mossman*, 56 Wn.2d 909, 912, 355 P.2d 985 (1960); *compare Van Noy v. State Farm*

[2] *See also Barstad v. Stewart Title Guar. Co.*, 145 Wn.2d 528, 543-44, 39 P.3d 984 (2002); *Staples v. Allstate Ins. Co.*, 176 Wn.2d 404, 413, 295 P.3d 2012 (2013).

Mut. Auto. Ins. Co., 142 Wn.2d 784, 790-95, 16 P.3d 574 (2001) *with id*. at 800 (Talmadge, J., concurring).

As amici curiae argue, it is unlikely that the Legislature in adopting RCW 48.01.030 intended to impose an actionable duty of good faith on every person involved in an insurance-related matter. *Amicus Curiae Memo* at 8. Under this Court's precedents, the insurer owes the insured a nondelegable, actionable duty of good faith, and the insurer's agents owe a duty in a representative capacity, as agents of the insurer. *See Chicago Title Ins.*, 178 Wn.2d at 135-36. That arrangement comports with the legal and practical realities, is fair to insureds and protects their interests, and fulfills important public policies. This Court should grant review to restore that state of affairs.

D. This Court should accept review to determine whether RCW 48.01.030 creates an actionable tort duty under the *Bennett* factors.

This Court has held that the *common-law* duty of good faith in the context of the quasi-fiduciary relationship between insurer and insured is actionable in tort. *Burnham v. Commercial Cas. Ins. Co. of Newark, N.J.*, 10 Wn.2d 624, 631, 117 P.2d 644 (1941); *Murray*, 56 Wn.2d at 912. The Court of Appeals held that a *statute*, RCW 48.01.030, imposes a duty on individual adjusters that is actionable in tort.

Not every duty imposed by a statute is actionable in tort. RCW 48.01.030 does not expressly create a private right of action against adjusters or anyone else. Amici curiae correctly point out a court properly determines whether a statute implies a cause of action under the three-factor

Bennett test. *Amicus Curiae Memo* at 8-10; *see Bennett v. Hardy*, 113 Wn.2d 912, 784 P.2d 1258 (1990). The Court of Appeals did not analyze the *Bennett* factors or cite any authority for the existence of a private right of action under RCW 48.01.030. Amici curiae's analysis of those factors demonstrates that RCW 48.01.030 need not and should not be interpreted as implying a private right of action. This Court should grant review to analyze the issue under the *Bennett* factors.[3]

III. CONCLUSION

This Court should grant review of the Court of Appeals' decision that RCW 48.01.030 creates an actionable tort duty on the part of individual claims adjusters, and it should reverse the Court of Appeals.

[3] Imposing personal liability under the Unfair Trade Practices Act (a model act authored by the National Association of Insurance Commissioners), as courts have done in Montana and West Virginia, is materially different than imposing personal liability for breach of the general duty of good faith. *See Petition for Review* at 11 n.6; *Answer to Petition* at 12; *see also O'Fallon v. Farmers Ins. Exch.*, 260 Mont. 233, 859 P.2d 1008, 1014 (1993); *Taylor v. Nationwide Mut. Ins. Co.*, 214 W. Va. 324, 589 S.E.2d 55, 60-62 (2003); *Grubbs v. Westfield Ins. Co.*, 430 F. Supp. 2d 563, 569 (N.D. W. Va. 2006). Liability under the Unfair Trade Practices Act is premised on a finding of a specific unfair claims settlement practice. *See* Mont. Code Ann. §§ 33-18-102(1), 33-18-201; W. Va. Code §§ 33-11-3, 33-11-4; *cf.* WAC 284-30-330. The duty of good faith is far broader. No state other than Washington has held that an adjuster personally owes an actionable duty of good faith. *See Petition for Review* at 10-11.

Respectfully submitted this 20th day of August, 2018.

FOX ROTHSCHILD, LLP

By #14405 MBK for
Gavin W. Skok, WSBA No. 27966

CARNEY BADLEY SPELLMAN, P.S.

By Michael B. King
Michael B. King, WSBA No. 14405
Jason W. Anderson, WSBA No. 30512

Attorneys for Petitioners

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

☒ Email, to the following:

Gavin W. Skok FOX ROTHSCHILD, LLP 1001 Fourth Avenue, Suite 4500 Seattle, Washington 98154 gskok@foxrothschild.com	C. Steven Fury Scott David Smith Fury Duarte PS 1606 148th Ave SE Ste 102 Bellevue WA 98007 steve@furyduarte.com scott@furyduarte.com
Vonda M. Sargent Law Office of Vonda M. Sargent 119 1st Ave S Ste 500 Seattle WA 98104 Sisterlaw@me.com	Daniel H. Syhre Betts Patterson & Mines One Convention Place 701 Pike Street, Suite 1400 Seattle, WA 98101-3927 dsyhre@bpmlaw.com dmarsh@bpmlaw.com

DATED this 20th day of August, 2018.

Patti Saiden, Legal Assistant

CARNEY BADLEY SPELLMAN

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