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.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Moun Keodalah, an Allstate insured, suffered injuries in a serious traffic crash an uninsured motorcyclist caused in Seattle on April 2, 2007. He made a UIM claim with Allstate and asked that it pay his $25,000 limits. Though Allstate knew the Seattle Police Department found the biker was at fault, Allstate's witness interviews revealed that the biker was driving well over the speed limit, and its own accident-reconstruction expert found that the biker caused the crash, Allstate told Keodalah he was 70 percent at fault, refused to explain its reasoning, and offered only $1,600.

Keodalah filed a UIM suit against Allstate in King County District Court. Allstate's adjuster, Tracey Smith, aided in answering discovery and testified at deposition and trial. Throughout the process, she misrepresented facts, asserted facts that contradicted both her and Allstate's investigation, refused to settle Keodalah's claim despite the fact liability was reasonably clear, and otherwise consistently failed to deal with Keodalah honestly and with lawfulness of purpose. The jury awarded Keodalah $108,868.20.

Keodalah subsequently filed bad-faith and CPA claims against both Allstate and Smith in King County Superior Court. The trial court dismissed the bad-faith and CPA claims against Smith under CR 12(b)(6). It held that Washington law does not permit those claims against employee adjusters. Division I granted discretionary review.

Recognizing insureds may base bad-faith claims on RCW 48.01.030 good-faith duty violations, Division I, relying on the statute's unambiguous text (which imposes good-faith duties on insurers and their representatives), and Division III's *Merriman v. Am. Guar. & Liab. Ins.*, 198 Wn. App. 594, 396 P.3d 351 (2017), decision (which held RCW 48.01.030 unambiguously applies to corporate adjusters), determined that RCW 48.01.030 imposes an actionable good-faith duty on employee adjusters. Therefore, it reinstated the bad-faith and CPA claims against Smith. Because Division I's decision, which is consistent with Division III's decision, is also consistent with this Court's precedent and no issue of public importance requires this Court's review, the Court, as it did in *Merriman*, should deny review.

II. RESPONSE TO ISSUE PRESENTED FOR REVIEW

Whether RCW 48.01.030—which unambiguously imposes a good-faith duty on both insurers and "their representatives"—applies to employee insurance adjusters as insurer representatives.

III. COUNTERSTATEMENT OF THE CASE

A. Allstate's employee insurance adjuster, Tracey Smith, engaged in dishonest, deceptive, and otherwise bad-faith conduct.

Keodalah incorporates Division I's factual recitation. Pet. App. 2-4. He only briefly elaborates on and/or adds key facts here:

1. Keodalah served discovery on Allstate in the UIM action on October 19, 2012. CP 7. Allstate, through attorney Jodi Held and adjuster Tracey Smith, asserted that Keodalah failed to stop at the stop sign and was at fault. CP 7. Yet, Allstate and Smith acknowledged they had the Seattle Police Department (SPD) report, which found the motorcyclist at fault, CP 3, 7, and Allstate's own reconstructionist's report, which found Keodalah had stopped and the biker was at fault. CP 5-6, 8.

2. On February 28, 2013, Allstate designated Smith as its CR 30(b)(6) representative. CP 8. She testified that Keodalah ran the stop sign and was thus at fault, but she later admitted that Keodalah had not failed to stop. CP 8. She additionally testified Keodalah had been on his cell phone, but again later admitted he had not been on his phone. CP 8.

3. In March 2013, Allstate offered to settle Keodalah's UIM claim for $15,000—substantially less than the $25,000 policy limits. CP 8. Then, in October 2013, Allstate refused a policy limit offer. CP 8-9. Smith directed and participated in the acts throughout the course of the UIM claim.

4. Trial in the UIM suit began on March 10, 2014. CP 9. Smith again testified Keodalah was 70 percent at fault. CP 9. Yet, she also testified she and Allstate had relied on the eyewitness statements, SPD report, and the reconstructionist report—all demonstrating the biker was at fault—to reach that conclusion. CP 9. Indeed, she later conceded during her testimony

that Allstate's reconstructionist did not support that at-fault finding, CP 10, and Allstate refused to alter its liability position after it learned the biker's speed caused the crash. CP 10. She also testified that when she and Allstate alleged Keodalah failed to stop, they knew the statement was false. CP 9.

B. Proceedings below.

Keodalah incorporates Division I's recitation of both the trial court's proceedings and the order dismissing the bad-faith and CPA claims against Smith. Pet. App. 3-4. Division I reversed. It first noted that RCW 48.01.030 imposes a statutory good-faith duty on "all persons" involved in insurance, including the insurer and its "representatives," *id.* at 4, and that "person" is defined to include an individual. *Id.* at 5. It then noted that "[a] person who violates this duty may be liable for the tort of bad faith." *Id.* at 5.

Following Division III's statutory interpretation of RCW 48.01.030 in *Merriman*, 198 Wn. App. 594, which held corporate adjusters, as insurer representatives, owe a good-faith duty under the statute's "unambiguous" language, Division I held that Smith is a person involved in insurance, was Allstate's representative, and that she, thus, had a duty to act in good faith under the statute. Pet. App. 4-6. And, because Smith owed a statutory duty, she could be held liable for bad faith and under the CPA for breaching that duty. *Id.* at 5. Division I also rejected Smith's argument that she could not be liable under *Annechino v. Worthy*, 175 Wn.2d 630, 290 P.3d 126 (2012),

as Allstate's agent. It concluded that, because she owed her own good-faith duty independent of Allstate's, she could be held personally liable.

IV. ARGUMENT WHY REVIEW SHOULD BE DENIED

RAP 13.4 sets forth conditions under which this Court will review a Court of Appeals decision terminating review. Here, Division I's decision neither conflicts with this Court's precedent, *id.*(b)(1), nor involves an issue of substantial public interest this Court should determine. *Id.*(b)(4). Smith raises no other conditions.[1] Thus, the Court, as it just recently did in a nearly identical request in *Merriman v. Am. Guar. & Liab. Ins.*, 189 Wn.2d 1038, 413 P.3d 565 (2017), should deny review.

A. The decision reinstating the bad-faith and CPA claims against Smith does not conflict with this Court's precedent.

Division I—recognizing RCW 48.01.030 imposes actionable good-faith duties on insurer representatives—held that employee claims adjusters are insurer representatives to whom the statute applies, and that the statute, thus, permits bad-faith suits against adjusters who breach their independent statutory duty. Pet. App. 4-10. Smith—in her sole "conflict argument"—now alleges this Court has previously restricted insurance good-faith duties to only a fiduciary insurer-insured relationship. Smith is incorrect. Because

[1] Smith does not argue that the decision conflicts with a published decision of the Court of Appeals, RAP 13.4(b)(2), or involves a significant question of law under the United States or Washington constitutions. *Id.*(b)(3). *See* Pet. 1.

Smith's argument fails and no conflicts otherwise exist between this Court's precedent and Division I's decision, the Court should deny Smith's petition.

1. *This Court's fiduciary duty discussions do not conflict with Division I's decision*.

This Court has made clear that two sources impose insurance good-faith duties: the common law and RCW 48.01.030. Though this Court has looked to the common law's holding that an insurer's good-faith duty arose from a fiduciary-like insurer-insured relationship, it has done so to define *the nature and scope of insurers' duties*, not to limit good-faith duties solely to the relationship. The Court consistently recognizes that both the common law and the Legislature have imposed good-faith duties.

In *Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 385, 715 P.3d 1133 (1986), the Court, tasked with deciding what "an insurer's duty of good faith entail[s] when [it] defends under a reservation of rights", began by reviewing "the evolution of the duty of good faith imposed on insurers in this state". *Id.* at 386. It first recognized that our courts have imposed a common-law duty of good-faith since at least 1941. *Id.* at 386. Noting the common-law duty arose from a fiduciary relationship that exists between the insurer and insured, the Court held that insurers necessarily, as fiduciaries, owe a duty higher than mere good faith. *Id.* at 385-86. The Court has employed that same duty-defining analysis since *Tank* as well. *Safeco*

Ins. Co. v. Butler, 118 Wn.2d 383, 823 P.2d 499 (1992) (holding the insurer-insured relationship is not a true fiduciary relationship, that insurers are thus not subject to a type of strict liability a fiduciary-breach may entail, and requiring that insureds demonstrate harm to maintain a bad-faith action).

However, after the *Tank* Court established the nature of the insurer's duty and noted "[t]he duty of good faith has been imposed on the insurance industry in this state by a long line of judicial decisions", it then recognized the Legislature had imposed a statutory good-faith duty as well. *Id.* (citing RCW 48.01.030). The Court has consistently recognized the statutory good-faith-duty source—under which Keodalah has sued Smith—since that time. *St. Paul Fire & Marine Ins. v. Onvia, Inc.*, 165 Wn.2d 122, 130, 196 P.3d 664 (2008) ("Both Washington courts and the legislature have consistently imposed a duty of good faith on the insurance industry."); *Indus. Indem. Co. v. Kallevig*, 114 Wn.2d 907, 916, 792 P.2d 520 (1990) ("RCW 48.01.030 requires insurers to act in good faith in dealing with their insureds."). It has also recognized that a breach of the statutory duty is actionable. *Tank*, 105 Wn.2d at 386 ("The imposition of an insurer's duty of good faith by both the courts and the Legislature of this state has resulted in lawsuits alleging breach of that 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) ("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.").

Though Smith seizes on this Court's common-law fiduciary-origin discussions—and ignores its recognition of an actionable statutory bad-faith duty—to argue the Court has limited the duty to a fiduciary insurer-insured relationship, *Tank* and the Court's other cases demonstrate her reliance is misplaced. *Tank* and this Court's other cases rely on the fiduciary nature of the common-law duty to define both the nature and scope of an insurer's good-faith duty, not to limit the duty to the relationship. Indeed, the Court's consistent recognition that the Legislature has imposed statutory good-faith duties—which broadly apply to insurers and their representatives—clearly demonstrates the Court has not so limited the duty's application.[2]

Consistent with the Court's recognition that the Legislature imposed statutory good-faith duties through RCW 48.01.030 and that breaches of the duties are actionable, Division I analyzed the statute to determine whether employee adjusters fall in its scope. Relying on the statute's unambiguous text—which imposes a duty on insurers and their representatives—and on

[2] Smith cites to *Murray v. Mossman*, 56 Wn.2d 909, 355 P.2d 985 (1960), and *Evans Continental Cas. Co.*, 40 Wn.2d 614, 245 P.3d 470 (1952), as this Court continuing to cite the common law as the good-faith duty's source even after RCW 48.01.030 was enacted. But, as detailed above, the Court has consistently cited RCW 48.01.030 as imposing a duty of good faith after it was enacted as well, *e.g.*, *Tank*, 105 Wn.2d at 386; *St. Paul*, 165 Wn.2d 122; *Ellwein*, 142 Wn.2d at 775, 15 P.3d 640 (2001), and both *Murray* and *Evans*—each about 60 years old—were decided well before *Tank*'s discussion of RCW 48.01.030.

Division III's interpretation of the statute in *Merriman*, Division I held that the statute applies to employee adjusters. Nothing in this Court's precedent, including its discussion of a fiduciary insurer-insured relationship to define both an insurer's common-law and statutory good-faith duty, conflicts with Division I's straightforward application of bad-faith law.[3] The Legislature unambiguously intended that claims adjusters carry a good-faith duty, and Division I complied. This Court should deny review on this basis.

2. *The Court's limitations on third-party insurance bad-faith suits do not conflict with Division I's decision*.

Contrary to Smith's argument, Division I's decision also does not conflict with the fact this Court has precluded third-parties from alleging bad-faith claims against insurers. Like the Court's review of the common-law's characterization of an insurer as a fiduciary, this Court's cases that restrict third-party actions deal with the *existence and scope of an insurer's duty*. They do not address whether other parties defined in RCW 48.01.030 also owe an actionable good-faith duty to a first-party insured.

In *Murray v. Mossman*, 56 Wn.2d 909, 355 P.2d 985 (1960), the Court, while noting a fiduciary relationship is entirely lacking between an insurer and a third-party, more thoroughly explained:

[3] Smith argues "this Court has not distinguished between the common-law and statutory good-faith duties in terms of their nature and scope." Pet. 7. It has not had to. It defined an insurer's duty by looking to the common-law, and, recognizing that the Legislature had imposed a duty as well, applied that definition to the statutory duty.

> The cases assign different reasons for the result attained, but, basically, it is that the insured's right of recovery against the insurance company sounds in tort, and is bottomed on negligence or bad faith. For the company's conduct to be legally wrongful, it must contravene some duty which the law attaches to the relationship between the parties. Liability for negligence is imposed only for injuries resulting from the particular hazard against which the duty of due care required protection to be given. The duty of an insurance company to protect its insured in the settlement of claims cannot consistently be extended to include protection to one who is prosecuting a claim against the insured.

Id. at 912 (internal citations omitted). In other words, the insurer's duty is intended to protect an insured in claims settlement; it was not intended to, and could not be consistently extended to, third parties. Alternatively, here, the Legislature has specifically imposed a good-faith duty on adjusters to protect insureds, and the first-party insured—Keodalah—initiated the suit. *Mossman* does not conflict with Division I's holding.

Similarly, in *Tank*, the Court did not rely on a special relationship or fiduciary duty to foreclose third-party claims. Rather, discussing neither RCW 48.01.030 nor its language in the relevant part of the opinion, it noted that the third-parties' claims were "bottomed" on RCW 48.30.010, which generally prohibits unfair acts and permits the Insurance Commissioner to promulgate regulations defining such acts. It held that, in promulgating its regulations, the Commissioner did not intend to create a cause of action for third-party claimants. *Id.* at 393.

Unlike *Tank*, RCW 48.01.030's unambiguous language imposes a good-faith duty on adjusters, and this Court has held that RCW 48.01.030 breaches are actionable. Division I applied RCW 48.01.030's unambiguous text and reinstituted the bad-faith and CPA claims against Smith. Division I's decision is consistent with *Mossman* and *Tank*.[4]

3. *Smith's merits-based arguments fail to demonstrate a conflict exists*.

Likely recognizing that no conflicts justifying review actually exist, Smith also makes several merits-based arguments—which Keodalah only briefly addresses here—none of which are availing. First, Smith argues that she cannot owe Keodalah a duty because she is Allstate's agent, and RCW 48 does not permit her to be a dual agent. Pet. 9. Keodalah does not argue, however, that Smith owes him a duty because she is his agent. Rather, Smith owes him a good-faith duty under RCW 48.01.030—a statutorily created duty and relationship. That good-faith duty exists regardless of the fact she is Allstate's agent. Smith's argument is without merit and certainly shows no conflict with this Court's precedent.

Second, Smith argues that Division I's decision is contrary to other states' decisions. However, she provides no discussion of the reasoning or

[4] Smith argues that *Ellwein*, which in part holds that the good-faith duty survives into the UIM action, demonstrates the good-faith duty arises from the insurer-insured relationship alone. But the holding is the same under RCW 48.01.030. *Ellwein*'s point is that the insured still expects good-faith treatment during any UIM litigation. Under RCW 48.01.030, the insurer, insured, and adjuster maintain their good-faith duties in the UIM context.

statutes involved in any of these other states' decisions.[5] Instead, she lists them largely from a footnote list in *Lodholtz v. York Risk Services Group*, 778 F.3d 635 (7th Cir. 2015). She also fails to note that the supreme courts of Montana and West Virginia, applying statutory interpretation principles to analogous statutes in their own states, have held that employee adjusters can be held personally liable in bad-faith and/or consumer protection suits. *O'Fallon v. Farmers Ins. Exch.*, 260 Mont. 233, 859 P.2d 1008 (Mont. 1993) (holding an employee adjuster is subject to a common-law bad-faith action for violating Mont. Code Ann. § 33-18-201); *Taylor v. Nationwide Mut. Ins.*, 214 W. Va. 324, 589 S.E.2d 55 (W. Va. 2003).

B. The decision reinstating the bad-faith and CPA claims against Smith does not involve an issue of public interest this Court must decide.

Smith's substantial-public-interest argument, which relies solely on hypothetical speculation that Division I's holding will increase consumers' insurance costs and cause financial repercussions to employee adjusters, does not warrant review. First, if the Court were to accept this argument, in its speculative form, it would mean any decision adverse to an insurer would require this Court's review. That would render RAP 13.4(b)(4) meaningless as far as insurance companies are concerned. More importantly, Smith's

[5] Of the cases Smith cites—via a footnote citation in a federal case—to show other state courts have held that an adjuster does not owe a duty to the insured, only three of those were from that states' high courts: Oklahoma, South Carolina, and Vermont. None of those three cases cite to or discuss any statute imposing a good-faith duty like RCW 48.01.030.

failure to support her argument tacitly admits that these issues will not come to pass here. Keodalah repeatedly cited to the fact that Montana and West Virginia have imposed tort duties on employee adjusters for 25 and 15 years respectively below. *O'Fallon*, 260 Mont. 233; *Taylor*, 214 W. Va. 324. Yet, despite the states' histories of imposing such duties and Smith's knowledge that those cases exist, she cites no statistics indicating that her hypothetical, negative consequences for either the public of for insurance adjusters have come to pass in those states.[6] Nor does any other evidence of such exist in the record. The Court should, thus, deny review under RAP 13.4(b)(4).[7]

V. CONCLUSION

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

Respectfully submitted this 20th day of June, 2018.

/s/ Scott David Smith	/s/ Vonda M. Sargent
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[6] Smith is incorrect in stating that a cause of action against an employee adjuster would not benefit insureds. As only one example, such an action provides a strong deterrent effect against both an insurer and its representative. For instance, insurers have encouraged employee adjusters to engage in bad-faith conduct through employee-incentive programs. *See, e.g.*, *Niver v. Travelers Indem. Co.*, 433 F. Supp. 2d 968, 980-82 (N.D. Iowa 2006). In such cases, both an insurer and its employee are motivated to engage in such conduct; no institutional incentive, *i.e.*, adverse employment consequences, exist to deter bad-faith conduct. Civil liability can act to deter the adjuster from engaging in bad-faith conduct.

[7] To the extent that Smith argues that this Court should "at minimum" grant review "to provide guidance on the nature and scope of an adjuster's independent duties", Pet. 13, the issue has not been litigated and was not addressed by the trial court or Division I.

CERTIFICATE OF SERVICE

The undersigned hereby 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 *Answer to Petition for Review* on the facilities and to the parties mentioned below as indicted:

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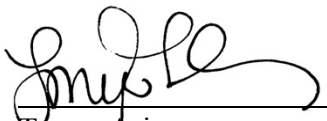

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