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No. 96536-6

SUPREME COURT OF THE STATE OF WASHINGTON

ZURICH AMERICAN INSURANCE COMPANY,
a foreign insurer doing business in Washington State,

Appellant,

v.

JOGINDER SINGH DBA AP TRANSPORT,

Respondent,

MEMORANDUM OF AMICUS CURIAE AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION IN SUPPORT OF PETITION FOR REVIEW

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

I. IDENTITY AND INTERESTS OF AMICUS CURIAE 1

II. STATEMENT OF THE CASE 1

III. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED 2

A. Summary of Argument. 2

B. This Court should accept review because the Court of Appeals' decision conflicts with precedent on settling claims within policy limits. 3

1. A liability insurer must evaluate settlement opportunities as if it bears the entire risk. 3

2. The insurer must not squander an opportunity to settle a claim within policy limits, where liability is clear. 4

3. When there are multiple claims and insufficient coverage, the insured's interests are best served by using the available coverage to extinguish as much potential liability as reasonably possible. 5

4. In focusing on preserving the insurer's defense obligation, the Court of Appeals set aside the paramount consideration: settling claims within policy limits. 6

(a) The Court of Appeals' decision ignores that attempting to negotiate against an offer to settle within policy limits is playing with fire. 6

(b) The Court of Appeals' decision requiring insurers to consider a "holdback" to preserve the defense obligation requires the insurer to put the insured's interests ahead of its own, contrary to precedent. 9

TABLE OF CONTENTS

Page

C. The issue of the standards for insurers to exercise good faith where there are multiple claims and insufficient coverage is an issue of substantial public importance that this Court should decide.......... 10

IV. CONCLUSION.......... 10

TABLE OF AUTHORITIES

Page(s)

Washington Cases

Badgett v. Sec. State Bank,
116 Wn.2d 563, 807 P.2d 356 (1991) 9

Besel v. Viking Ins. Co. of Wis.,
146 Wn.2d 730, 49 P.3d 887 (2002) 3, 5

Hamilton v. State Farm Ins. Co.,
83 Wn.2d 787, 523 P.2d 193 (1974) 2, 4, 5, 6, 8

Miller v. Kenny,
180 Wn. App. 772, 325 P.3d 278 (2014).. 5

St. Paul Fire & Marine Ins. Co. v. Onvia, Inc.,
165 Wn.2d 122, 196 P.3d 664 (2008) 2, 3, 4, 9, 10

Tank v. State Farm Fire & Cas. Co.,
105 Wn.2d 381, 715 P.2d 1133 (1986) 3, 4

Truck Ins. Exch. of Farmers Ins. Grp. v. Century Indem. Co.,
76 Wn. App. 527, 887 P.2d 455 (1995) 5, 9

Tyler v. Grange Ins. Ass'n,
3 Wn. App. 167, 473 P.2d 193 (1970) 2, 3, 4, 5, 8

Viking Ins. Co. of Wis. v. Hill,
57 Wn. App. 341, 787 P.2d 1385 (1990).. 6

Weyerhaeuser Co. v. Comm'l Union Ins. Co.,
142 Wn.2d 654, 15 P.3d 115 (2000) 7

Woo v. Fireman's Fund Ins. Co.,
161 Wn.2d 43, 164 P.3d 454 (2007) 7

Federal Cases

Peckham v. Cont'l Cas. Ins. Co.,
895 F.2d 830 (1st Cir. 1990).. 6

TABLE OF AUTHORITIES

Page(s)

Court Rules

RAP 13.4(b)(1) 2, 9, 10

RAP 13.4(b)(2) 2, 9

RAP 13.4(b)(4) 3, 10

Treatises

THOMAS V. HARRIS, WASH. INS. LAW § 18.02 (3d ed. 2010) 4

I. IDENTITY AND INTERESTS OF AMICUS CURIAE

The American Property Casualty Insurance Association (APCI) is the preeminent national trade association representing property and casualty insurers writing business in Washington, nationwide, and globally. APCI was recently formed through a merger of two longstanding trade associations—Property Casualty Insurers Association of America (PCI) and American Insurance Association (AIA). APCI's members, which range in size from small companies to the largest insurers with global operations, represent nearly 60% of the United States property and casualty marketplace. On issues of importance to that marketplace, APCI advocates sound public policies on behalf of its members in legislative and regulatory forums at the state and federal levels and files amicus-curiae briefs in significant cases before federal and state courts. This allows APCI to share its broad national perspectives with the judiciary on matters that shape and develop the law. APCI's interests are in the clear, consistent, and reasoned development of law that affects its members and the policyholders they insure.

II. STATEMENT OF THE CASE

APCI relies on the facts as presented in Appellant Zurich American Insurance Company's Petition for Review.

III. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. Summary of Argument.

The Court of Appeals affirmed the judgment on a verdict that Zurich American acted in bad faith toward its insured, Joginder Singh, when it accepted an offer to settle the most substantial claim against him within policy limits. The court held that the jury could reasonably find bad faith based on expert testimony that Zurich should have explored the possibility of a "holdback" arrangement, suggested by the insured's retained counsel, under which Zurich would have withheld $1,000 of the $1 million in coverage so that its defense obligation would not be extinguished as to the remaining claims.

Review by this Court is warranted because the Court of Appeals' decision conflicts with decisions of both this Court and of the Court of Appeals. RAP 13.4(b)(1), (2). First, the decision conflicts with precedent requiring an insurer to consider whether negotiating against a policy-limits demand may squander an opportunity to settle a substantial claim within the policy limits. *See, e.g., Hamilton v. State Farm Ins. Co.*, 83 Wn.2d 787, 794, 523 P.2d 193 (1974); *Tyler v. Grange Ins. Ass'n*, 3 Wn. App. 167, 178-79, 473 P.2d 193 (1970). Second, because a holdback arrangement is not required under the policy and can benefit only the insured (or his retained counsel), the Court of Appeals' decision conflicts with precedent recognizing that an insurer must give equal consideration to the insured's interests and need not put the insured's interests ahead of its own. *St. Paul*

Fire & Marine Ins. Co. v. Onvia, Inc., 165 Wn.2d 122, 129-30, 130 n.3, 196 P.3d 664 (2008).

Review is also warranted because this case involves an issue of substantial public importance that this Court should decide, where this Court has not previously addressed the standards for insurers to exercise good faith where there are multiple claims and insufficient coverage. RAP 13.4(b)(4).

B. This Court should accept review because the Court of Appeals' decision conflicts with precedent on settling claims within policy limits.

1. A liability insurer must evaluate settlement opportunities as if it bears the entire risk.

An insurer owes its insured a duty to exercise good faith in performing its obligations under the insurance contract. *Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 385-86, 715 P.2d 1133 (1986). The duty arises because of the quasi-fiduciary relationship existing between the insurer and insured. *Id*. at 385; *St. Paul*, 165 Wn.2d at 129-30, 130 n.3. "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." *Tank*, 105 Wn.2d at 385.

Liability insurance provides the insured with two main benefits: defense and indemnity. *St. Paul*, 165 Wn.2d at 129. Along those lines, liability insurers owe a duty to explore settlement of claims against their insureds. *Id*. (citing *Besel v. Viking Ins. Co. of Wis.*, 146 Wn.2d 730, 735-

36, 49 P.3d 887 (2002)). "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 over the decision concerning opportunities of settlement within policy coverage." *Tyler v. Grange Ins. Co.*, 3 Wn. App. 167, 172, 473 P.2d 193 (1970). But as a corollary to that control, our courts have imposed a duty to explore settlement when it is in the insured's interests. *Id*.

Nevertheless, because the insurer-insured relationship is a quasi-fiduciary—as opposed to a true—fiduciary relationship, the insurer "is not required to put the insured above itself." *St. Paul*, 165 Wn.2d at 130 n.3. In the context of handling a claim under a liability-insurance policy, the duty of good faith requires the insurer to give "equal consideration" to the insured's interests as to its own. *Id.*; *Tank*, 105 Wn.2d at 385-86. This means that the insurer must approach decisions, such as whether to accept a settlement offer, as if the insurance policy had no limits and the insurer bore the entire risk. *Hamilton*, 83 Wn.2d at 790, 794 (citing *Tyler*, 3 Wn. App. at 178-79).

2. The insurer must not squander an opportunity to settle a claim within policy limits, where liability is clear.

The "high stakes" involved in the insurer-insured relationship are magnified when the insured faces a potential judgment in excess of the policy limit. THOMAS V. HARRIS, WASH. INS. LAW § 18.02 (3d ed. 2010) (quoting *Tank*, 105 Wn.2d at 385). "An excess judgment may have a devastating impact on an insured's financial and personal well-being." *Id*.

Where the insurer's investigation discloses a likelihood that the insured is liable, the insurer has an affirmative duty to make a good faith effort to settle the case. *Truck Ins. Exch. of Farmers Ins. Grp. v. Century Indem. Co.*, 76 Wn. App. 527, 534, 887 P.2d 455 (1995) (citing *Hamilton*, 83 Wn.2d at 791-92).

"Where the insured has caused damages clearly exceeding policy limits, an insurer's failure to offer policy limits exposes the insured to the risk of an excess judgment." *Miller v. Kenny*, 180 Wn. App. 772, 801-02, 325 P.3d 278 (2014). Where an excess judgment is likely, "[i]f settlement can be made…for the policy limits or less, the insured's interests are the only ones put in jeopardy by the decision" to proceed with litigation. *Tyler*, 3 Wn. App. at 180. Receipt of an offer to settle a claim within policy limits thus triggers an obligation to consider settlement. The insurer may not in bad faith refuse an opportunity to settle within the policy limits in order to gamble on the chance of either a defense verdict or a verdict within the policy limits. *See id.* at 181. An insurer that refuses in bad faith to settle claims within its policy limits may be held liable beyond the policy limits. *Besel*, 146 Wn.2d at 735.

3. When there are multiple claims and insufficient coverage, the insured's interests are best served by using the available coverage to extinguish as much potential liability as reasonably possible.

No Washington case directly addresses how an insurer should in good faith approach the situation of multiple claims and insufficient coverage. But in light of precedent requiring an insurer to approach

settlement as if it bore the entire risk, *e.g., Hamilton*, 83 Wn.2d at 794, "[t]he insurer's goal should be to try to effect settlement of all or some of the multiple claims so as to relieve its insured of so much of his potential liability as is reasonably possible, considering the paucity of the policy limits." *Peckham v. Cont'l Cas. Ins. Co.*, 895 F.2d 830, 835 (1st Cir. 1990). This approach best serves to minimize, if not eliminate, the possibility of an excess judgment. It is precisely what an insured with limited resources would seek to do, absent insurance coverage.

4. In focusing on preserving the insurer's defense obligation, the Court of Appeals set aside the paramount consideration: settling claims within policy limits.

(a) The Court of Appeals' decision ignores that attempting to negotiate against an offer to settle within policy limits is playing with fire.

Prior to settlement, Singh's appointed defense counsel valued the Beckwith claims in excess of the defendants' combined $3 million policy limits. CP 195 (No. 76009-2-I). The Beckwiths' counsel testified at the bad-faith trial that he valued the claims at $15 million. RP 383-86. These were by far the most significant claims Singh faced, and his liability was undisputed. Four months before trial, the Beckwiths indicated their willingness to settle for policy limits from all defendants. Ex. 249. Zurich plainly had to give serious consideration that offer. An insurer's duty to exercise good faith extends to the decision to pay limits, when doing so will extinguish the duty to defend. *See Viking Ins. Co. of Wis. v. Hill*, 57 Wn. App. 341, 349-50, 787 P.2d 1385 (1990).

The jury was allowed to find Zurich guilty of bad faith even though it resolved the most substantial claims against Singh within policy limits. In its decision affirming the judgment on the verdict, the Court of Appeals reasoned that Singh "presented evidence that Zurich placed its own interest above his when it settled the Beckwith claim." *Slip Op.* at 9. The court concluded that the jury could reasonably find that Zurich acted in bad faith because it did not explore opportunities to resolve the Beckwith claims without extinguishing its defense obligation. The court focused on expert testimony that Zurich should have explored the option of a holdback of coverage, and that it was reasonable to expect the Beckwith claimants to settle "somewhat south of the policy limits." *Slip Op.* at 9-10 (quoting RP 317).

To be sure, an insurer-provided defense can be highly valuable to the insured. *See Woo v. Fireman's Fund Ins. Co.*, 161 Wn.2d 43, 54, 164 P.3d 454 (2007). And exhausting the coverage will terminate the insurer's defense obligation where, as here, the policy so provides. *See Weyerhaeuser Co. v. Comm'l Union Ins. Co.*, 142 Wn.2d 654, 692, 15 P.3d 115 (2000). But preserving the defense obligation should not be the primary consideration when there are multiple claims and insufficient coverage, and particularly when there is an opportunity to settle for policy limits the most substantial claims, which are the only identified claims that by themselves pose a risk of an excess judgment against the insured. Here, the excess exposure to the insured—an individual doing business as a trucker—from the Beckwith claims was at least $2 million to $4 million over policy limits.

Preserving a defense going forward is plainly less important where, as here, the most substantial claims, which present a unique risk of a potentially devastating excess judgment against the insured, can be resolved within policy limits and there is no viable liability defense. By focusing on preserving a defense in this circumstance, an insurer risks squandering an opportunity to avoid financial disaster for its insured, as was the case here.

The Court of Appeals' decision addresses none of the potential countervailing considerations to trying to preserve the defense obligation. In its fact recitation and analysis of this issue, the court did not even mention that the Beckwith claimants offered to accept policy limits—a material omission that suggests the court did not appreciate the significance of that fact. The court stated that it was reasonable to infer that the Beckwith claimants would agree to a holdback from the Zurich policy because they had previously agreed to a holdback from the other defendant's policy. *Slip Op.* at 10. But attempting to negotiate such an arrangement so close to trial could have backfired and caused the Beckwiths to withdraw the offer and proceed to trial. Under the circumstances, the notion that Zurich would reject the holdback proposal "to avoid having to create a reserve for defense costs for non-Beckwith claims" is nonsensical, particularly when there was no viable liability defense to mount against any of the claims. *Slip Op.* at 9.

This Court should accept review to address the conflict between the Court of Appeals' decision and the holdings in *Hamilton*, *Tyler*, and other cases, which indicate that the insurer's paramount consideration should be making the most of the available coverage by settling claims within the

policy limits, rather than preserving its defense obligation potentially at the expense of a critical settlement opportunity. RAP 13.4(b)(1), (2).

(b) The Court of Appeals' decision requiring insurers to consider a "holdback" to preserve the defense obligation requires the insurer to put the insured's interests ahead of its own, contrary to precedent.

Even where the circumstances allow exploring the possibility of a holdback arrangement without substantial risk, an insurer is not required to do so, either under the policy[1] or as part of the duty of good faith. *See Badgett v. Sec. State Bank*, 116 Wn.2d 563, 569, 807 P.2d 356 (1991) ("The duty of good faith does not extend to obligate a party to accept a material change in the terms of its contract.").

When a settlement demand *exceeds* the policy limits, the insurer must communicate the offer to its insured and give the insured the opportunity to contribute to a settlement. *Truck Ins. Exch.*, 76 Wn. App. at 534. But when a claim can be settled in good faith *within* the policy limits, the sole purpose of a contribution by the insured is to extend artificially the insurer's defense obligation, contrary to the terms of the policy. Such an arrangement can benefit *only* the insured (or his retained counsel), at the insurer's expense. The Court of Appeals' holding that an insurer must consider a holdback requires an insurer to put the insured's interests ahead of its own, which under this Court's precedents it is not required to do. *St. Paul*, 165 Wn.2d at 130 n.3.

[1] *See* Ex. 201.

of its own, which under this Court's precedents it is not required to do. *St. Paul*, 165 Wn.2d at 130 n.3.

This Court should accept review to address the conflict between the Court of Appeals' decision and this Court's holding in *St. Paul* and other cases that an insurer must give equal consideration to the insured's interest, but need not put the insured's interest ahead of its own. RAP 13.4(b)(1).

C. The issue of the standards for insurers to exercise good faith where there are multiple claims and insufficient coverage is an issue of substantial public importance that this Court should decide.

The issue of the appropriate standards for dealing with multiple claims where the coverage is insufficient is one of substantial public importance that this Court should decide. RAP 13.4(b)(4). Given the paucity of Washington case law addressing that issue, this Court should accept review to address what is required of insurers to exercise good faith in these circumstances.

IV. CONCLUSION

This Court should grant Zurich American's petition for review.

Respectfully submitted this 14th day of January, 2019.

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By

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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:

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DATED this 16th day of January, 2019.

Patti Saiden, Legal Assistant

CARNEY BADLEY SPELLMAN

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