Supreme Court No. 97188-9

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 77919-2-I

COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

GRETCHEN MICHELS, Petitioner,

v.

FARMERS INSURANCE EXCHANGE, Respondent.

RESPONDENT FARMERS INSURANCE EXCHANGE'S ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Petitioner Michels filed this lawsuit against her condominium association, Ballard Six (the "Association"), and the insurer for the Association, Respondent Farmers. The trial court granted Farmers' summary judgment motion dismissing all claims against it because Michels is not a named insured on the policy for property coverage issued to the Association and does not have coverage or standing to assert claims arising under the policy. On appeal, the Court of Appeals affirmed the trial court's ruling.[1] Michels now seeks review. This Court should deny Michels' request for review because the Court of Appeals' decision is not in conflict with any appellate decisions and does not involve an issue of substantial public interest.

The Association purchased the Farmers policy pursuant to the Washington Condominium Act, RCW 64.34.352, which requires that condominium associations procure an insurance policy to cover the association's interest in the property. In

[1] *See Michels v. Farmers Ins. Exch.*, 2019 WL 1531670, at *26 (April 8, 2019).

the event of an insurance claim, RCW 64.34.352 requires the insurer to adjust the loss directly with the association and to pay policy proceeds to the association or its trustee. The association is then required under the statute to use those proceeds to repair the damaged property before disbursing any surplus to the unit owners.

Here, the Farmers policy was written consistent with the statute, listing the Association as the only Named Insured. The policy covers property in which the Association has an interest and, as specifically allowed by the statute, excludes coverage for the personal property of unit owners.

Petitioner Michels argues that she should be considered an insured under the policy, but fails to identify any provision that would provide coverage and payment to her for any property she owned. There is none. The rule urged by Michels would allow any unit owner to assert individual first party claims against the Association's insurer any time the condominium building has a loss—even where the unit owner was not insured and was not entitled to payment. Michels' proposed rule would abrogate established case law and the Washington Condominium Act. The Court of Appeals'

decision was correct. Michels' petition for review should be denied.

II. STATEMENT OF THE CASE

A. Relevant Facts[2]

Michels owns a condominium unit at the Ballard Six condominium in Seattle, Washington.[3] Michels insured her personal property through PEMCO.[4] The Ballard Six Homeowners Association, which is organized under the Washington Condominium Act (RCW 64.34), purchased a policy from Farmers naming the Association as the only named insured.[5] Michels is not a named insured on the Farmers policy.[6]

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[2] Farmers disputes Michels' Statement of the Case, which does not comply with RAP 10.3(a)(5), requiring a fair statement of the case presented without argument. Farmers requests that the Court review the relevant facts set forth in by the Court of Appeals. *See Michels*, 2019 WL 1531670, at **2-6.

[3] CP 3 ¶ 9.

[4] CP 200-01.

[5] CP 66.

[6] The individual condominium unit owners are included as "insureds" for purposes of third-party liability coverage, not the first-party property coverage at issue in this case.

Michels' unit suffered smoke damage on May 11, 2015, after Michels placed a microwave on a lighted stove burner.[7] In addition, Michels alleged that her unit suffered a water loss on May 30, 2015, after her toilet overflowed.[8]

Michels submitted a claim to her personal insurance company, PEMCO, for damage to her personal property, which was paid in full.[9]

Michels, however, attempted to make a claim to Farmers arising out of the loss.[10] Based upon Michels' representation to Farmers' adjuster that, as the treasurer of the Association, she was authorized to move forward with the claim,[11] Farmers mistakenly believed that Michels was acting on behalf of the Association.[12] Farmers' adjuster gave Michels the initial insurance checks made out to Ballard Six, totaling about $29,000. When Farmers learned that Michels

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[7] *Id.* ¶ 28. *See also* CP 54 at Deposition of Michels, 131:5-7, 131:20-21, 132:14-16, 271:20-272:1.

[8] CP 3 ¶ 36.

[9] CP 200-01.

[10] CP 255.

[11] *Michels*, 2019 WL 1531670, at *3.

[12] CP 40-41. Declaration of Oscar Ortiz [Supplemental Clerk's Papers].

was attempting to make a claim in her individual capacity and not as the Association, Farmers alerted the Association and thereafter worked directly with the Association, instead of Michels, to adjust the losses pursuant to the policy, determine the scope of repairs, and issue payments for those repairs.[13]

Michels filed this lawsuit against Farmers alleging breach of the insurance policy and extra-contractual claims for bad faith and violation of the Consumer Protection Act ("CPA") and the Insurance Fair Conduct Act ("IFCA").[14] Michels then amended her complaint to add the Association as a defendant.[15]

Farmers denied liability for Michels' individual claims and moved for summary judgment on the grounds that Michels is not a named insured, is not an intended third party beneficiary under the insurance contract, and there is no coverage for Michels' claim.[16] The trial court granted Farmers' summary judgment, leaving only the claims against

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[13] *Id.*

[14] CP 3.

[15] *Id.*

[16] CP 36.

the Association for trial.[17] Michels then settled her claims with the Association in advance of trial, and those claims are not at issue on appeal.

B. Procedural History

Farmers moved for and was granted summary judgment on the claims against it under CR 54(b).[18] Michels appealed the trial court's ruling on summary judgment. By unpublished opinion dated April 8, 2019, the Court of Appeals affirmed the trial court's ruling in favor of Farmers.[19] Michels filed a timely petition for review.

III. ARGUMENT

The Court of Appeals' decision was correct and Michels' petition for review should be denied. Under RAP 13.4 (b), Michels' petition asserts the Court of Appeals' decision is in conflict with this Court's decisions in *Panag v. Farmers Ins. Co*.[20] and *Postlewait Construction, Inc. v. Great*

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[17] CP 1203; Order Amending Case Schedule [Dkt. No. 42].

[18] Order Granting Entry of Final Judgment as to Defendant Farmers [Dkt. No. 129].

[19] *Michels*, 2019 WL 1531670, at *26

[20] 166 Wn.2d 27, 204 P.3d 885 (2009).

American Ins. Co.,[21] and the Court of Appeals' decision in *Merriman v. American Guar. & Liab. Ins. Co*.[22] Michels also argues that this petition presents an issue of substantial public interest. Michels' petition should be denied because the Court of Appeals' decision does not conflict with any precedent and is, in fact, consistent with the language of the Washington Condominium Act ("WCA"). In addition, the decision is consistent with the public policy articulated by the legislature in the WCA.

As an initial matter, Michels can point to no provision in the policy that provides coverage to her for any damage insured under the Farmers policy. No coverage exists as to Michels. As noted repeatedly in the Court of Appeals' decision (and left unaddressed in Michels' petition), the property policy expressly excludes property owned by, used by or in the care, custody or control of a unit owner.[23] As noted in the Court of Appeals' decision, "[t]hese facts are not

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[21] 106 Wn.2d 96, 720 P.2d 805 (1986).

[22] 198 Wn. App. 594, 396 P.3d 351 (2017).

[23] *Michels*, 2019 WL 1531670, at **9, 11, 13, 14, 15, 16-17, 19.

disputed."[24] Nonetheless, Michels attempts to obscure coverage by generically referring to her ownership of "building components," a phrase that obfuscates between the personal property, fixtures, and building coverages in the policy, and a phrase that is neither used in the policy nor in any prior briefing.[25] The Court of Appeals recognized that there is no coverage for Michels' property under the Farmers policy.[26]

The Court of Appeals held that Michels lacks standing to bring a claim against Farmers because she is not an insured or a third party beneficiary under the policy.[27] That holding does not conflict with and is instead consistent with Washington law, as discussed below.

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[24] *Id.* at *19.

[25] Michels' argument that she "owned" or had an "insurable interest" in the property similarly misses the point. The issue is not whether she owned or had an insurable interest in property, but is whether she was an intended direct beneficiary of a policy.

[26] *Michels*, 2019 WL 1531670, at *19.

[27] *Id.* at *26.

A. The Court of Appeals decision does not conflict with *Panag* and does not involve an issue of substantial public concern. Michels does not have standing to bring a CPA claim.

Michels first argues that regardless of her status or relationship to Farmers, she may bring a CPA claim against Farmers because questions of fact exist as to whether Farmers engaged in "unfair conduct," the conduct affects the public interest, and Michels was injured when Farmers refused to pay her the proceeds under the insurance policy. Michels argues that the holding in *Panag* allows a plaintiff to bring a CPA claim without an insured-insurer or direct contractual relationship.

This Court, in *Panag*, did not so hold. At issue in *Panag* was whether the CPA could apply to the deceptive tactics of a debt collection agency that was attempting to collect on an insurance company's subrogation claim against an uninsured motorist.[28] The *Panag* court allowed the CPA claim under those facts, but the court expressly distinguished circumstances in which the CPA claim is based, as here, upon the insurance company's alleged violation of its statutory

[28] *Panag*, 166 Wn.2d at 34.

duty of good faith.[29] The court recognized that "[o]nly an insured may bring a CPA claim for an insurer's breach of its statutory duty of good faith."[30] The Court of Appeals recognized the same rule earlier in *Green v. Holm*: "A Consumer Protection Act claim against an insurance company for breach of its duty to exercise good faith under RCW 48.01.030 is limited to the insured."[31] The reason for the rule is that these statutes impose a duty of good faith on only the insurer and the insured.[32]

The Court of Appeals' decision is consistent with *Panag*. Michels alleges in her complaint that the basis for her CPA claim is Farmers' statutory violation of the insurance code, specifically the Unfair Claims Settlement Practices Regulations at WAC 284-30-300 through -450. Because the insurance code applies only to an insured, it

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[29] *Id.* at 43 n.6.

[30] *Id.*

[31] *Green v. Holm*, 28 Wn. App. 135, 137, 622 P.2d 869, 871 (1981).

[32] *Panag*, 166 Wn.2d at 43 n.6; RCW 48.01.030.

follows that the insurance code cannot be the basis of a statutory-based CPA claim by a non-insured like Michels.

The relevant facts are undisputed. Michels is not a named insured under the policy. As a matter of law, she cannot bring a CPA claim against an insurance company that is not her insurer.

The Court of Appeals' decision does not conflict with this Court's decision in *Panag*. Michels' petition for review should be denied.

B. The Court of Appeals decision does not conflict with *Merriman*. Michels is not an insured under the policy.

Michels argues that the Court of Appeals' decision conflicts with the Court of Appeals' holding in *Merriman*. Michels argues that the holding in *Merriman* requires that the owner of personal property be allowed coverage even when that owner is not a named insured under the policy.

Again, the Court of Appeals in *Merriman* did not so hold. The court in that case construed the particular insurance policy at issue and held that the language of the

policy "is most reasonably read to include all owners of covered property as insureds."[33]

The *Merriman* court looked to the terms of the insurance contract to determine who was actually covered by its express and unambiguous terms. The court specifically recognized that "[a] clear lesson from [the previously-cited] authorities is that no presumption can be made that 'other owners' whose property is covered by this type of policy are first party claimants or that they are third party claimants. Policies can be, and are, written both ways."[34]

Because the policy was of the type that expressly provided coverage for the owners' property, the *Merriman* plaintiffs had standing as first party claimants.

In contrast, the Farmers policy expressly states that covered property does not include the personal property of unit owners. Neither does it contain a provision like that found in the liability section of the policy that expressly makes unit owners additional insureds. As noted by the Court

[33] *Merriman*, 198 Wn. App. at 610.

[34] *Id*.

of Appeals, "[t]hese facts are undisputed."[35] There is no provision in the policy that makes Michels an additional insured under the property coverage form, or makes her a payee for any of the property covered by the policy.[36] The Association is the only named insured for the property covered under the Farmers policy.[37]

For these reasons, the Court of Appeals' decision in this case comports with, and is not in conflict with, *Merriman*. Michels' petition for review should be denied.

C. The Court of Appeals' decision does not conflict with *Postlewait*. Michels is not a third party beneficiary.

Michels argues that the Court of Appeals' decision is inconsistent with *Postlewait*, but she does not explain the alleged inconsistency. Instead, Michels appears to argue that *Postlewait* should be overruled so as to eliminate the

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[35] *Michels*, 2019 WL 1531670, at *19.

[36] The case cited in Petitioner's Statement of Additional Authority, *Barriga Figueroa v. Prieto Mariscal* , No. 95827-1, ___Wn.2d ___, ___ P.3d ___ (May 23, 2019), adds nothing to Michels' argument. In *Figueroa*, a pedestrian was considered an insured under a PIP policy by operation of statute. There is no similar statute that makes Michels an insured under the Association's property policy.

[37] *Id*. at 11.

requirement that the parties intend that a third party beneficiary contract be created. As a threshold issue, Michels' petition for review on this basis should be rejected because the Court of Appeals' decision was consistent with *Postlewait*, and Michels' request to overrule *Postlewait* does not offer a basis for review under RAP 13.4(b)(1).

Michels mischaracterizes the test under *Postlewait* arguing that a third party beneficiary contract is created when "performance under the contract would necessarily and directly benefit that party…"[38] This argument is a variation of the same argument made to, and rejected by, the Court of Appeals.[39] Michels' articulation of the test leaves out the intent of the contracting parties and would allow any third party to intervene in a contract if that third party would benefit from the contract, regardless of the parties' intent. Michels' proposed test would eviscerate the holding of *Postlewait* and its legal reasoning.

[38] Petition at 17.

[39] *Michels*, 2019 WL 1531670, at **15-16.

Rather, the accurate test requires the parties to "*intend* that a third party beneficiary contract be created."[40] The parties must intend to "necessarily and directly benefit" the third party.[41] Whether such intent exists is determined by "construing the terms of the contract as a whole, in light of the circumstances under which it is made."[42] Thus, it is not enough that the contract benefit a third party, as Michels argues, but the written contract must itself evidence that the contracting parties intended to necessarily and directly benefit the third party.

Here, it is undisputed that the Association is the only named insured. It is likewise undisputed that Michels is not named or alluded to in the property contract.[43] There is no evidence that either the Association or Farmers intended

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[40] *Postlewait*, 106 Wn.2d at 99 (emphasis added).

[41] *Id.*

[42] *Id.* at 99-100.

[43] This is in contrast to the liability contract, which specifically states that unit owners shall be considered insureds as to liability. This drafting context further clarifies the intent of the contracting parties that individual unit owners were not intended third party beneficiaries under the property policy.

Michels to be a direct payee of any proceeds under the policy, any more than any of the other ten unit owners were intended to be direct payees of the policy. This is so regardless of whether Michels benefited from the contract. The policy, instead, specifically excludes coverage for any personal property of unit owners.

Thus, whether it is the common elements of the building or personal property of the individual unit owners, the express terms of the policy make clear that the contracting parties did not intend to benefit Michels.

The Court of Appeals' decision is consistent with the test in *Postlewait*. Michels' petition for review should be denied.

D. There are no issues of substantial public interest.

Michels makes the additional argument that the Court of Appeals' opinion leaves her without an adequate remedy. This is not accurate. First, just like the WCA contemplates, and as insurers and condominium owners and associations have done for decades, Farmers and its insured, the Association, can adjust the claim in the ordinary course, make repairs and issue payments to the appropriate payee.

Second, as noted by the *Postlewait* court, a third-party action under a policy in which she is not named as an insured and not intended to be a direct beneficiary is not Michels' appropriate remedy.[44] To the extent the proceeds from the Farmers policy are not properly or adequately used to repair the condominium, Michels' remedy is with the Association. Indeed, Michels brought suit and litigated against the Association for these very same proceeds. Michels' attempt to double-dip, and to sustain a CPA cause of action that could only lie with the Association should be rejected.

IV. CONCLUSION

Michels' petition for review should be denied. The Court of Appeals' decision does not conflict with, and is instead consistent with the decisions of this Court and the prior decisions from the Court of Appeals. The Court of Appeals' decision here is well-reasoned and accurately and appropriately relies upon correct precedent. There is no conflict with any precedent and no issues of substantial

[44] *Postlewait*, 106 Wn.2d at 101.

public interest. There is no basis to grant review and Michels' petition for review should be denied.

DATED this 7th day of June, 2019.

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CERTIFICATE OF SERVICE

I further certify that on June 7, 2019, a true correct copy of the foregoing RESPONDENT FARMERS INSURANCE EXCHANGE'S ANSWER TO PETITION FOR REVIEW was served on each of the following via E-mail and through the Washington Supreme Court Division One E-service:

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June 07, 2019 - 12:25 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	97188-9
Appellate Court Case Title:	Gretchen Michels v. Farmers Insurance Exchange
Superior Court Case Number:	16-2-27533-8

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