

NO. 36480-8-II

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COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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ERENE REED,

Respondent,

v.

FARMERS INSURANCE COMPANY OF WASHINGTON, 

Appellant.

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**BRIEF OF APPELLANT FARMERS INSURANCE COMPANY OF  
WASHINGTON**

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**STATUTES**

RCW 19.86 *et seq.* *passim*

WAC 284-30, *et seq.* *passim*

**RULES**

CR 14(c) 10

ER 201(b) 8

**A. INTRODUCTION**

This appeal arises out of plaintiff/respondent Erene Reed's claim that defendant/appellant Farmers Insurance Company of Washington ("Farmers") violated the Washington Consumer Protection Act ("CPA") by declining to pay her claim for alleged diminished value to her vehicle after her vehicle collided with a vehicle owned by Farmers' insured. Under Washington law, only an insured has standing to bring a CPA claim against an insurance company for improper claims handling. Reed is not Farmers' insured. The trial court declined to dismiss Reed's CPA cause of action on summary judgment. Commissioner Skerlac granted Farmers' motion for discretionary review of the trial court's decision, finding probable error.

**B. ASSIGNMENT OF ERROR**

The trial court erred in entering that portion of its May 25, 2007 Order which denied Farmers' motion for summary judgment on Reed's CPA cause of action.

**C. ISSUES PERTAINING TO ASSIGNMENT OF ERROR**

1. The trial court erred in finding that Farmers had a general policy of refusing to pay non-insureds' claims of alleged diminished value.

2. The trial court erred in finding that respondent had standing to bring a CPA claim against Farmers.

3. Standing issues aside, the trial court erred in finding that respondent stated a *prima facie* CPA cause of action.

**D. STATEMENT OF THE CASE**

On December 11, 2004, Farmers' insured Karyn Whitacre rear-ended a vehicle driven and owned by respondent Erene Reed. CP 11, 58. Reed is not insured by Farmers. CP 31, 66. The Farmers policy issued to Whitacre contained the following language which prevents a non-insured from naming Farmers as a defendant where the allegation is that the plaintiff was entitled to another element of damages from the Farmers-insured alleged tortfeasor:

**3. Legal Action Against Us**

We may not be sued unless there is full compliance with all terms of the policy. We may not be sued under the Liability Coverage until the obligation of a person we insure to pay is finally determined either by judgment against that person at the actual trial or by written agreement of that person, the claimant and us. No one shall have any right to make us a party to a suit to determine the liability of a person we insure.

CP 142 (emphasis added).

Farmers paid nearly \$6,300 to repair the damage to Reed's vehicle, and also paid for a rental car until her vehicle was fixed. CP 31. In

addition to the cost of repairs, Reed sought payment from Farmers for alleged "inherent diminished value" of her car stemming from this accident. CP 31, 34-36. Based upon a report generated by Darrell Harber, of Stroud's, Reed alleged that her car had suffered "inherent diminished value" in the \$1,132-1,888 range as a result of this accident. CP 34-36.

On November 9, 2005, Reed's attorney wrote to Farmers demanding \$1,510, the "mid-point" of the diminished value range per Harber. CP 34-36. At that time, her attorney also demanded an additional payment of \$465.12 for "repairs necessary to restore her vehicle to pre loss condition." CP 34-36. In this letter, Reed's attorney threatened to pursue litigation on the diminished value issue if Farmers refused to compensate her for diminished value to her vehicle. CP 34-36.

Farmers, through a letter signed by Field Coordinator Gregory Lebien, denied Reed's diminished value claim in mid-December 2005. CP 38-39. Farmers' letter explained that

Farmers' position has always been there is no diminished value on privately owned vehicles if the repairs are done properly to industry standards. This is evident by the thousands of claims paid by Farmers and other insurance companies to individuals whose vehicles have been totaled. Many of the vehicles have been in prior accidents and repaired. If there repairs are done properly the settlements are based on "fair market value" (not trade in or diminished value) and are not adjusted for these prior repairs.

CP 38. Farmers' letter also explained why Reed's "expert" opinion as to her purported diminished value was entirely speculative. CP 39. This

letter also explained why Reed's claim for an additional \$465.12 failed. CP 38. Titus-Will Ford in Tacoma, where Reed had her car repaired after this accident, warrantied its work for the lifetime of the vehicle, such that any legitimate complaints about the quality of repair work could be addressed by Titus-Will. CP 32, 38.

On September 7, 2006, Reed filed suit against Farmers. CP 3-7. On September 28, 2006, she filed an amended complaint adding Whitacre and Lebien as defendants. CP 10-15. This amended complaint alleged negligence on the part of Whitacre<sup>1</sup>, and intentional infliction of emotional distress and CPA violation against Farmers and Lebien<sup>2</sup>. CP 10-15.

On November 1, 2006, Reed's counsel agreed to dismiss Reed's CPA claim against Lebien. CP 16-17. However, she declined to dismiss Reed's CPA claim against Farmers. CP 43.

Farmers subsequently moved, under CR 56, for dismissal of Reed's claims against Farmers. CP 69-81. With regard to her CPA cause of action, Farmers argued that Reed lacked standing to pursue a CPA claim against Farmers based on a claims-related dispute because she is not Farmers' insured. CP 75-77. Likewise, Farmers sought dismissal of

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<sup>1</sup> Shortly before the May 25, 2007 summary judgment hearing, Reed settled her claims against Whitacre. CP 156. As a result, Whitacre is no longer a party to this lawsuit.

<sup>2</sup> The Court's May 25, 2007 Order dismissed Lebien from the lawsuit. CP 159-161. As a result, Lebien is not a party to this appeal, and the claims plaintiff made against him are likewise not at issue in this appeal.

Reed's CPA claim on the merits because, even if she had standing to pursue a CPA claim against Farmers, she had failed to state a *prima facie* CPA cause of action against Farmers. CP 77-79. Reed filed a response to Farmers' motion. CP 82-112. Farmers thereafter replied in support of its motion. CP 117-127.

Following oral argument on May 25, 2007, Pierce County Superior Court Judge Bryan Chushcoff denied Farmers' motion as it pertained to Reed's CPA cause of action, because he personally disagreed with Farmers having denied Reed's claim for alleged diminished value. CP 159-61. Significantly, The trial court acknowledged that, in denying Farmers' summary judgment motion on Reed's CPA cause of action, he "could be wrong" and that the "safe thing would be to grant the motion." RP 36, ll. 20-22.

Farmers timely sought discretionary review of that portion of the trial court's May 25, 2007 decision which denied Farmers' motion for summary judgment dismissal of Reed's CPA cause of action.<sup>3</sup> See CP 164-70. Oral argument was held on the motion for discretionary review before Commissioner Skerlac on August 15, 2007. On August 24, 2007, Commissioner Skerlac issued an order granting review, finding probable

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<sup>3</sup> In the same summary judgment motion, Farmers also sought dismissal of plaintiff's outrage cause of action. CP 69-81. The trial court granted this portion of Farmers' summary judgment motion, and plaintiff's outrage cause of action is not at issue in this appeal. CP 159-61.

error in the trial court's rulings on both standing and the merits of Reed's CPA cause of action.

**E. ARGUMENT**

The trial court erred by not dismissing Reed's CPA cause of action because Reed is not Farmers' insured, and therefore has no standing to pursue a CPA claim against Farmers based on her unhappiness with its decision not to pay diminished value. Likewise, even if Reed had standing to pursue a CPA claim against Farmers, the trial court erred in not dismissing her CPA cause of action because she failed to satisfy the elements of a *prima facie* CPA cause of action.

**1. The Trial Court's Ruling Was Based Upon Assumptions Unsupported by Evidence in the Record**

Reed's disagreement with Farmers over whether she was entitled to any payment of alleged diminished value to her vehicle is a claims-related dispute, and because she is not Farmers' insured, *Tank v. State Farm Fire & Cas.*, 105 Wn.2d 381, 715 P.2d 1133 (1986), precludes her from bringing a CPA claim against Farmers stemming from this claims-related dispute. The trial court based its denial of Farmers' summary judgment motion as to Reed's CPA cause of action on an argument not even made by Reed, and not supported by any evidence in the record. First, the trial court concluded that Farmers has a blanket policy of never

paying any third-party claimant's alleged diminished value. As was pointed out to the trial court at oral argument, there is absolutely no evidence in the record that Farmers had or has such a blanket policy. RP 19. Second, the trial court concluded that the speculative purported blanket policy of Farmers never to pay for alleged diminished value somehow took this particular claims-related dispute outside of *Tank's* prohibition against a non-insured bringing a CPA claim against an insurer over a claims-related dispute. RP 32-33. Therefore, not only was the trial court's legal conclusion erroneous, it was necessarily based on an assumption not supported by any evidence in the record.

Similarly, there was no admissible evidence in the record that Reed's vehicle had suffered any diminished value stemming from this accident, and likewise no admissible explanation of how or why. RP 31. Admissible evidence substantiating Reed's alleged diminished value as to this specific vehicle arising from this specific accident would be a necessary prerequisite – among many other requirements that Reed did not and could not meet here – to any finding that Farmers had some obligation to pay her for her vehicle's alleged diminished value. The trial court glossed over this major evidentiary shortcoming, and in essence improperly took judicial notice that every vehicle after every accident has diminished value regardless of the quality of repairs. See RP 34-35. The

trial court's denial of Farmers' summary judgment motion on Reed's CPA cause of action was based on its personal view, unsupported by Washington law, that diminished value is always present in vehicles following an accident. RP 34, ll. 15-16. Given the widely divergent opinions over whether, and the circumstances in which, a given vehicle has experienced diminished value following an accident, judicial notice that Reed's vehicle had experienced diminished value following this accident was directly contrary to established Washington law. See, e.g., ER 201(b) ("A judicially noticed fact must be one not subject to reasonable dispute...."). Thus, there was no admissible evidence in the record that Reed's vehicle had experienced diminished value stemming from this accident.

In short, the trial court's erroneous legal conclusion was based on two factual assumptions which were wholly unsupported by any admissible evidence in the record before it: (1) that Farmers had a blanket policy of never paying any third-party claimant's claim for alleged diminished value; and (2) that Reed's vehicle suffered some diminished value as a result of the accident with Whitacre. The trial court's denial of Farmers' summary judgment motion as to Reed's CPA cause of action was necessarily incorrect because it was based on these two unsupported assumptions. In addition, the trial court's decision not to dismiss Reed's

CPA claim, as discussed below, would have been incorrect even if there had been admissible evidence in the record on both of these factual points.

**2. Reed Has No Standing to Bring a CPA Claim Against Farmers**

As discussed above, the trial court erred in assuming “facts” for which no admissible evidence existed in the record. It then compounded that error by arriving at an incorrect legal conclusion by essentially carving out an exception to *Tank* which is wholly inconsistent with *Tank* itself.<sup>4</sup> Even assuming there had been some evidence in the record of a blanket policy on the part of Farmers never to pay third-party claimants’ diminished value claims, a dispute arising between Farmers and a non-insured over whether any payment for alleged diminished value would be owed would necessarily be a claims-related dispute. And, *Tank* makes clear that a non-insured cannot bring any CPA claim against an insurer based on a claims-related dispute, because a non-insured lacks standing to bring such a claim.<sup>5</sup>

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<sup>4</sup> Moreover, Reed had never argued that the purported existence of a blanket policy of denying alleged diminished value claims somehow took her claim outside *Tank*’s general prohibition of a non-insured having no standing to make a CPA claim against an insurer stemming from a claims-related dispute. See CP 82-112. It was improper for the trial court essentially to come up with its own argument, and then rule based on that argument which had not been made or briefed by either party, and which was completely unsupported by any admissible evidence, in addition to the Court reaching the incorrect legal conclusion.

<sup>5</sup> Although Farmers does not believe that Reed is entitled to recover alleged diminished value to her vehicle, the trial court did not have to address that issue in order to dismiss Reed’s CPA cause of action. Rather, the issue before the trial court was from whom

Neither Reed's original complaint, nor her amended complaint, reveal the purported basis of her CPA claim against Farmers. CP 3-7, 10-15. At her deposition, Reed disclaimed all knowledge of the purported factual basis of her CPA claim against Farmers, stating that her attorney had that information. See CP 53-54. Likewise, Reed's Amended Complaint did not specify whether she is alleging a *per se* or non *per se* CPA violation, although she has subsequently acknowledged that she would not have standing to pursue a *per se* claim.<sup>6</sup> The Washington Supreme Court has never held that a non-insured is permitted to bring either type of CPA claim against an insurer arising from a claims-related dispute. Rather, *Tank* prohibited a non-insured from bringing a *per se* CPA claim against an insurer, but declined to address the broad issue of

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Reed was permitted to seek the alleged diminished value to her vehicle. Washington law does not permit a direct lawsuit against an insurer for property damage allegedly caused by its insured. See *Postlewait Constr. v. Great Am. Ins. Cos.*, 106 Wn.2d 96, 99, 720 P.2d 805 (1986); see also CR 14(c). Rather, a plaintiff alleging property damage must seek relief from the alleged tortfeasor.

The only avenue of recovery available to Reed for her alleged diminished value was a direct lawsuit against Farmers' insured Whitacre, and Reed did, in fact, pursue this remedy by filing suit against Whitacre. By the time Farmers' summary judgment motion was heard, plaintiff had already settled with Whitacre. See CP 156. Dismissal of Reed's CPA cause of action would not have deprived Reed of the right or ability to pursue her diminished value claim against the only potentially liable party, Whitacre. Reed's diminished value claim arising from property damage is no different from any other plaintiff's property damage claim, and Reed should not have been permitted to pursue a direct claim against the alleged tortfeasor's insurer.

<sup>6</sup> The difference between a *per se* and non *per se* CPA claim is that with a *per se* claim, the first two of the five elements of a *prima facie* CPA cause of action may be established by showing that the alleged act constitutes a *per se* unfair trade practice. See, e.g., *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 785-86, 719 P.2d 531 (1986). In contrast, with a non *per se* CPA claim, the plaintiff must individually satisfy all five CPA elements in order to state a *prima facie* CPA cause of action. See *Id.*

whether a non-insured could ever bring a non per se CPA claim against an insurer, because the parties had not raised that issue. See *Tank*, 105 Wn.2d at 393.

Nevertheless, although *Tank* therefore left for another day the broad issue of whether a non-insured would ever be permitted to pursue a non *per se* claim against an insurer, *Tank* does foreclose even a non-*per se* CPA claim by a non-insured based on claims-related disagreements. Any other outcome would place insurers in an untenable position given their duties to their own insureds.

Washington law is clear that a non-insured cannot bring a private cause of action against an insurer based on alleged violation of any provision contained in, or based upon any activity regulated by, WAC 284-30-300 to -600:

In *Tank*, the Washington Supreme Court held that the state's unfair claims settlement practices regulations, set forth in WAC 284-30-300 through -600, do not create a cause of action against insurers for third party claimants. *Tank*, 105 Wn. 2d at 393. Nothing in the language of the regulations gives third party claimants the right to enforce the rules or indicates an intent by the insurance commissioner to create such a right. *Tank*, 105 Wn. 2d at 393. The enforcement of these rules on behalf of third parties should be the province of the insurance commissioner, not individual third party claimants. *Tank*, 105 Wn. 2d at 393.

*Dussault ex rel. Walker-Van Buren v. American Intern. Group, Inc.*, 123 Wn. App. 863, 868, 99 P.3d 1256 (2004); see also *Planet Ins. Co. v.*

*Wong*, 74 Wn. App. 905, 909-10, 877 P.2d 198 (1994). Even though the *Tank* Court declined to address the broad issue of whether a non-insured could ever bring a non-*per se* CPA claim against an insurer, the *Tank* Court did clearly hold that a non-insured could not pursue a private CPA claim against an insurer based upon any activity regulated by any provision contained within WAC 284-30-300 through -600. 105 Wn.2d at 393; see also *Dussault*, 123 Wn. App. at 868. Division Two has explicitly held, relying on *Tank*, that a non-insured cannot bring a CPA claim against an insurer relating to a dispute over settlement discussions and disagreements. See *Neigel v. Harrell*, 82 Wn. App. 782, 919 P.2d 630 (1996). Under these cases, Reed did not have standing to pursue even a non-*per se* claim against Farmers, given the context in which her allegations arose.

As the above-quoted portion of *Dussault* makes clear, a third-party cannot bring a claim against an insurer based upon any activity regulated or encompassed by any provision contained within WAC 284-30-300 through -600. There is no question that any dispute between a claimant – either an insured or a non-insured – and an insurer regarding the settlement of any claim stemming from property damage to a vehicle is regulated by provisions falling within this range. WAC 284-30-390 is entitled “Regulation of settlements of insurance claims relating to

vehicles,” and the text of this regulation states that “WAC 284-30-390 through -3916 are the standards for prompt, fair, and equitable settlements for insurance claims relating to vehicles.” The mere description of WAC 284-30-300 through -600 as constituting the “Unfair Claims Settlement Practices” regulations makes it clear that any complaint arising from a dispute occurring during the course of settlement or denial of a property damage claim, for purposes of the CPA, falls within these provisions. Thus, there can be no serious dispute that Reed’s claim that she is entitled to diminished value for her vehicle is, as to Farmers, encompassed by WAC 284-30-300 through -600. Therefore, Reed has no standing to bring a CPA claim against Farmers relating to a disagreement over her diminished value claim.

Under the facts of this case, permitting Reed to pursue any CPA claim against Farmers would be contrary to *Tank* and *Dussault*. Dismissal of Reed’s CPA cause of action was, therefore, required because she lacked standing to pursue a CPA cause of action against Farmers.

**3. Even if Reed Had Standing to Bring a CPA Claim Against Farmers, Her CPA Claim Should Still Have Been Dismissed on Summary Judgment Because She Failed to State a *Prima Facie* CPA Cause of Action**

In the Order Granting Review, Commissioner Skerlac noted that Reed’s CPA claim against Farmers is necessarily a *per se* CPA claim

given the context in which it arises. In addition, even if this Court believes that Reed has standing to pursue a non-*per se* CPA claim based upon a claims-related dispute, her CPA claim should still have been dismissed as a matter of law because she did not satisfy the elements of a *prima facie* non-*per se* CPA claim. To make out a *prima facie* non-*per se* CPA cause of action, a plaintiff must show: (1) an unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to the plaintiff's business or property; and (5) causation. RCW 19.86.020; *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 784-85, 719 P.2d 531 (1986). If the plaintiff does not establish all five elements, her CPA claim fails as a matter of law. *Hangman Ridge*, 105 Wn.2d at 784.

Whether a particular act constitutes an “unfair or deceptive act,” or “whether a particular action gives rise to a Consumer Protection Act violation” is a question of law. *Leingang v. Pierce County Med. Bureau, Inc.*, 131 Wn.2d 133, 149-50, 930 P.2d 288 (1997). Farmers did not concede the other four elements below, but focused on Reed's failure to satisfy the first element of a *prima facie* CPA cause of action. Reed did not demonstrate an “unfair or deceptive act” as defined by the CPA.

A reasonable basis for denying insurance benefits, even if denial was incorrect, constitutes a complete defense to any claim that an insurer

violated the CPA. See *Rizzuti v. Basin Travel Service of Othello, Inc.*, 125 Wn. App. 602, 622, 105 P.3d 1012 (2005); *Roberts v. Allied Group Ins. Co.*, 79 Wn. App. 323, 326, 901 P.2d 317 (1995). Likewise, even as to an insured, “[a]cts performed in good faith under an arguable interpretation of existing law do not constitute unfair conduct violative of the consumer protection law.” *Leingang*, 131 Wn.2d at 155. Under this principle, the Court of Appeals has affirmed dismissal of an insured’s CPA claim on summary judgment, even where it held that the insurer’s decision was incorrect, because there was no prior case law precisely on point and the insurer’s position was therefore arguable. See *Mencel v. Farmers Ins. Co. of Washington*, 86 Wn. App. 480, 937 P.2d 627 (1997).

An insurer’s duty to a non-insured, as thoroughly discussed in *Tank*, *Dussault*, and many other cases, is substantially lower than its duty to one of its insureds. As the *Dussault* Court noted, “to a third party claimant, an insurer owes no duty – only a duty to refrain from tortious acts.” 123 Wn. App. at 871. In addition, the CPA does not prohibit reasonable acts or business practices. *American Mfrs. Mut. Ins. Co. v. Osborn*, 104 Wn. App. 686, 699, 17 P.3d 1229 (2001) (citing RCW 19.86.920).

Here, Reed identified no act which purportedly constituted a CPA violation other than the mere fact that Farmers denied her claim for

alleged diminished value. As a matter of law, the mere denial of a third-party's diminished value claim cannot provide a basis for a CPA cause of action against an insurer. There can be no dispute that no Washington authority explicitly holds that an insurer must pay a third-party's claim for alleged diminished value where its insured allegedly causes property damage. This one fact alone, under *Mencel*, required dismissal of Reed's CPA claim on summary judgment, even if this Court believes Reed cleared the standing hurdle. Given the absence of any Washington statute or case law holding that an auto insurer must always pay a third-party claimant for alleged diminished value to that non-insured's vehicle, Reed, as a matter of law, cannot satisfy the first element of a *prima facie* CPA cause of action. See *Mencel*, 86 Wn. App. at 487. Here, Farmers' determination that Reed was not entitled to alleged diminished value was an "[a]ct[] performed in good faith under an arguable interpretation of existing law," and therefore does "not constitute unfair conduct violative of the consumer protection law." See *Leingang*, 131 Wn.2d at 155.

#### **F. CONCLUSION**

Reed's CPA cause of action should have been dismissed on summary judgment, because it failed as a matter of law for at least two reasons. First, because her claim involved an activity (adjustment/settlement of a vehicle property damage claim) encompassed

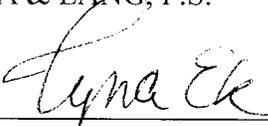
and regulated by WAC 284-30-300 through -600, and she is not Farmers' insured, she had no standing to pursue a CPA cause of action against Farmers for this claims-related disagreement. Second, her CPA claim failed as a matter of law on its merits, because she did not satisfy the elements of a *prima facie* CPA cause of action. Reed's CPA claim should therefore have been dismissed as a matter of law, yet the trial court declined to dismiss it.

The trial court expressly recognized that its ruling in this regard "could be wrong," and that the "safe thing" would have been to dismiss Reed's CPA claim on summary judgment. RP 36, ll. 21-22. These statements reflect the trial court's recognition that its ruling would likely be reversed on appeal, yet the trial court declined to dismiss Reed's CPA cause of action. This was obvious error because, under *Tank*, Reed had no standing to bring a CPA claim against Farmers, and under *Leingang* and *Rizzutti* she also failed to state a *prima facie* CPA cause of action. The trial court's denial of Farmers' summary judgment motion as to Reed's CPA claim should be reversed, and judgment should be entered for Farmers dismissing Reed's CPA claim as a matter of law.

DATED this 19<sup>th</sup> day of November, 2007.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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ORIGINAL

I hereby certify that, on November 19, 2007, I served **Brief of Appellant Farmers Insurance Company of Washington** and this **Declaration of Service** upon the following counsel of record as indicated:

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**Facsimile 11/19/07 and delivery via ABC LEGAL MESSENGER on 11/20/07**

**I declare under penalty of perjury under the laws of the State of Washington that the above is true and correct.**

Executed at Seattle, Washington this 19<sup>th</sup> day of November, 2007.

  
Helen M. Thomas  
Legal Secretary to Nathaniel J.R. Smith