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No. 95867-0

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

MOUN KEODALAH and AUNG KEODALAH,
husband and wife,

Plaintiffs-Respondents,

vs.

ALLSTATE INSURANCE COMPANY, a corporation, and TRACEY
SMITH and JOHN DOE SMITH, husband and wife,

Defendants-Petitioners.

BRIEF OF AMICUS CURIAE
WASHINGTON STATE ASSOCIATION FOR JUSTICE
FOUNDATION

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington State Association for Justice Foundation (WSAJ Foundation) is a not-for-profit corporation organized under Washington law, and a supporting organization to Washington State Association for Justice. WSAJ Foundation operates an amicus curiae program and has an interest in the rights of persons seeking redress under the civil justice system, including an interest in the duty of good faith owed by all persons engaged in the business of insurance under Washington law.

II. INTRODUCTION AND STATEMENT OF THE CASE

Moun Keodalah brings this action against Allstate and its insurance adjuster, Tracey Smith, arising out of their conduct in handling Keodalah's claim for coverage under his uninsured motorist (UIM) policy with Allstate. The facts are drawn from the Court of Appeals opinion, the Petition for Review, the Answer to the Petition for Review and the Supplemental Briefs. *See Keodalah v. Allstate Ins. Co.*, 3 Wn. App. 2d 31, 32-35, 413 P.3d 1059, *review granted*, 191 Wn.2d 1004 (2018); Pet. for Rev. at 2-3; Ans. to Pet. for Rev. at 2-5; Insurers' Supp. Br. at 2-4; Keodalah Supp. Br. at 2.

Keodalah was involved in an automobile accident in 2007. After stopping at a stop sign, Keodalah advanced into the intersection and was struck by a motorcyclist. Keodalah was injured and the motorcyclist was killed. The Seattle Police Department (SPD) investigated and determined the motorcyclist was traveling 70 to 74 miles per hour in a 30 mph zone and that Keodalah was not on his cell phone at the time of the collision.

Keodalah was insured by Allstate; the motorcyclist was uninsured. Allstate paid Keodalah's claim under his personal injury protection (PIP) coverage. Keodalah then requested his policy limits of \$25,000 under his UIM policy. Allstate hired an accident reconstruction firm, Traffic Collision Analysis Inc. (TCA), to conduct an independent investigation of the accident. TCA determined that as the motorcycle approached the intersection, it was speeding between cars. It also found that Keodalah had properly stopped at the intersection and that the motorcyclist's excessive speed was the cause of the collision. Notwithstanding the results of the SPD and TCA investigations, Allstate rejected Keodalah's request for the UIM policy limits, and countered with an offer to settle the claim for \$1,600, based on its apparent conclusion that Keodalah was 70% responsible for the accident. Keodalah demanded an explanation for Allstate's fault determination. Allstate responded by raising its offer to \$5,000.

Keodalah sued Allstate for coverage under his UIM policy. Allstate designated Smith, an Allstate employee, as its CR 30(b)(6) representative. Smith was in possession of the SPD and TCA reports, but nonetheless maintained that Keodalah had failed to stop at the stop sign and had been on his cell phone, and that these facts caused the accident. Smith subsequently admitted, however, that these facts were inaccurate. Before trial, Allstate increased its offer to \$15,000. Keodalah refused the offer. Smith testified at trial that Keodalah had failed to stop and was 70% at fault, but later acknowledged that she knew the statements to be false. The jury found the motorcyclist was 100% at fault and awarded Keodalah \$108,868.

Keodalah brought a bad faith action against Allstate and Smith (hereinafter the Insurers). Against Smith, he asserted bad faith and violation of the CPA. Smith filed a motion to dismiss, which the trial court granted. The court then certified the case for discretionary review under RAP 2.3(b)(4). The Court of the Appeals granted review and held that an employee adjuster may be liable for breach of the duty of good faith and violation of the CPA. This Court granted the Insurers' Petition for Review.

III. ISSUE PRESENTED

Whether an insurance adjuster employed by an insurance company may be personally liable to an insured consumer under the common law or the Consumer Protection Act (CPA), Ch. 19.86 RCW, for breach of the statutory duty of good faith.

IV. SUMMARY OF ARGUMENT

Liability of an agent or servant focuses on the party's conduct, and status as an agent or servant is generally irrelevant to this determination. An agent or servant may be liable for acts undertaken in the scope of the relationship with the principal if the agent owes an independent, actionable duty to the plaintiff to refrain from the complained of conduct.

Insurance bad faith stems from statutory and regulatory provisions, and the common law. The Legislature has declared that "all persons" engaged in the business of insurance, including insurers, insureds, their providers and their representatives, must be actuated in good faith. This Court has incorporated these statutory provisions into its common law jurisprudence refining the duty of good faith. It has recognized that the common law duty of good faith is grounded in public policy, which reflects

the “high stakes” involved, as insureds who obtain insurance seek not just financial protection, but also security and peace of mind.

Whether to recognize a common law duty is a question of law for the Court, and turns on considerations of public policy, precedent, common sense, fairness and justice. Here, public policy and precedent reflected in the Insurance Code’s statutory and regulatory provisions, as well as this Court’s bad faith jurisprudence, warrant the recognition of a duty of good faith owed by adjusters to insureds – a duty that includes a duty to abstain from deception. Fairness and common sense also support recognizing a duty, to ensure adjusters are adequately deterred from bad faith conduct. To be liable, an adjuster must in fact be engaged in “the business of insurance.”

A claim of bad faith against an adjuster should also be actionable under the CPA. The business of insurance is affected by the public interest, and conduct constituting insurance bad faith constitutes a CPA violation. There is no requirement under the CPA that a contractual relationship be present. CPA claims are intended to supplement other bodies of law, to ensure otherwise unaccountable conduct may be actionable. The relevant CPA and Insurance Code provisions, as well as this Court’s jurisprudence clarifying their application, support a CPA claim predicated on breach of the duty of good faith by an adjuster engaged in the business of insurance.

V. ARGUMENT

A. **Under Washington Law, Agents And Servants May Be Liable For Conduct Undertaken In The Scope Of The Relationship If They Owe An Independent Duty To The Plaintiff.**

Under Washington law, an agent or servant is liable for acts undertaken within the scope of the relationship if the agent or servant owes an independent duty to the plaintiff. *See Annechino v. Worthy*, 175 Wn.2d 630, 638, 290 P.3d 126 (2012). The focus of this inquiry is on the actor's conduct. *See Annechino*, 175 Wn.2d at 638 (citing *Restatement (Third) of Agency* § 7.01 (2006)). The *Restatement* explains: "An agent is subject to tort liability to a third party harmed by the agent's conduct only when the agent's conduct breaches a duty that the agent owes to the third party." *Restatement (Third)* § 7.02 (2006); *see also Restatement (Second) of Agency* § 343 (1958) (providing that "[a]n agent who does an act otherwise a tort is not relieved from liability by the fact that he acted at the command of the principal or on account of the principal..." (brackets added)).

Because the focus is on the actor's conduct, status as an agent or servant generally adds nothing to the analysis. *See, e.g., Dodson v. Economy Equipment Co.*, 188 Wash. 340, 343, 62 P.2d 708 (1936) (noting "[t]hat the agent acts for his principal neither adds to nor subtracts from his liability" (brackets added)). Whether the agent or servant benefits personally from the wrongful conduct is also generally immaterial to the question of tort liability. *See Restatement (Third) of Agency* § 7.01 cmt. b. In sum, status as an agent or servant generally has no bearing on the issue of liability, and the critical question instead is whether he or she owes an actionable duty to the plaintiff.

B. In Washington, The Duty Of Good Faith Requires All Persons Engaged In The Business Of Insurance, Including Insurer Representatives, To Be Actuated In Good Faith, And An Insurance Adjuster Engaged In The Business Of Insurance

Should Be Liable For Breach Of This Duty Under The Common Law And the Consumer Protection Act, Ch. 19.86 RCW.¹

1. Overview of insurance bad faith under Washington law.

The tort of insurance bad faith derives from the common law, as well as statutory and regulatory provisions. *See St. Paul Fire & Marine Ins. Co. v. Onvia, Inc.*, 165 Wn.2d 122, 128, 196 P.3d 664 (2008). Title 48 RCW, the Insurance Code, includes provisions that govern the insurance industry as a whole. RCW 48.01.030 provides:

The business of insurance is one affected by the public interest, requiring that *all persons* be actuated by good faith, abstain from deception, and practice honesty and equity in all insurance matters. Upon *the insurer, the insured, their providers, and their representatives* rests the duty of preserving inviolate the integrity of insurance.

(Emphasis added). RCW 48.01.020 declares the Code’s broad scope: “All insurance and insurance transactions in this state...and all persons having to do therewith are governed by this code.” “Person” means “any individual, company, insurer, association, organization, reciprocal or interinsurance exchange, partnership, business trust, or corporation.” RCW 48.01.070. Insurance transactions include transactions “of matters subsequent to execution of the contract and arising out of it.” RCW 48.01.060.

Conduct defined in the Insurance Code as unfair or deceptive constitutes a breach of the duty of good faith. *See Tank v. State Farm*, 105

¹ For the first time in their supplemental brief, the Insurers assert the Court must find an implied cause of action to recognize an actionable duty here. Keodalah argues an implied cause of action is not essential to the analysis. This brief examines the issues arising out of the arguments advanced by Keodalah. If the Court is inclined to consider whether an implied cause of action is created by the relevant statutory provisions, including the good faith duty in RCW 48.01.030 or the duty to refrain from deception in the business of insurance in RCW 48.30.040, the Foundation is prepared to submit supplemental briefing to address that issue.

Wn.2d 381, 386, 715 P.2d 1133 (1986) (recognizing that an unfair or deceptive act or practice under Title 48 RCW constitutes bad faith). RCW 48.30.010 provides that “[n]o person engaged in the business of insurance shall engage in...unfair or deceptive acts or practices in the conduct of such business as...defined pursuant to subsection (2) of this section” (brackets added). Subsection (2) defines unfair or deceptive acts or practices to include those “expressly defined and prohibited by this code,” as well as those identified in regulations promulgated by the Insurance Commissioner.

Among those unfair practices “expressly defined” in the Code is that described in RCW 48.30.040, which prohibits persons engaged in the business of insurance from making representations they know to be false:

No person shall knowingly make, publish, or disseminate any false, deceptive or misleading representation or advertising in the conduct of the business of insurance, or relative to the business of insurance or relative to any person engaged therein.

RCW 48.30.040.² As an “expressly defined” unfair practice under the Insurance Code, violation of § .040 would also constitute insurance bad faith under RCW 48.01.030. *See Tank*, 105 Wn.2d at 386.

In explicating the duty of good faith, this Court has incorporated the statutory duty of good faith into its common law jurisprudence. *See, e.g., Onvia*, 165 Wn.2d at 131 (recognizing that based on the “principles enunciated by the legislature in chapter 48.01 RCW . . . the insurance

² The Court has not had an opportunity to construe RCW 48.30.040, but it has cited § .040 in support of the view that a “primary purpose” of provisions regulating the insurance industry “is to create public confidence in the honesty and reliability of those who engage in the business of insurance.” *Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 43 & n.7, 204 P.3d 885 (2009). While the statute is entitled “False information and advertising,” the text prohibits any “false, deceptive or misleading representation *or* advertising.” RCW 48.30.040 (italics added).

business requires good faith, honesty, and equity in all insurance matters”); *Ellwein v. Hartford Accident and Indem. Co.*, 142 Wn.2d 766, 775, 15 P.3d 640 (2001), *overruled on other grounds by Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 78 P.3d 1274 (2003) (stating “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”); *Indus. Indem. Co. of the Nw., Inc. v. Kallevig*, 114 Wn.2d 907, 916, 792 P.2d 520 (1990) (recognizing “RCW 48.01.030 requires insurers to act in good faith in dealing with their insureds”).³

In addition to relying on the statutory duty of good faith to define the scope of the common law duty, this Court has looked to the quasi-fiduciary nature of the insurer-insured relationship as a principle on which the tort is based. The Court’s jurisprudence indicates, however, that the quasi-fiduciary nature of some insurer-insured relationships is not a limiting principle that restricts the scope of the duty, and it is not a required element in the common law bad faith cause of action. *Burnham v. Commercial Cas. Ins. Co.*, 10 Wn.2d 624, 117 P.2d 644 (1941), is acknowledged as the first case in which this Court recognized a common law cause of action for insurance bad faith. In *Burnham*, the Court makes no reference to a fiduciary or quasi-fiduciary relationship between the insurer and the insured. In *Evans v. Continental Cas. Co.*, 40 Wn.2d 614, 630, 245 P.2d 470 (1952), the Court recognized a bad faith action as one involving “bad faith

³ This is consistent with the principle that a violation of a statutory duty permits a trier of fact to infer negligence in a common law action. *See* RCW 5.40.050.

in failing to perform a contractual obligation [that] sounds in tort,” but makes no mention of a fiduciary relationship. (Brackets added).

Later opinions refer to the fiduciary relationship between an insurer and insured as one principle underlying bad faith actions. *See, e.g., Murray v. Mossman*, 56 Wn.2d 909, 912, 355 P.2d 985 (1960) (“the duty of the insurance company to use good faith in the handling of a claim against the insured springs from a fiduciary relationship”); *Tank*, 105 Wn.2d at 385 (referring to the fiduciary relationship between an insurer and insured as a source of the good faith duty); *Kallevig*, 114 Wn.2d at 916 (referencing the “fiduciary duty to act in good faith”). However, the quasi-fiduciary nature of some insurer-insured relationships has not limited the duty.

In *Safeco Ins. Co. of Am. v. Butler*, 118 Wn.2d 383, 389, 823 P.2d 199 (1992), the Court recognized that the relationship between an insurer and an insured “is not a true fiduciary relationship,” and “that something less than a true fiduciary relationship exists between the insurer and the insured.” In *Ellwein*, 142 Wn.2d at 779, the Court cited *Butler* for the proposition that when an insurer defends its insured under a reservation of rights, the insurer is “nearly” a fiduciary of the insured. The Court in *Ellwein* stated that in contrast, “the relationship between a UIM insurer and its insured ‘is by nature adversarial and at arm’s length.’” *Id.* (citation omitted). However, despite the absence of an enhanced relationship between an insured and a UIM insurer, the Court recognized an insured is still entitled to a “basic standard of good faith,” and can bring a common law insurance bad faith claim against the UIM insurer. *Ellwein*, 142 Wn.2d at 781. The

Court in *Ellwein* found the duty of good faith exists despite the fact that the relationship is an adversarial one:

Tank's enhanced obligation rule is simply unworkable in the UIM context. How could a UIM insurer stand in the shoes of the tortfeasor, with the ability to assert liability defenses, while at the same time give equal consideration to the insured's interest?... Having found that an "enhanced" duty does not exist does not mean, however, that the duty of good faith simply disappears after a UIM claim is made. Many other courts have held, as we do today, that the duty of good faith and fair dealing survives within the UIM relationship. *This is because, although the relationship becomes adversarial, the insured still has the reasonable expectation that he will be dealt with fairly and in good faith by his insurer.*

142 Wn.2d at 780 (emphasis added; quotations and citations omitted).

In *Tank*, while the Court acknowledged the relationship between the insurer and the insured as a source of the duty of good faith, it also recognized the public policy considerations warranting tort liability:

[The] source [of the good faith duty] is the fiduciary relationship existing between the insurers and insured. 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.

105 Wn.2d at 385 (brackets added). Indeed, independent of any quasi-fiduciary relationship, case law has long recognized that the business of insurance is affected by the public interest and grounded in public policy. *See, e.g., Oregon Auto Ins. Co. v. Salzberg*, 85 Wn.2d 372, 376, 535 P.2d 816 (1975) (recognizing that insurance policies "abound with public policy considerations"); *National Sur. Corp. v. Immunex Corp.*, 176 Wn.2d 872, 878, 297 P.3d 688 (2013) (noting an insured seeks "security and peace of mind" in obtaining insurance, and the "bargained-for peace of mind comes from the assurance that the insured will receive prompt payment of money

in times of need”). That the insurance industry is one imbued with public policy has become a foundational principle of insurance law.

In sum, the tort of bad faith is grounded in public policy, as reflected in Washington’s comprehensive statutory and regulatory scheme governing insurance, and case law. The quasi-fiduciary nature of the insurer-insured relationship neither defines nor limits the good faith duty. The duty is owed regardless of whether coverage exists under the insurance contract. *See Onvia*, 165 Wn.2d at 132 (third party coverage); *Coventry Associates v. American States Ins. Co.*, 136 Wn.2d 269, 279, 961 P.2d 933 (1998) (first party coverage). And the duty may be found in the absence of a quasi-fiduciary relationship between the insurer and insured. *See Ellwein*, 142 Wn.2d at 780. The duty is grounded in the public policy nature of insurance, as insureds seek not just financial recompense, but security and peace of mind, in obtaining insurance coverage.

2. This Court should hold that an insurance adjuster has a duty of good faith that is actionable under Washington common law.

The question of whether a common law duty exists is a question of law for the Court. *McKown v. Simon Property Group, Inc.*, 182 Wn.2d 752, 762, 344 P.3d 661 (2015). To determine the existence and scope of a duty, the Court weighs considerations of “logic, common sense, justice, policy and precedent.” *Snyder v. Med. Serv. Corp. of E. Wash.* 145 Wn.2d 233, 243, 35 P.3d 1158 (2001). Recognition of a duty “is a reflection of all those considerations of public policy which lead the law to conclude that a plaintiff’s interests are entitled to legal protection against the defendant’s

conduct.” *Taylor v. Stevens County*, 111 Wn.2d 159, 168, 759 P.2d 447 (1988) (internal quotations and citations omitted).

Statutes and case law serve as primary sources of public policy. *See Sedlacek v. Hillis*, 145 Wn.2d 379, 388, 36 P.3d 1014 (2001). It is well established that a “[d]uty may be predicated on violation of a statute or common law principles of negligence.” *Bernethy v. Walt Failor’s, Inc.*, 97 Wn.2d 929, 933, 653 P.2d 280 (1982) (brackets added); *Degel v. Majestic Mobile Manor, Inc.*, 129 Wn.2d 43, 49, 914 P.2d 728 (1996). In *Bernethy*, the Court considered whether a gun seller who sold a firearm to an intoxicated patron owed a tort duty to the plaintiff, who was later shot by the purchaser. No statutory cause of action spoke directly to the facts before the Court, so it looked to an analogous statute regarding the sale of firearms to “incompetent persons.” The Court concluded that “at a minimum,” the statute reflected “a strong public policy in our state that certain people should not be provided with dangerous weapons.” *Bernethy*, 97 Wn.2d at 933. The Court concluded that a common law duty should lie. *See id.*

As in the statute at issue in *Bernethy*, the comprehensive statutory framework in the Insurance Code embodies public policies supporting the recognition of a common law duty here.⁴ The Legislature has declared that

⁴ The Montana Supreme Court relied on a Montana state statute similar to RCW 48.01.030 to find an actionable common law duty owed by an employee adjuster. *See O’Fallon v. Farmers Ins. Exchange*, 859 P.2d 1008 (Mont. 1993). There, the adjuster argued he was not an “insurer” under Montana’s Unfair Trade Practices Act and not subject to liability for its violation. The court examined the language of the statute, which applied to any “person.” *O’Fallon*, 859 P.2d at 1014. The court relied in significant part on the broad statutory mandate requiring “all persons” to comply with the duty of good faith, to warrant the recognition of an actionable *common law* duty: “[W]e conclude that individuals, as well as insurers,

“all persons” having to do with the business of insurance are governed by the Code, *see* RCW 48.01.020, and that “all persons” engaged in the business of insurance, including insurer representatives, must be actuated in good faith. *See* RCW 48.01.030. A “person” includes “any individual, company, insurer...or corporation.” RCW 48.01.070. The Legislature prohibits unfair or deceptive acts or practices in the insurance business. *See* RCW 48.30.010. A knowing misrepresentation is an unfair practice. *See* RCW 48.30.040. These statutes reflect public policies recognizing and defining the good faith duty, public policies that support a duty owed by insurer representatives engaged in the business of insurance to be actuated in good faith and to refrain from deception.

Case law recognizes the public policy nature of insurance and the good faith duty that arises therefrom. As this Court has noted, insureds seek insurance for the “security and peace of mind” that comes from knowing they are protected in times of need. *See Immunex*, 176 Wn.2d at 878 (citation omitted). This makes insurance contracts “unique in nature and purpose.” *Id.*, 176 Wn.2d at 878.⁵ Insureds depend on the good faith and

are prohibited from engaging in the unfair trade practices set forth in § 33-18-201, MCA, and that when an individual breaches the obligations imposed by that statute, the claimant who is damaged by that breach has a common law cause of action against that individual.” *Id.* at 1015 (brackets added). Supreme Courts in other jurisdictions have permitted bad faith claims against adjusters directly under their statutory schemes. *See, e.g., Liberty Mut. Ins. Co. v. Garrison Contractors*, 966 S.W.2d 482 (Tex. 1998) (express cause of action); *Taylor v. Nationwide Mut. Ins. Co.*, 589 S.E.2d 55 (W.Va. 2003) (implied cause of action).

⁵ UIM coverage presents special public policy considerations. The Legislature requires that insurers offer UIM coverage. *See* RCW 4.22.030(2). The Court has recognized that this statute “embodies a strong public policy to ensure the availability of a source of recovery for an innocent automobile-accident victim when the responsible party does not possess adequate liability insurance.” *Fisher v. Allstate Ins. Co.*, 136 Wn.2d 240, 245, 961 P.2d 350 (1998).

honesty of insurers and insurer representatives for this security and peace of mind. *See Tank*, 105 Wn.2d at 385.

The statutory law surveyed here embodies the public policies underlying the business of insurance, and this Court has recognized these public policies and has incorporated Insurance Code provisions into its bad faith jurisprudence. These public policies, and this Court's precedent, support the recognition of a good faith duty against insurance adjusters engaged in the business of insurance. At most, imposing this duty is an application of the common law bad faith cause of action that has been recognized in Washington since 1941.

Recognizing a duty here also comports with principles of fairness and common sense. Insureds rely on the honesty and good faith of insurance adjusters, who perform the critical tasks that form the foundation of insurance practice. They evaluate policies, adjust claims and in some cases serve as a trusted adviser to the insured. If the Court concludes no duty is owed by adjusters to their insureds, the liability of insurers must function as the deterrent for bad faith conduct by adjusters. Adjusters will often have little reason to refrain from conduct that benefits insurers over insureds, and indeed may be tempted to garner favor with their employer or seek financial gain where there may be company incentives.

The duty advocated here is not limitless. RCW 48.01.030 imposes a duty of good faith on all persons engaged in the "business of insurance," and this Court has relied on the Code provisions to define the scope of the good faith duty. "Persons" performing routine tasks, such as answering

phones or making deliveries, are arguably not engaged in the “business of insurance.” It is reasonable to limit the duty of good faith to those engaged in the business of insurance – adjusting claims, making coverage determinations and communicating those determinations to insureds. Circumscribing the duty in this way best captures the type of conduct this Court’s jurisprudence and the relevant legislative pronouncements target. Where an employee performs tasks not reasonably characterized as “the business of insurance,” the duty would not attach. However, where an adjuster knowingly misrepresents the facts related to an insured’s coverage, he or she engages in bad faith conduct involving the business of insurance. In such cases, it is reasonable and consistent with the principles of insurance bad faith under Washington law to hold adjusters to a good faith duty of care.⁶ *Cf. Liberty Mutual Ins. Co. v. Garrison Contractors, Inc.*, 966 S.W.2d 482, 486 (Tex. 1998) (recognizing a duty of good faith owed by adjusters engaged in the “business of insurance,” relying on statutory language to define the scope of the duty).

It is squarely within the province of the Court to recognize a common law cause of action, as “the Legislature is not given to consistent

⁶ In *Merriman v. Am. Guar. & Liab. Ins. Co.*, 198 Wn. App. 594, 396 P.3d 351, review denied, 413 P.3d 565 (2017), an independent adjuster made a similar claim to the Insurers’ argument here, asserting common law bad faith is only available against an insurer, in part because this Court in *Tank* focused on “the evolution of the duty of good faith imposed on insurers.” *Merriman*, 198 Wn. App. at 612 (quoting *Tank*, 105 Wn.2d at 385). The court of appeals responded: “The fact that a case involving an insurer focused on insurers is unsurprising. It does not signal any retreat from case law imposing the duty of good faith ‘on the insurance industry’...or any narrowing construction of RCW 48.01.030 that imposes the duty on ‘all persons’ engaged in ‘the business of insurance’.... RCW 48.01.030 unambiguously applies to insurance adjusters.” *Merriman*, 198 Wn. App. at 612.

reevaluations of tort law.” *Dickinson v. Edwards*, 105 Wn.2d 457, 481, 716 P.2d 814 (1986) (Utter, J., concurring). “When justice requires, this court does not hesitate to expand the common law and recognize a cause of action.” *Ueland v. Reynolds Metals Co.*, 103 Wn.2d 131, 136, 691 P.2d 190 (1984) (considering policies in case law and inherent in legislative acts to recognize a child’s cause of action for loss of parental consortium). “The common law owes its glory to its ability to cope with new situations. Its principles are not mere printed fiats, but are living tools to be used in solving emergent problems.” *Senear v. Daily Journal-American*, 97 Wn.2d 148, 152, 641 P.2d 1180 (1982) (internal quotations and citation omitted).

3. This Court should hold that an insurance adjuster has a duty of good faith that is actionable under the CPA.

The business of insurance implicates the public interest, and an insured may also sue for breach of the duty of good faith under the CPA. *See* RCW 48.01.030 (declaring public interest in insurance); RCW 48.30.010 (providing that violations of the Insurance Code constitute unfair or deceptive acts or practices); RCW 19.86.090 (enabling private CPA actions); *Kallevig*, 114 Wn.2d at 924. Demonstrating a violation of the CPA requires proof of: (1) an unfair or deceptive act or practice; (2) in trade or commerce; (3) which affects the public interest; (4) injury to plaintiff in his or her business or property; and (5) a causal link between the unfair or deceptive act complained of and the injury suffered. *See Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 784-85, 719 P.2d 531 (1986). The Legislature has declared the CPA must be “liberally construed that its beneficial purposes may be served.” *See* RCW 19.86.920.

Violations of the Insurance Code, Title 48 RCW, and certain Insurance Commissioner regulations, are deemed per se unfair trade practices in private CPA actions. *See Kallevig*, 114 Wn.2d at 920-25; *Onvia*, 165 Wn.2d at 133-34; *see also* RCW 19.86.170 (describing relationship between the Insurance Code and its regulations and the CPA); RCW 48.30.010. RCW 48.01.030 imposes a duty of good faith on “all persons” engaged in the “business of insurance,” including a duty to practice honesty in all insurance matters. RCW 48.30.010(1) provides that “[n]o person engaged in the business of insurance” shall commit unfair methods of competition as defined in subsection (2) of that statute. (Brackets added). Subsection (2) states that “unfair methods and unfair or deceptive acts or practices” include those acts “expressly defined and prohibited by [the Insurance] code” (brackets added). RCW 48.30.040 prohibits any “false, deceptive or misleading representation or advertising in the conduct of the business of insurance.” Violation of these prohibitions constitute unfair practices in violation of the Insurance Code as well as bad faith, and should constitute per se violations of the CPA.

The Insurers do not appear to deny that Smith’s conduct would meet the *Hangman Ridge* elements and otherwise violate the CPA. They argue instead the Court should hold a quasi-fiduciary relationship must be present to prove a CPA violation based on breach of the statutory duty of good faith. *See* Resp. Br. at 19. They assert the CPA should be narrowly construed as limited to violations of the Insurance Code that arise out of the insurer-insured relationship: “Because Keodalah claims a breach of the duty of good

faith by someone outside the quasi-fiduciary relationship, his CPA claim based on RCW 48.01.030 was properly dismissed.” Insurers’ Supp. Br. at 19-20. They cite *Tank* and *Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 41-42, 204 P.3d 885 (2009), which examine the language of § .030 limiting the duty of good faith to “the insurer, the insured, their providers, and their representatives.” In *Panag*, this Court stated: “Only an insured may bring a CPA claim for an insurer’s breach of its statutory duty of good faith.” *Panag*, 166 Wn.2d at 43 n.6; *see also Tank*, 105 Wn.2d at 394-95.

The Insurers read too much into the comment in *Panag* and its reference to *Tank*, which together stand only for the proposition that the parties must be within the reach of RCW 48.01.030 to allege a CPA violation on that basis. In *Tank*, the Court held that a third party claimant could not sue for breach of the duty of good faith announced in RCW 48.01.030, because that statute applies only to “the insurer, the insured, their providers, and their representatives.” *See Tank*, 105 Wn.2d at 394-95. The import of this statement in *Tank* is that if a party is not within the reach of the Insurance Code, e.g., an “insured,” he or she may not assert a CPA claim predicated on the good faith duty declared in that statute.

Panag acknowledged and endorsed the rule from *Tank*. *See Panag*, 166 Wn.2d at 43 n.6. It did *not* go further, to hold there must be a quasi-fiduciary or contractual relationship between a plaintiff and a defendant to assert a CPA claim, and indeed reached the opposite conclusion: “contractual privity ordinarily is not required to bring a CPA claim.” 166 Wn.2d at 43 n.6.

More broadly, *Panag* reflects the Court’s recognition of the CPA’s statutory mandate of liberal construction, to effectuate its purpose of protecting the public from unfair practices. *See Panag*, 166 Wn.2d at 40. In *Panag*, the Court considered whether the plaintiffs, who had been the target of deceptive collection methods, could bring suit under the CPA against collection agencies with whom they had no contractual relationship. The defendants argued the CPA applies only to “protective relationships” and not to adversarial disputes between parties lacking privity.

The Court disagreed, reasoning that its opinion in *Hangman Ridge* had properly articulated the five elements of a CPA claim, and it would “not adopt a sixth element, requiring proof of a consumer transaction between the parties, under the guise of a separate standing inquiry.” *Panag*, 166 Wn.2d at 38. The Court noted the purpose of the CPA is protection of the public, and a plaintiff bringing a CPA claim “can serve the goal of protecting the public regardless of whether that person is a consumer or in a business relationship with the actor.” *Panag*, 166 Wn.2d at 40.

The Insurers’ argument here similarly asks the Court to narrowly construe the CPA, asserting a common law claim is unavailable and the CPA should also be limited, to maintain “consistency.” *See Insurers’ Supp. Br.* at 19. Yet this Court has held the CPA should supplement, rather than duplicate, other remedies, as harmful conduct may otherwise escape accountability: “By broadly prohibiting ‘unfair or deceptive acts or practices in the conduct of any trade or commerce,’ RCW 19.86.020, the legislature intended to provide sufficient flexibility to reach unfair and

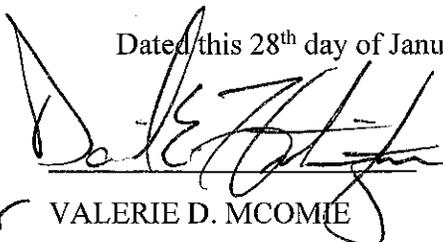
deceptive conduct that inventively evades regulation.” *Panag*, 166 Wn.2d at 49.

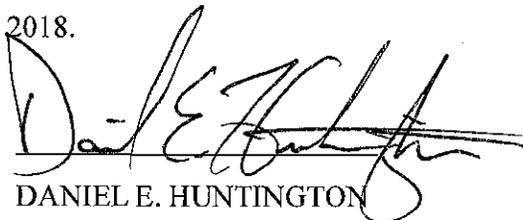
A CPA claim may lie where the complained of conduct is unfair or deceptive, affects the public interest, occurs in trade or commerce and causes injury to the plaintiff’s business or property. *See Hangman Ridge*, 105 Wn.2d at 784-85; *Panag*, 166 Wn.2d at 39. Breach of the statutory provisions governing good faith and unfair practices in insurance, including RCW 48.01.030 and RCW 48.30.040, is actionable under the CPA. *See RCW 19.86.090; Leingang v. Pierce County Medical Bureau, Inc.*, 131 Wn.2d 133, 149, 930 P.2d 288 (1997). Breach of this duty constitutes a per se violation of the CPA. *Kallevig*, 114 Wn.2d at 922-23. This Court should enforce these statutory provisions and hold that breach of the duty of good faith by an insurance adjuster is actionable under the CPA.

VI. CONCLUSION

This Court should adopt the arguments in this brief and resolve the issues accordingly.

Dated this 28th day of January, 2018.


for VALERIE D. MCOMIE


DANIEL E. HUNTINGTON

On Behalf of WSAJ Foundation

APPENDIX

RCW 19.86.020

RCW 19.86.090

RCW 19.86.170

RCW 19.86.920

RCW 48.01.020

RCW 48.01.030

RCW 48.01.060

RCW 48.01.070

RCW 48.30.010

RCW 48.30.040

RCW 19.86.020

Unfair competition, practices, declared unlawful.

Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

[**1961 c 216 § 2.**]

NOTES:

Hearing instrument dispensing, advertising, etc.—Application: RCW 18.35.180.

RCW 19.86.090

Civil action for damages—Treble damages authorized—Action by governmental entities.

Any person who is injured in his or her business or property by a violation of RCW 19.86.020, 19.86.030, 19.86.040, 19.86.050, or 19.86.060, or any person so injured because he or she refuses to accede to a proposal for an arrangement which, if consummated, would be in violation of RCW 19.86.030, 19.86.040, 19.86.050, or 19.86.060, may bring a civil action in superior court to enjoin further violations, to recover the actual damages sustained by him or her, or both, together with the costs of the suit, including a reasonable attorney's fee. In addition, the court may, in its discretion, increase the award of damages up to an amount not to exceed three times the actual damages sustained: PROVIDED, That such increased damage award for violation of RCW 19.86.020 may not exceed twenty-five thousand dollars: PROVIDED FURTHER, That such person may bring a civil action in the district court to recover his or her actual damages, except for damages which exceed the amount specified in RCW 3.66.020, and the costs of the suit, including reasonable attorney's fees. The district court may, in its discretion, increase the award of damages to an amount not more than three times the actual damages sustained, but such increased damage award shall not exceed twenty-five thousand dollars. For the purpose of this section, "person" includes the counties, municipalities, and all political subdivisions of this state.

Whenever the state of Washington is injured, directly or indirectly, by reason of a violation of RCW 19.86.030, 19.86.040, 19.86.050, or 19.86.060, it may sue therefor in superior court to recover the actual damages sustained by it, whether direct or indirect, and to recover the costs of the suit including a reasonable attorney's fee.

[2009 c 371 § 1; 2007 c 66 § 2; 1987 c 202 § 187; 1983 c 288 § 3; 1970 ex.s. c 26 § 2; 1961 c 216 § 9.]

NOTES:

Application—2009 c 371: "This act applies to all causes of action that accrue on or after July 26, 2009." [2009 c 371 § 3.]

Effective date—2007 c 66: See note following RCW 19.86.080.

Intent—1987 c 202: See note following RCW 2.04.190.

Short title—Purposes—1983 c 288: "This act may be cited as the antitrust/consumer protection improvements act. Its purposes are to strengthen public and private enforcement of the unfair business practices-consumer protection act, chapter 19.86 RCW, and to repeal the unfair practices act, chapter 19.90 RCW, in order to eliminate a statute which is unnecessary in light of the provisions and remedies of chapter 19.86 RCW. In repealing chapter 19.90 RCW, it is the intent of the legislature that chapter 19.86 RCW should continue to provide appropriate remedies for predatory pricing and other pricing practices which constitute violations of federal antitrust law." [1983 c 288 § 1.]

RCW 19.86.170

Exempted actions or transactions—Stipulated penalties and remedies are exclusive.

Nothing in this chapter shall apply to actions or transactions otherwise permitted, prohibited or regulated under laws administered by the insurance commissioner of this state, the Washington utilities and transportation commission, the federal power commission or actions or transactions permitted by any other regulatory body or officer acting under statutory authority of this state or the United States: PROVIDED, HOWEVER, That actions and transactions prohibited or regulated under the laws administered by the insurance commissioner shall be subject to the provisions of RCW 19.86.020 and all sections of chapter 216, Laws of 1961 and chapter 19.86 RCW which provide for the implementation and enforcement of RCW 19.86.020 except that nothing required or permitted to be done pursuant to Title 48 RCW shall be construed to be a violation of RCW 19.86.020: PROVIDED, FURTHER, That actions or transactions specifically permitted within the statutory authority granted to any regulatory board or commission established within Title 18 RCW shall not be construed to be a violation of chapter 19.86 RCW: PROVIDED, FURTHER, That this chapter shall apply to actions and transactions in connection with the disposition of human remains.

RCW 9A.20.010(2) shall not be applicable to the terms of this chapter and no penalty or remedy shall result from a violation of this chapter except as expressly provided herein.

[1977 c 49 § 1; 1974 ex.s. c 158 § 1; 1967 c 147 § 1; 1961 c 216 § 17.]

NOTES:

Radio communications: RCW 80.04.530.

Telecommunications: RCW 80.36.360.

RCW 19.86.920

Purpose—Interpretation—Liberal construction—Saving—1985 c 401; 1983 c 288; 1983 c 3; 1961 c 216.

The legislature hereby declares that the purpose of this act is to complement the body of federal law governing restraints of trade, unfair competition and unfair, deceptive, and fraudulent acts or practices in order to protect the public and foster fair and honest competition. It is the intent of the legislature that, in construing this act, the courts be guided by final decisions of the federal courts and final orders of the federal trade commission interpreting the various federal statutes dealing with the same or similar matters and that in deciding whether conduct restrains or monopolizes trade or commerce or may substantially lessen competition, determination of the relevant market or effective area of competition shall not be limited by the boundaries of the state of Washington. To this end this act shall be liberally construed that its beneficial purposes may be served.

It is, however, the intent of the legislature that this act shall not be construed to prohibit acts or practices which are reasonable in relation to the development and preservation of business or which are not injurious to the public interest, nor be construed to authorize those acts or practices which unreasonably restrain trade or are unreasonable per se.

[1985 c 401 § 1; 1983 c 288 § 4; 1983 c 3 § 25; 1961 c 216 § 20.]

NOTES:

Reviser's note: "This act" originally appears in 1961 c 216.

Short title—Purposes—1983 c 288: See note following RCW 19.86.090.

RCW 48.01.020

Scope of code.

All insurance and insurance transactions in this state, or affecting subjects located wholly or in part or to be performed within this state, and all persons having to do therewith are governed by this code.

[1947 c 79 § .01.02; Rem. Supp. 1947 § 45.01.02.]

RCW 48.01.030

Public interest.

The business of insurance is one affected by the public interest, requiring that all persons be actuated by good faith, abstain from deception, and practice honesty and equity in all insurance matters. Upon the insurer, the insured, their providers, and their representatives rests the duty of preserving inviolate the integrity of insurance.

[**1995 c 285 § 16**; 1947 c 79 § .01.03; Rem. Supp. 1947 § 45.01.03.]

NOTES:

Effective date—1995 c 285: See RCW **48.30A.900**.

"Insurance transaction" defined.

"Insurance transaction" includes any:

- (1) Solicitation.
- (2) Negotiations preliminary to execution.
- (3) Execution of an insurance contract.
- (4) Transaction of matters subsequent to execution of the contract and arising out of it.
- (5) Insuring.

[1947 c 79 § .01.06; Rem. Supp. 1947 § 45.01.06.]

RCW 48.01.070

"Person" defined.

"Person" means any individual, company, insurer, association, organization, reciprocal or interinsurance exchange, partnership, business trust, or corporation.

[1947 c 79 § .01.07; Rem. Supp. 1947 § 45.01.07.]

Unfair practices in general—Remedies and penalties.

(1) No person engaged in the business of insurance shall engage in unfair methods of competition or in unfair or deceptive acts or practices in the conduct of such business as such methods, acts, or practices are defined pursuant to subsection (2) of this section.

(2) In addition to such unfair methods and unfair or deceptive acts or practices as are expressly defined and prohibited by this code, the commissioner may from time to time by regulation promulgated pursuant to chapter **34.05** RCW, define other methods of competition and other acts and practices in the conduct of such business reasonably found by the commissioner to be unfair or deceptive after a review of all comments received during the notice and comment rule-making period.

(3)(a) In defining other methods of competition and other acts and practices in the conduct of such business to be unfair or deceptive, and after reviewing all comments and documents received during the notice and comment rule-making period, the commissioner shall identify his or her reasons for defining the method of competition or other act or practice in the conduct of insurance to be unfair or deceptive and shall include a statement outlining these reasons as part of the adopted rule.

(b) The commissioner shall include a detailed description of facts upon which he or she relied and of facts upon which he or she failed to rely, in defining the method of competition or other act or practice in the conduct of insurance to be unfair or deceptive, in the concise explanatory statement prepared under RCW **34.05.325**(6).

(c) Upon appeal the superior court shall review the findings of fact upon which the regulation is based de novo on the record.

(4) No such regulation shall be made effective prior to the expiration of thirty days after the date of the order by which it is promulgated.

(5) If the commissioner has cause to believe that any person is violating any such regulation, the commissioner may order such person to cease and desist therefrom. The commissioner shall deliver such order to such person direct or mail it to the person by registered mail with return receipt requested. If the person violates the order after expiration of ten days after the cease and desist order has been received by him or her, he or she may be fined by the commissioner a sum not to exceed two hundred and fifty dollars for each violation committed thereafter.

(6) If any such regulation is violated, the commissioner may take such other or additional action as is permitted under the insurance code for violation of a regulation.

(7) An insurer engaged in the business of insurance may not unreasonably deny a claim for coverage or payment of benefits to any first party claimant. "First party claimant" has the same meaning as in RCW **48.30.015**.

[2007 c 498 § 2 (Referendum Measure No. 67, approved November 6, 2007); **1997 c 409 § 107**; **1985 c 264 § 13**; **1973 1st ex.s. c 152 § 6**; **1965 ex.s. c 70 § 24**; 1947 c 79 § .30.01; Rem. Supp. 1947 § 45.30.01.]

NOTES:

Short title—2007 c 498: See note following RCW **48.30.015**.

RCW 48.30.040

False information and advertising.

No person shall knowingly make, publish, or disseminate any false, deceptive or misleading representation or advertising in the conduct of the business of insurance, or relative to the business of insurance or relative to any person engaged therein.

[1947 c 79 § .30.04; Rem. Supp. 1947 § 45.30.04.]

CERTIFICATE OF SERVICE

I hereby declare under penalty of perjury, under the laws of the State of Washington, that on the 28th day of January, 2019, I served the foregoing document by email to the following persons:

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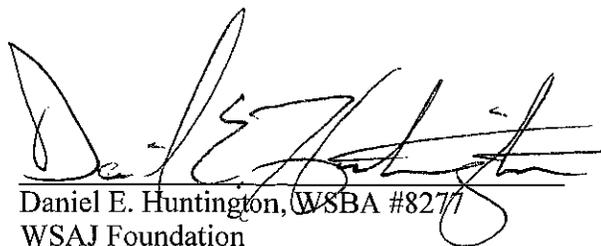
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