SUPREME COURT
OF THE STATE OF WASHINGTON

SEATTLE TUNNEL PARTNERS and WASHINGTON STATE DEPARTMENT OF TRANSPORTATION, Petitioners, v. GREAT LAKES REINSURANCE (UK) PLC, a foreign insurance company; et al., Respondents.	No. 100168-1 MOTION TO STRIKE STP/WSDOT'S JOINT REPLY

A. INTRODUCTION

Petitioners Seattle Tunnel Partners ("STP") and the Washington State Department of Transportation ("WSDOT") filed a joint reply to the respondent Insurers' opposition to their petitions for review. That reply is improper under RAP 13.4(d). The reply should be stricken and sanctions levied against both petitioners. RAP 10.7.

B. ARGUMENT

The central focus of petitioners' reply is footnote 1 to

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Insurers' opposition in which Insurers raise certain issues *contingently*. Opp. at 3 n.1. Insurers *oppose* review by this Court. They do not seek review affirmatively on any issue. Rather, if, and only if, review is granted by this Court on petitioners' issues, Insurers reserve the right to present *all* issues pertinent to this Court's review in the case.

Petitioners' assertions that Insurers seek "cross-review," Reply at 1, or "effectively concede" that the case involves issues of substantial public interest, *id.*, are demonstrably false.

Contrary to petitioners' assertion that Insurers failed to present "authority" supporting their effort to raise issues contingently, petitioners seemingly fail to appreciate the well-established rule of raising issues conditionally at the review stage in this Court.

The practice of a respondent to a petition for review raising issues conditionally is so commonly understood, it is addressed in the WSBA's treatise, *Appellate Practice Deskbook* (2d ed.), at 18-9. The conditional issue process makes sense. A

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respondent obviously wants this Court to *deny review* of a Court of Appeals opinion in its favor. If, and only if, this Court grants review does a respondent seek review of other issues. In the compressed 5,000 words permitted for an answer to a petition for review, RAP 18.7(c)(1), there is little opportunity to address such conditional issues in detail because the focus of a respondent's effort in its answer is addressed to persuading the Court not to grant review.

Historically, as Insurers noted in their opposition at 3 n.1, this Court has recognized on *numerous* occasions that conditional issues may be considered on review by this Court. *See, e.g., Lewis River Golf, Inc. v. O.M. Scott & Sons,* 120 Wn.2d 712, 725, 845 P.2d 987 (1993); *State v. Grott*, 195 Wn.2d 256, 265, 458 P.3d 750 (2020) (recognizing that issues may be raised conditionally); *Gerlach v. Cove Apts., LLC,* 196 Wn.2d 111, 119 n.4, 471 P.3d 181 (2020) (same). Only recently in *Schwartz v. King County* (Cause No. 99359-9), this Court rejected an effort by a petitioner to prevent a respondent from

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presenting issues raised contingently in the answer to the petition for review.

Further, it is a long-standing common law principle that with regard to review of a summary judgment ruling, this Court may sustain the ruling on any legal basis supported in the record. *Martinez-Cuevas v. DeRuyter Bros. Dairy, Inc.*, 196 Wn.2d 506, 514, 475 P.3d 164 (2020). Although this rule usually applies to the initial review of a trial court decision, there is no reason that it should not apply with equal vigor to this Court's review of a Court of Appeals reversal of a trial court summary judgment order.

The petitioners also ignore the general imperative in the rule and case law favoring resolution of the issues on the merits. RAP 1.2(a) clearly so provides when it states: "These rules will be liberally interpreted to promote justice and facilitate the decision of cases on the merits." As Professor Tegland cogently observed: "The goal of the review process is to reach the merits

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of the case." 2A Karl Tegland, *Wash. Prac.* (8th ed.) at 66.[1] Allowing a party to raise issues contingently advances that policy.

Apart from their mistaken understanding of contingent presentation of issues to this Court by respondents to a petition for review, petitioners blatantly ignore the express language of RAP 13.4(d) regarding replies. Unsurprisingly, they do not cite that language anywhere in their improper reply. RAP 13.4(d) states:

> (d) Answer and Reply. A party may file an answer to a petition for review. A party filing an answer to a petition for review must serve the answer on all other parties. If the party wants to seek review of any issue that is not raised in the petition for review, including any issues that were raised but not decided in the Court of Appeals, the party must raise

[1] It is well-established, consistent with the principle of RAP 1.2(a), that this Court will even exercise its inherent authority and review issues if necessary for a proper decision, *Blaney v. Int'l Ass'n of Machinists & Aerospace Workers Dist. No. 160*, 151 Wn.2d 203, 214, 87 P.3d 757 (2004), or if necessary to serve the ends of justice. *Tuerk v. State, Dep't of Licensing*, 123 Wn.2d 120, 124, 864 P.2d 1382 (1994). Thus, this Court should consider *all* issues when writing its opinion in this case.

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> those new issues in an answer. Any answer should be filed within 30 days after the service on the party of the petition. *A party may file a reply to an answer only if the answering party seeks review of issues not raised in the petition for review*. A reply to an answer should be limited to addressing only the new issues raised in the answer. A party filing any reply to an answer must serve the reply to the answer on all other parties. A reply to an answer should be filed within 15 days after the service on the party of the answer. An answer or reply should be filed in the Supreme Court. The Supreme Court may call for an answer or a reply to an answer.

(emphasis added.) Specifically, Insurers *do not seek review,* but oppose it. Replies under the rule are confined to situations where an answering party actually asks the Court to affirmatively grant review on issues. The Insurers here do not seek review by this Court. No reply is appropriate.

C. CONCLUSION

This Court should strike petitioners' reply and levy sanctions against both for filing an improper brief. RAP 10.7.

This document contains 985 words, excluding the parts of the document exempted from the word count by RAP 18.17.

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DATED this 22nd day of November, 2021.

Respectfully submitted,

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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: November 22, 2021, at Seattle, Washington.

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