Supreme Court No: 100278-5

Court of Appeals No: 55168-3-II (Division 2)

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

Tacoma South Hospitality LLC, and all others similarly situated throughout Washington State and the United States of America

Petitioner,

v.

National General Insurance Company, an insurance company and Integon National Insurance Company, an insurance company

Respondents.

PETITION FOR REVIEW

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I. INTRODUCTION

Washington law imposes liability on a driver who damages a Washington citizen's property. Washington law also requires a driver to carry at least $10,000 of insurance to cover that driver's damage to a Washington citizen's property. RCW 46.30.020 & 46.29.090. The purpose of these laws is to protect the Washington citizen whose property is damaged.

In this case, a driver crashed into and damaged the plaintiff hotel owner's property. No compensation has been paid to the hotel owner to date.

The driver's insurance company did not dispute the resulting damage was more than its policy's $10,000 limit. Nor did it dispute that its policy covered that damage up to its $10,000 policy limit. Instead, it refused to pay plaintiff that $10,000 policy limit unless plaintiff released the driver from liability for plaintiff's remaining damage **above** $10,000.

The insurance company stated it demanded that release because its standard company practice is to refuse to pay the

victim of its insured's misconduct unless the victim releases that insured from liability **above** the policy limits the insured chose to buy.

The insurance company's refusal to pay the $10,000 it owes unless plaintiff releases the driver from liability for the property damage plaintiff suffered **above** $10,000 fits the dictionary definition of "extortion". Or at least, as a matter of Washington law, is an unfair practice in violation of RCW 19.86.020 ("unfair ... acts or practices in the conduct of any trade or commerce are hereby declared unlawful"). Insurers make the same unfair demands to thousands of other innocent tort victims ever year. The hotel owner is acting as a private attorney general to protect **all** Washington citizens.

The plaintiff hotel owner filed a motion for summary judgment on the insurance company's violation of RCW 19.86.020. The defendant insurance company's response did not dispute the material facts entitling plaintiff to judgment as a matter of law. As the legal discussion later in this Petition

confirms, the superior court's July 10, 2020 denial of summary judgment was therefore a dipositive error of law.

The insurance company filed its own summary judgement motion at a later date which the superior court granted. That was a legal error because plaintiff's prior motion had already established plaintiff was entitled to judgment as a matter of Washington law.

This Petition for Review should be granted because the Court of Appeals' published decision rests on three fundamental errors of Washington law.

First, the Court of Appeals decision completely ignored the fundamental principle of Washington law that a plaintiff's summary judgment motion **must** be granted when the defendant's opposition raises no genuine issue as to the material facts entitling plaintiff to judgment as a matter of law. Upholding this fundamental principle of Washington law is dispositive here because it foreclosed the superior court's subsequently entertaining and granting the insurance company's later motion.

Enforcing this fundamental principal of Washington law is also important to our state's court system as a whole – the purpose of summary judgments is to promptly clear court dockets of congestion as soon as a party establishes their entitlement to judgment as a matter of law.

Second, the Court of Appeals decision put the cart before the horse. Instead of addressing the threshold (and dispositive) fact that the trial court committed legal error by denying plaintiff's motion for judgment, the Court of Appeals held that plaintiff's appealing that trial court error was frivolous and sanctionable because plaintiff did not **also** designate certain Clerks Papers regarding the insurance company's **later** motion which the superior court was foreclosed from entertaining or granting under the fundamental (and dispositive) principle of Washington law that plaintiff's prior summary judgment motion **must** have been granted. Not taking a step (or not incurring an expense) that would be irrelevant under the proper application of Washington law is not "frivolous".

Third, the Court of Appeals decision also grafts new legal requirements onto class certification. Class certification requires only that the lead plaintiff's **claim** be the same as the claim asserted by the class as a whole. CR 23(a)(3). Instead, the courts below held that meritorious class members can be denied access to the court based solely on the **facts** specific to the class representative. "[C]lass actions are a critical piece of the enforcement of consumer protection law…. Without class actions, many meritorious claims would never be brought." *Scott v. Cingular Wireless*, 160 Wn.2d 843, 853, 161 P.3d 1000, (2007). So, again, the lower courts avoided answering a question of widespread importance to Washington citizens by putting the cart before the horse. If this is not remedied, thousands of Washington citizens will have their claims extinguished by the statute of limitations without the facts of their case ever given any consideration.

II. IDENTITY OF PETITIONER & RESPONDENT

Petitioner Tacoma South Hospitality, LLC ("Tacoma South") owns a small hotel in Tacoma, Washington. It was the plaintiff below.

Respondents were the driver's insurer (defendants below): Integon National General Insurance and National General Insurance Company (collectively "the insurance company").

III. COURT OF APPEALS DECISION

The Court of Appeals' September 8, 2021 decision is attached as Appendix A.

IV. THE THREE LEGAL ISSUES PRESENTED FOR REVIEW

The plaintiff hotel owner respectfully asks this Court to review three issues of law:

1. When an insurance company's insured damages a Washington citizen's property, and the insurance company refuses to pay that Washington citizen the dollar amount that its policy does cover (its policy limit) unless that Washington citizen releases the insured from liability for amounts its policy

does not cover (the remaining property damage above policy limits), is that an unfair act or practice by the insurance company under RCW 19.86.020? *The property damage victim in this case respectfully submits the answer is "yes".*

2. When the insurance company's response to a Washington citizen's motion for summary judgment on the above legal issue established no genuine dispute of material fact to defeat the Washington citizen's entitlement to judgment as a matter of law, is it frivolous and sanctionable for that Washington citizen to appeal the trial court's wrongful denial of summary judgment without **also** incurring the expense of paying for the record with respect to a subsequent motion filed by the insurance company **after** that wrongful denial? *The property damage victim in this case respectfully submits the answer is "no".*

3. Should thousands of meritorious claims be forestalled from being heard on the basis of the facts specific to the original plaintiff when there would have been substitute plaintiffs

available to carry on the class action if the case had been handled properly under the court rules? *The putative class representative respectfully submits the answer is "no".*

V. STATEMENT OF THE CASE

Although the account of the facts relevant to this Petition for Review and the procedural history of the case given by the Court of Appeals is largely correct, there are some misstatements of the facts as contained in the court records and omission of other facts. Appx.A at 2-6. The statements of facts ignored that two eye-witnesses testified, and recorded this at the time of the accident, that the tortfeasor, Cristian Altamirano (Altamirano), was driving under the influence of alcohol at the time of the accident and Altamirano never denied being intoxicated at the time of the accident. CP at 328 and 330. Second, no employee or insurance adjuster of the insurance company, ever stated that it believed the amount of snow accumulated during the snowstorm was unreasonable or even relevant to its evaluation. The trial court never found that there was any relevant

accumulation of snow. Third, there is eye-witness testimony recorded at the time of the accident that Altamirano did not lose control of his vehicle but instead entered the driveway at an excessive speed. CP at 330.

Additionally in the statement of the case, the Court of Appeals does not give a full description of the procedural posture of Tacoma South's motion for summary judgment. Tacoma South's motion for summary judgment was heard and decided on an earlier date than the insurance company's motion. CP at 339-40 and 344-45. The motion filed was dispositive regarding the RCW 19.86.020 claim as to the insurance company's liability towards Tacoma South, namely all five elements of the *Hangman* test were pled and proven. Appx.A at 6. The **amount** of damages was necessarily reserved because this was a class action and class actions have separate hearings on liability and damages. Because the trial court wrongly reserved ruling on class certification until a hearing on liability toward the primary plaintiff was decided, there could not be a hearing beyond this level. CP at 91-92.

VI. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. The Lower Courts Ignored CR 56 by Denying Tacoma South's Motion for Summary Judgment After Tacoma South Demonstrated There Were no Disputes as to Material Facts.

The failure of the lower courts to grant summary judgment when there was not dispute as to the material facts is in conflict with the law clearly established by this Court justifying review under RAP 13.4(b)(1).

Unfair practices are those undertaken by businesses which are likely to cause injury to individuals which are not reasonably avoidable by the individuals themselves and not outweighed by countervailing benefits to those individuals. *Klem v. Washington Mutual Bank*, 176 Wn.2d 771, 787, 295 P.3d 1179 (2013).

In this case, the insurance company refused to pay out amounts it indicated it would be liable to payout unless the hotel released Altamirano for all damages the hotel incurred above Altamirano's policy limits. CP. at 247-48. The justification for

this demand was that it was standard industry practice. Appx.A at 3. This standard practice is unfair since it would clearly damage tort victims by not allowing them to be made whole. *See Leingang v. Pierce County Medical Bureau*, 131 Wn.2d 133, 141 and 149, 930 P.2d 288 (1997). The hotel could avoid this additional demand since the accident had already occurred and it could not control who damaged (or insured those who damaged) its property. Finally, there is no benefit to the hotel to accepting this demand.

This practice is basically extortion since it uses the threat of not performing a reasonable and required action (paying out the hotel's claim) to try and extract a commercial benefit. See RCW 9A.04.110. The insurance company took this action to bolster is reputation. In fact, it stated that it took this action because insureds prefer insurers who take this hard line. CP at 34.

CR 56 directs courts to enter summary judgment whenever a party proves it is entitled to judgment based on the undisputed

issues of material fact. Tacoma South proved and the insurance company never contested any of the following facts. 1) Altamirano damaged the hotel's property. 2) The hotel suffered damages over $10,000. 3) Altamirano's insurance policy covered $10,000 in damages. 4) The purpose of the insurance policy was to compensate entities injured by Altamirano as required by RCW 46.30.020 and 46.29.090. CP at 238-41. 5) The only real justification given for demanding the release prior to the lawsuit was that it was the insurance company's standard practice. CP at 250. This is extortion and therefore an unfair business practice under RCW 19.86.020.

Tacoma South has also proven the other elements of an RCW 19.86.020 claim as required by *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 719 P.2d 531 (1986). Element 2 requires that a transaction occur in the course of business. The insurance company has a Washington State business license to sell insurance. CP at 259 and 267.

Insurance companies regularly engage in claim settlement discussion.

Element 3 requires that an action, "(3)(a) [i]njured other persons; (b) had the capacity to injure other persons; or (c) has the capacity to injure other persons." RCW 19.86.093(3). The insurance company by its own admission has undertaken the same behavior towards other third-party property damage claimants. CP at 276-77. Thus, this practice either injured other persons or has the capacity to injure other persons.

Element 4 and 5 requires that the business practice cause injury to the plaintiff. In the present case there are two obvious injuries. In *Sorrel v. Eagle Healthcare. Inc*. 110 Wn.App. 290, 38 P.3d 1024 (2002) the plaintiff brought a CPA claim against the defendant for delaying reimbursement for 14 days longer than allowed by statute. *Sorrel* at 293-94. The *Sorrel* Court held that "[m]onetary damages are not necessary to establish injury, a mere delay in use of property or receiving payment is an injury under the CPA." *Id*. at 298. In this case, the insurance company

is holding the insurance proceeds hostage to pressure Tacoma South at a time when Tacoma South needed the money into giving up part of its claim for nothing. It took the insurance company 130 days and a lawsuit to get to the factually justified offer. CP at 236 and 108. In *Sorrel* it only took 14 days.

Second, under *Panag v. Farmers Ins. Co. of Washington*, 166 Wn.2d 27, 204 P.3d 885 (2009), there is sufficient injury under RCW 19.86.020 if the entity needs to consult an attorney to determine if a practice is fair or legitimate. Tacoma South has proven that this happened. CP at 306.

B. Washington Law and Regulations Support the Conclusion that the Insurer's Practice is Unfair.

The insurance commissioner has defined unfair practices in claims settlements which support that the insurance company violation RCW 19.86.020. WAC 284-30-330 requires that whenever an insurer receives a claim, before it can deny the claim or make a compromise offer, it must conduct a reasonable investigation of the accident and then explain the laws and facts

which justify its decision. WAC 284-30-330(4) and (13). The insurer has 30 days to complete its investigation. WAC 284-30-370. Once liability is reasonable clear, the insurer must pay the claim. WAC 284-30-330(6). As was stated by the Court of Appeals, the reason given for demanding the release was that the property damage exceeded the policy limits. Appx.A at 3. Furthermore, the time between the accident and the offer to pay in exchange for release was 14 weeks, clearly unreasonable in light of WAC 284-30-370. CP at 236 and 250.

In *Folweiler Chiropractic, PS v. Am. Family Ins. Co.*, 5 Wn.App.2d 829, 429 P.3d 813 (2018) the court held that absent evidence of a reasonable investigation, the application of a standard practice which effectuates a partial settlement violates WAC 284-30-330(3) and (4). *Folweiler* at 839. In this case, the only investigation conducted by the insurance company was to request images and an estimate of the damage. The insurance company never investigated the cause of the underlying tort. The insurance company never asked to speak with the witnesses to

the accident. CP at 328 and 330. A court is required to hear both sides in tort actions before deciding liability. An investigation by an insurer must do the same if its investigation is reasonable under WAC 284-30-330(4).

In *Truck Ins. Exchange v. Vanport Homes, Inc*., 147 Wn.2d 751, 58 P.3d 276 (2002) this Court held that an insurer must give a legal affirmative defense and the facts justifying it at the time that a denial or partial settlement offer is made. Recitation of policy provision is insufficient to comply with WAC 284-30-330(13). *Truck* at 757. Thus, citing a duty to defend and the policy limits are not a sufficient justification for the demand of the release since they are just a recitation of policy provisions. Additionally, in this case, the insurance company did not raise any recognized affirmative defense to justify the release. CP at 250.

Instead of following the legal precedent, the trial court premised its holding on the error of law that the behavior of the insurer during the settling the claim is irrelevant to RCW

19.86.020. Instead, an RCW 19.86.020 claim under WAC 284-30-330 is dependent on a claimant first establishing unlimited liability. The court inferred that Altamirano must have told the insurance company that he was not at fault and that the insurance company behaved as it did because of that conversation. See II VRP at 10 and 14. But that presumes that the insurance company's stated reasons were mere pretexts. No employee or adjuster at the insurance company ever said its explanations were a pretext.

Instead, the court should have treated the evidence similarly to how courts evaluate debt collection violation. The evidence which is relevant to a claim settlement practices violation is the actual communication between the claimant and the insurer.

The insurance company has argued that pursuant to *Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 715 P.2d 1133 (1986), Tacoma South's claim fails as a matter of law. However, *Tank* is obsolete law with respect to whether a third-party

claimant can pursue an RCW 19.86.020 claim against adversarial insurance companies. *Tank* was decided under the CPA rubric instituted by *State v. Reader's Digest Ass'n*, 81 Wn.2d 259, 501 P.2d 290 (1972) which was later overturned in *Hangman*. The first time this Court analyzed whether a violation of the WACs is a violation of the CPA under the *Hangman* rubric occurred in *Industrial Indem. Co. of the Northwest, Inc. v. Kallevig*, 114 Wn.2d 907, 792 P.2d 520 (1990). In that case the Court held, "[T]he Legislature expressly provided that violations of the insurance regulations are subject to the CPA." *Kallevig* at 922.

C. *Stephens* Holds that the Specifics of an Underlying Tort is not Material to Whether a Violation of RCW 19.86.020 Occurred.

This case has many similarities to *Panag/Stephens* in that an insurance company has adopted a business practice which may boost its profits, but which is fundamentally unfair. In *Panag* the unfair practice was that insurance companies were hiring debt collectors to process subrogation claims in hopes to

pressure potential tortfeasors into paying money. These recoveries would reduce the cost of the premiums paid by their insureds. One of the plaintiffs in that case was counter-sued on the subrogation claim and confessed to the full amount requested in the wrongful collection efforts. *Stephens v. Omni Ins. Co.*, 138 Wn.App. 151, 184, 159 P.3d 10 (2007). Regardless, the RCW 19.86.020 claim was allowed to proceed separately. So, the merits of the underlying tort were irrelevant to whether the insurers violated RCW 19.86.020 with respect to adverse parties.

Although the insurance company wishes to treat this case as a tort case it is not. It is a claim under RCW 19.86.020. This statute applies to all insurers and imposes certain minimum standards of conduct towards both insureds and third-party claimants. RCW 19.86.170. The specifics of the underlying tort do not affect whether the insurance company violated RCW 19.86.020. Only the communication during the settlement negotiations is relevant to whether that communication complied with RCW 19.86.020 and WAC 284-30-330. That

communication did not, it was instead extortive. It gave no reasonable justification for the demanded release. The insurance company was merely using the leverage it had over Tacoma South, namely that it had the money the hotel needed to repair its business, to extract value out of the hotel. Accordingly, this Court should grant this Petition for Review as this practice is of similar import and scope to previously granted petitions for review.

D. The Court of Appeals Ignored RAP 1.2(a) and 9.12 and Created a Division Split by Refusing to Consider Tacoma South's Appeal of Its Motion for Summary Judgment.

The appellate court's decision to ignore Tacoma South's appeal of the denial of its motion for summary judgment conflicts with the law set out by this Court and the law as applied by Division I justifying review under RAP 13.4(b)(1)-(2).

RAP 1.2(a) states that, "These rules will be liberally interpreted to promote justice and facilitate the decision of cases on the merits. Cases and issues will not be determined on the

basis of compliance or noncompliance with these rules…" However, the Court of Appeals determined the whole case on a potential violation of the rules on only one assignment of error. Appx.A at 11. At most, the rules allow the Court of Appeals to only reject the unperfected assignment of error, not the entire appeal.

RAP 9.12 states that a court of appeals can only review a summary judgment motion based on the reasoning of the court in that motion. It cannot rely on later filings. But the Court of Appeals in this case did exactly that. Tacoma South's motion for summary judgment was heard and decided on an earlier date than the insurance company's motion. The insurance company's motion could have no bearing on whether the trial judge properly denied Tacoma South's **prior** motion for summary judgment. And if the trial court had granted summary judgment, the insurance company's motion would have been denied at moot under res iudicata. *St. Joseph Hosp. and Health Care Center v. Department of Health*, 125 Wn.2d 733, 744, 887 P.2d 891 (1995)

("decision(s) normally can be changed only through the appellate process.")

There was no finding by the Court of Appeals that the record on Tacoma South's motion was lacking. There is a verbatim report of proceedings so this Court can know exactly the facts the trial judge considered and the arguments made. *See Yorkston v. Whatcom County*, 11 Wn.App. 2d 815, 824, 461 P.3d 392 (2020). The evidence referred to in the verbatim report are all included. Tacoma South's motion demonstrate that all five *Hangman* elements were **pled and proven**. Appx.A at 6.

The appellate court's reference to the fact that Tacoma South's motion reserved the issue of the amount of damages is irrelevant to the dispositive nature of the motion. This suit is in reality a class action despite the fact that the trial judge wrongly delayed class certification. Almost every class action bifurcates the hearing on liability and the hearing on damages. This is because liability and damages are distinct concepts – especially in class actions. *See Sitton v. State Farm Mut. Auto. Ins. Co.*, 116

Wn.App. 245, 259, 63 P.3d 198, (2003). As such, Tacoma South continued to follow the protocol established for a class action. Additionally, RCW 19.86.020 case law clearly states that no amount of damages needs to be proven, merely that there was some injury to the plaintiff's business or property. *Panag* 166 Wn.2d at 57-58. Thus, Tacoma South's motion was dispositive and preclusive.

Division II's decision also conflicts with Division I's treatment of the issue. In *McGovern v. Smith*, 59 Wn.App. 721, 801 P.2d 250 (1990) the defendant had summary judgment entered against him on an issue and later there was a trial at which judgment was entered against him. *McGovern* at 734. The defendant then filed an appeal of the motion for summary judgment, but did not appeal the trial's findings or judgment. *Id*. The *McGovern* court concluded that this defect was not material and considered the merits of the defendant's appeal of the motion for summary judgment. *Id*. at 735. Since the *McGovern* court decided that the summary judgment motion should have been

decided in the defendant's favor, it vacated the judgment of the trial which had not been appealed. *Id*. at 737.

This Court should confirm *McGovern* as the correct approach under Washington law pursuant to RAP 1.2(a) and RAP 9.12 and ensure the law is applied uniformly throughout Washington.

E. The Lower Courts Significantly Altered Washington Law by Holding that a Trial Court Could Make Class Certification Dependent on the Individual Factual Merits of the Original Plaintiff.

The appellate court's decision on the issue of class certification departs from the law clearly set out by this Court justifying review under RAP 13.4(b)(1). This issue also impacts a significant number of Washington citizens justifying review under 13.4(b)(4).

The lower court's failure to follow clearly established law not only affects Tacoma South, but thousands of other Washington citizens. "[C]lass actions are a critical piece of the enforcement of consumer protection law…. Without class

actions, many meritorious claims would never be brought." *Scott v. Cingular Wireless*, 160 Wn.2d 843, 853, 161 P.3d 1000 (2007). This lawsuit would be a class action if the lower courts had properly applied Washington law to the summary judgment motion or the motion for class certification.

CR 23 allows lawsuits to proceed as class actions. "One or more members of a class may sue or be sued as representative parties on behalf of all…" CR 23(a). "Washington courts liberally interpret CR 23 because the 'rule avoids multiplicity of litigation, 'saves members of the class the cost and trouble of filing individual suits[,] and ... also frees the defendant from the harassment of identical future litigation.'"" *Weston v. Emerald City Pizza, LLC*, 137 Wn.App. 164, 168, 151 P.3d 1090 (2007) (alterations in original) (quoting *Smith v. Behr Process Corp.*, 113 Wn.App. 306, 318, 54 P.3d 665 (2002) (quoting *Brown v. Brown*, 6 Wn.App. 249, 256-57, 492 P.2d 581 (1971))). The value of class actions is in "conserving time, effort and expense;

providing a forum for small claimants; and deterring illegal activities." *Sitton* at 257.

The court rules only requires that a class representative have a claim which is in common with the claim assert by the class as a whole. CR 23(a)(3). However, the Court of Appeals interpreted *Sheehan v. Cent. Puget Sound Reg'l Transit Auth.*, 155 Wn.2d 790, 123 P.3d 88 (2005), to mean that class certification can be made dependent on the original plaintiff in a potential class action first winning its case on its individualized facts. However, this reading is not an accurate reflection of *Sheehan* or Washington law and ignores the procedural posture of the respective cases and the holding of *Washington Educ. Ass'n v. Shelton School Dist. No. 309*, 93 Wn.2d 783, 613 P.2d 769 (1980) which is cited as the basis for the holding in *Sheehan*.

Washington Educ. Ass'n did hold that certain dispositive motions, could be heard prior to certifying class, namely motions to demonstrate that "there was no claim upon which relief could be granted to ***any conceivable class***; i.e., there was no cause of

action as a legal, rather than as a factual, matter." *Washington Educ. Ass'n* at 789 (emphasis added). In *Sheehan,* the dispositive motion was labeled a motion for summary judgment, but the question decided was whether anyone could assert that the "vehicle taxes were unconstitutional and statutorily unauthorized…" as a matter of law. *Sheehan* at 795. There were no individualized questions of fact analyzed in that dispositive motion. Similarly, in *Wright v. Schock*, 742 F.2d 541 (9th Cir. 1984), a district court held a summary judgment motion on the limited issue of whether banks and title companies could be liable for the alleged transactions under certain statutes as a "matter of law". *Wright* at 542. This logic does not apply to this case.

In this case, the insurance company brought a motion to dismiss Tacoma South's case as a matter of law. Tacoma South won that motion. CP at 42. Thus, if Tacoma South could be granted relief, there was a class which could also. Tacoma South actually followed the best practices in class actions by waiting

until it survived a motion to dismiss to file for class certification to avoid wasting judicial resource. It was a clear legal error to not certify the class.

Furthermore, the Verbatim Report of Proceedings makes clear that the trial judge was directing the summary judgment motions towards the underlying tort. I VRP at 16-18.

The new procedure for class certification adopted by the lower courts in this case will have two main deleterious effects. First, class actions will be more cumbersome now that a class representative will need to complete its case before starting on the class action thus doubling the judicial resources and time needed. This undermines the goal of "avoid[ing] multiplicity of litigation". *Weston* at 168. Second, many deserving victims will effectively lose their cases due to statutes of limitations expiring during the pendency of the class representative's case. This will prevent "many meritorious claims" from being evaluated. *Scott* at 853.

Washington State has long held that claims by private citizens under RCW 19.86.020 are meant to function as if brought by the attorney general. *Panag* at 46. See also *Anhold v. Daniels*, 94 Wn.2d 40, 46, 614 P.2d 184 (1980). The claims are meant to protect **all** Washington citizens from unfair business practices. Limiting the evaluation of class certification to the merits of a single individual eviscerates this critical purpose. Even if the original plaintiff is found to be lacking in some regard, most courts will allow the plaintiff some time to procure a substitute plaintiff. *Stephens* at 185.

Even if Tacoma South did not have an individualized factual right to remedy, another member of the class could have that right and would be wrongly denied relief by the simple accident of who the original plaintiff was. In this case, this will effectively deny thousands of potentially meritorious claims due to the statute of limitations. As such this Court should accept this Petition for Review.

VII. CONCLUSION

As outlined above, the appellate court's decision conflicts with previous holdings of this Court (RAP 13.4(b)(1)) decision of other divisions (RAP 13.4(b)(2)) and involves an issue of substantial public impact (RAP 13.4(b)(4)). The hotel owner in this case respectfully asks this Court to grant its Petition for Review so this Court can consider briefing on the merits submitted by the parties and amici addressing the three legal issues presented in Part IV, and then issue a clear ruling to establish for those living and doing business in our State

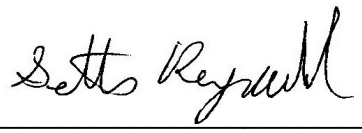
(1) whether the standard insurance company practice at issue in this case is an unfair act or practice under RCW 19.86.020, and

(2) whether it frivolous and sanctionable to appeal the wrongful denial of summary judgment without also incurring the expense of paying for the record on a subsequent motion that would have been foreclosed if the preceding summary judgment motion had not been wrongfully denied, and

(3) whether a class action can be made dependent on the class representative first winning its case.

RAP 18.17(b) & (c)(10) Word Limit Certification: "I certify that this petition for review contains 4999 words (less than 5000), excluding words in appendices, title sheet, table of contents, table of authorities, certificate of compliance, certificate of service, signature blocks, and pictorial images."

Respectfully submitted October 8, 2021



Seth M. Reynolds WSBA #44160
Attorney for Tacoma South

Declaration of Service

Pursuant to RCW 9A.72.085, I declare under penalty of perjury and the laws of the State of Washington that: On the date below, I delivered a true and correct copy of the foregoing via the method indicated below to the following party(ies) at their address(es) listed:

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[ ] Via hand delivery
[ ] Via US mail, postage prepaid first class
[ ] Via facsimile
[x] Via Div. 2 electronic service

Dated October 8, 2021.

Seth M. Reynolds WSBA #44160
Attorney for Petitioners

Filed
Washington State
Court of Appeals
Division Two

September 8, 2021

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

TACOMA SOUTH HOSPITALITY, LLC, and all others similarly situated throughout Washington State and the United States of America, Appellants, v. NATIONAL GENERAL INSURANCE COMPANY, an insurance company, and INTEGON NATIONAL INSURANCE COMPANY, an insurance company, Respondents.	No. 55168-3-II PUBLISHED OPINION

CRUSER, J. – Tacoma South Hospitality, LLC (Tacoma South) filed an action under the Consumer Protection Act (CPA) against Integon National Insurance Company and National General Insurance Company (collectively Integon) after Integon's insured collided into a pylon sign advertising Tacoma South's hotel. Tacoma South argues that the trial court erred in dismissing its CPA claim by denying its motion for partial summary judgment and granting Integon's motion for summary judgment. Tacoma South alleged that the insurers engaged in an unfair claims settlement practice by conditioning payment on Tacoma South's agreement to release the insured from liability for excess damages. In addition, Tacoma South argues that the trial court abused its discretion when it denied its motion seeking recusal of the trial court judge, delayed ruling on class

certification until after it decided Integon's motion for summary judgment, and when it denied its motions to compel discovery.

We hold that the trial court did not abuse its discretion when it denied the motion seeking recusal. We further hold that because Tacoma South has not provided an adequate record for this court to review the trial court's order granting Integon's motion for summary judgment, we cannot review that error. Therefore, we do not reach Tacoma South's assignment of error regarding the trial court's order denying its motion for partial summary judgment. Finally, we hold that the trial court did not abuse its discretion when it deferred ruling on Tacoma South's motion for class certification, or when it denied Tacoma South's motions to compel discovery pending the parties' motions for a protective order.

Accordingly, we affirm.

FACTS

I. Collision and Settlement Negotiation

Cristian Altamirano was a guest staying in a hotel owned by Tacoma South. On the day of the collision, there had been a heavy snowfall, and the parking lot of the hotel was covered in accumulated ice and snow. As Altamirano pulled into the hotel parking lot, he lost control of his car and collided into the hotel's pylon sign.

Altamirano was insured by National General Insurance Company, which is underwritten by its member, Integon National Insurance Company. Altamirano's policy with Integon carried a property damage policy limit of $10,000.

Tacoma South submitted a repair estimate of $12,769 for the damaged sign to Integon. An adjuster for Integon responded by informing Tacoma South that there was a policy limit issue

because the property damage coverage was limited to $10,000, and he advised Tacoma South to contact its insurer so that Integon could arrange a settlement with Tacoma South's insurer. Tacoma South declined to involve its own insurer, stating that its insurer advised it to deal directly with Integon.

Thereafter, Integon offered Tacoma South $10,000 to pay the claim. Before it would issue a check, Integon required Tacoma South to sign a liability release as to any further claims against either Integon or Altamirano. When Tacoma South indicated that it would not sign the release, Integon explained that it could not pay more than $10,000 because of the policy limit.

Tacoma South retained an attorney to handle the claim and negotiations moving forward. Through its attorney, Tacoma South asserted that it did not seek more than $10,000 from Integon, but because Tacoma South believed Altamirano was liable, it did not want to release him from liability for damages above policy limits. Integon explained that because it owed a duty to its insured, it would not agree to issue its payment without the release. In addition, Integon clarified that requiring the release was a standard practice in settling claims that exceed property damage policy limits. An excerpt from Integon's claims handling manual instructs adjusters to require releases in property damage policy limits cases.

In two emails sent during the settlement discussion, Integon offered to contact Altamirano to determine whether Altamirano would agree to pay the claimed damages above the policy limits. Tacoma South did not directly respond to Integon's proposals to settle the matter by making an arrangement with Altamirano for the excess damages. Instead, Tacoma South declined to sign the release and filed suit alleging that Integon violated the CPA. After Tacoma South filed the CPA

suit, Integon contacted Tacoma South confirming that Altamirano agreed to pay excess damages and was hoping to devise a payment schedule.

II. PROCEDURAL HISTORY

During the pretrial proceedings, Tacoma South filed a motion to compel discovery after Integon objected to several of Tacoma South's discovery requests. Integon responded to the first motion by highlighting the need for a protective order. The trial court deferred ruling on that motion until the parties conferred regarding the scope of the discovery requests, and it directed the parties to provide the court with a stipulated protective order, with any further disagreements regarding scope to be submitted electronically without the need for a hearing.

The parties were unable to agree to a stipulated order and Tacoma South renewed its motion to compel. The trial court denied Tacoma South's motion "at this time," and ordered Integon to file a motion for a protective order within one week of its ruling. Clerk's Papers (CP) at 186. Integon filed the motion as directed, and the trial court granted a protective order.[1]

Tacoma South filed a motion seeking class certification under CR 23. It asserted that every individual or entity involved in an auto collision with an Integon insured would be a putative class member given Integon's admission that it requires releases as a standard practice.

During the hearing on the motion for class certification, the trial court interrupted Tacoma South's argument and asked the parties whether it would make sense for the court to reserve ruling on the motion for class certification until Integon filed its motion for summary judgment. Tacoma South objected to the trial court's proposal, while Integon agreed that it would be appropriate for

[1] Integon's motion for a protection order and the trial court's order granting the protective order are not designated in the clerk's papers and are not a part of our record.

the court to defer its ruling. The trial court acknowledged that "this is a case that potentially would be certified for a class action," but because Integon disputed the underlying claim, it would reduce the cost of litigation to first address a motion for summary judgment. Verbatim Report of Proceedings (VRP) (Feb. 7, 2020) at 10. Tacoma South expressed concern that a deferred decision on class certification would prevent its case from moving forward because Integon could delay filing its motion. The trial court responded that it anticipated Tacoma South's concern and set a deadline by which Integon could either file its motion or the trial court would revisit the class certification issue.

On reviewing the superior court's electronic filing system records, Tacoma South noticed an entry indicating that Integon scheduled an unconfirmed "11:39 Exparte Action Mail," and that there was an ex parte order held. CP at 210. Based on this entry, Tacoma South filed a motion seeking recusal of the trial court judge and vacation of several adverse orders on the grounds that the trial judge's partiality could reasonably be questioned following his alleged surreptitious contact with Integon. Tacoma South also argued that the trial judge covertly changed the record because Tacoma South accessed the same electronic system several days later, but the outcome designation changed to state "Ex-Parte w/o Order Held." *Id.* at 215.

Integon denied having any ex parte contact with the trial judge. Integon explained that the entry was likely due to several filings it submitted electronically on the same date as the alleged ex parte contact. The trial court found that based on "objective and subjective evidence," the trial judge did not engage in an ex parte contact with Integon. *Id.* at 280. The trial court denied Tacoma South's motion for recusal.

Thereafter, Tacoma South filed a motion for partial summary judgment, arguing that it established each necessary element of its CPA claim based on Integon's violations of regulations that govern unfair claims settlement practices in insurance, and that it was entitled to judgment in its favor as a matter of law. The only remaining issue to resolve, Tacoma South argued, was damages. The trial court denied Tacoma South's motion for partial summary judgment.

Integon also filed a motion for summary judgment. In ruling on the motion for summary judgment, the trial court considered Integon's motion and attached declarations and exhibits, Tacoma South's response, and Integon's reply and attached declarations and exhibits. The trial court granted Integon's motion, dismissing Tacoma South's claims. Tacoma South appeals.

DISCUSSION

I. MOTION FOR RECUSAL

Tacoma South contends that the trial judge violated several canons of the Code of Judicial Conduct (CJC), and that as a result, his impartiality could reasonably be questioned. Because of the appearance of partiality, Tacoma South asserts that the trial judge abused his discretion in denying Tacoma South's motion to recuse and vacate orders. We disagree.

A. LEGAL PRINCIPLES

Due process entitles parties in both civil and criminal cases to "'an impartial and disinterested tribunal.'" *Tatham v. Rogers*, 170 Wn. App. 76, 90, 283 P.3d 583 (2012) (quoting *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242, 100 S. Ct. 1610, 64 L. Ed. 2d 182 (1980)). A judge is required to "disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned." CJC Canon 2.11(A). To determine whether the judge's impartiality might reasonably be questioned, courts employ an objective test that assumes "'a

reasonable person knows and understands all the relevant facts.'" *Sherman v. State*, 128 Wn.2d 164, 206, 905 P.2d 355 (1995) (quoting *In re Drexel Burnham Lambert Inc.*, 861 F.2d 1307, 1313 (2d Cir. 1988)).

We begin with the presumption "that a trial judge properly discharged his/her official duties without bias or prejudice." *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 692, 101 P.3d 1 (2004). To overcome this presumption, the party raising the challenge "must provide specific facts establishing bias." *Id.* Actual prejudice need not be proved; a mere suspicion of partiality may be enough to warrant recusal. *Sherman*, 128 Wn.2d at 205. We will review a trial judge's decision regarding recusal for an abuse of discretion. *State v. Davis*, 175 Wn.2d 287, 305, 290 P.3d 43 (2012), *abrogated on other grounds by State v. Gregory*, 192 Wn.2d 1, 427 P.3d 621 (2018).

B. APPLICATION

Tacoma South argues that the trial judge engaged in an ex parte communication with Integon, in violation of CJC 2.9, thus raising a question of the trial judge's partiality in this case. Tacoma South's claim is without merit.

With several exceptions, CJC 2.9(A) provides that "A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending or impending matter." In sole support of its claim that Integon and the trial judge engaged in an improper ex parte communication, Tacoma South points to a printed copy of the Pierce County Superior Court's electronic docketing system, which stated that on March 31, counsel for Integon scheduled an unconfirmed "11:39 Exparte Action Mail," and that the outcome initially was "Ex-Parte w/ Order Held." CP at 210. Tacoma South suggests further that the trial judge changed the record covertly

because when Tacoma South looked at the same electronic system several days later, the outcome designation changed to "Ex-Parte w/o Order Held." *Id.* at 215.

Integon's counsel denied having any ex parte contact with the trial judge and stated that the notation could refer to electronic documents it filed on that date that included a proposed order. The trial court also found that there was no ex parte contact between the trial judge and Integon based on "objective and subjective evidence." *Id.* at 280. Tacoma South has not provided any additional evidence that an ex parte contact actually occurred.

Tacoma South argues that the trial court abused its discretion because, as the trial court stated in its order, it considered subjective evidence, whereas the test for impartiality is objective. Tacoma South's contention is without merit because, as the trial court's order specified, the trial court considered subjective evidence in evaluating whether the ex parte contact occurred at all. It did not state that it considered its own subjective impression as to whether its impartiality might reasonably be questioned.

The electronic filing report, without more, is insufficient evidence to raise even a mere suspicion of partiality. *See Sherman*, 128 Wn.2d at 205. Receipt of an ex parte communication does not necessarily compel recusal. *Davis*, 175 Wn.2d at 307. Instead, an ex parte communication is "problematic" and may require recusal where the communication "revealed or implied a bias toward one party," or where the communication indicated that the trial judge's "future rulings in the case would be affected." *Davis*, 175 Wn.2d at 307. There is no evidence that the alleged ex parte action, even if it did occur, in any way implied a bias in favor of Integon or otherwise undermined the validity of the trial judge's future rulings. *See id.* Tacoma South's contentions regarding impropriety in the communications are entirely speculative and would not compel a

reasonable person to question the trial court judge's impartiality. On this evidence, the trial court did not abuse its discretion in denying Tacoma South's motion to recuse. *See id*. at 305.[2]

II. INTEGON'S MOTION FOR SUMMARY JUDGMENT

Tacoma South argues that the trial court erred in granting Integon's motion for summary judgment, thereby dismissing Tacoma South's CPA claim. Because Tacoma South failed to perfect the appellate record, which is a necessary predicate to our ability to review this issue, we decline to address this claim. Accordingly, we affirm the trial court's ruling granting Integon's motion.

The appellant bears the burden of perfecting the record on appeal so as to ensure that the reviewing court is apprised of all necessary evidence to decide the issues presented. *State v. Sisouvanh*, 175 Wn.2d 607, 619, 290 P.3d 942 (2012) ("The party presenting an issue for review has the burden of providing an adequate record to establish such error.") (citing RAP 9.2(b)); *see also Yorkston v. Whatcom County*, 11 Wn. App. 2d 815, 824, 461 P.3d 392 (2020). Where the appellant has failed to meet its burden of perfecting the record, the reviewing court may decline to address the merits of an issue. *Sisouvanh*, 175 Wn.2d at 619. Barring compelling circumstances,

[2] Tacoma South separately asserts that recusal was necessary because the trial judge violated CJC 2.6(A), requiring the judge to ensure a right to be heard according to law, and CJC 2.7, requiring the judge to hear and decide matters assigned to the judge, when the judge deferred deciding Tacoma South's motion to compel discovery and ruled that the discovery issue could be resolved without a hearing. In addition, Tacoma South argues that the trial judge violated CJC 2.2, requiring impartiality and fairness, CJC 2.3, prohibiting the judge from manifesting bias or prejudice, and CJC 2.6(B), prohibiting the judge from coercing parties into a settlement, when it effectively suggested that Integon file a motion for summary judgment during the hearing on class certification. Tacoma South did not include either of these arguments in its motion to recuse and raises these arguments for the first time on appeal. Because a claim challenging the appearance of fairness is not considered a "constitutional" claim under RAP 2.5(a)(3), an appellate court will generally decline to consider the issue for the first time on appeal. *See State v. Tolias*, 135 Wn.2d 133, 140, 954 P.2d 907 (1998) ("An appearance of fairness objection has been deemed waived when not raised in the trial court."); *see also State v. Morgensen*, 148 Wn. App. 81, 91, 197 P.3d 715 (2008). We therefore decline to consider these additional allegations.

however, courts should avoid deciding a case based on noncompliance with the rules of appellate procedure. *Rhinevault v. Rhinevault*, 91 Wn. App. 688, 693, 959 P.2d 687 (1998).

On reviewing Tacoma South's assignment of error challenging the trial court's decision to grant summary judgment in favor of Integon, we sit in the same position as the trial court. *See Killian v. Seattle Pub. Sch.*, 189 Wn.2d 447, 453, 403 P.3d 58 (2017). Our scope of review is limited to evidence and issues called to the attention of the trial court before the order on summary judgment was entered. RAP 9.12.

Here, due to Tacoma South's failure to perfect the record, we are unable to carry out our role on review of a motion for summary judgment. *See LeBeuf v. Atkins*, 93 Wn.2d 34, 36, 604 P.2d 1287 (1980) ("In an appellate review of a summary judgment of dismissal, the reviewing court must have before it the precise record considered by the trial court."). The trial court granted Integon's motion for summary judgment after considering Integon's motion and supporting declarations and exhibits, Tacoma South's response, and Integon's reply and supporting declarations and exhibits. But Tacoma South did not designate the motion for summary judgment, responsive pleadings, or the attached declarations and exhibits as clerk's papers.[3] As a result, we cannot review the issues and evidence that were presented before the trial court anew to determine whether the trial court reached its decision in error because Tacoma South did not provide the information on which that decision was based. *See* RAP 9.12; *see also Killian*, 189 Wn.2d at 453.

[3] During oral argument, Tacoma South explained that it did not designate the motion, attachments, and responsive pleadings as clerk's papers because the trial court did not enter factual findings or conclusions of law when it granted Integon's motion. In making this assertion, Tacoma South wholly misunderstands a court's role on summary judgment. In ruling on a motion for summary judgment, courts do not resolve factual disputes but rather determine whether a genuine issue of material fact exists. *Jacobsen v. State*, 89 Wn.2d 104, 110, 569 P.2d 1152 (1977).

Tacoma South's failure to perfect the record on appeal with respect to the trial court's order granting Integon's motion for summary judgment amounts to more than mere technical noncompliance with the rules of appellate procedure. *See Rhinevault*, 91 Wn. App. at 693. Instead, the failure to provide an adequate record in this instance wholly forecloses our ability to evaluate the complained of error. Consequently, we decline to review this claim.

Because we affirm the trial court's order granting Integon's motion for summary judgment, thus leaving the trial court's order dismissing Tacoma South's complaint intact, we do not reach Tacoma South's assignment of error challenging the trial court's order denying its motion for partial summary judgment.[4,5]

[4] Tacoma South argues that the trial court abused its discretion when it reserved ruling on its motion for class certification until after it decided Integon's motion for summary judgment. We disagree because a trial court has discretion "for purposes of judicial economy, to delay ruling on a motion for class certification until after hearing dispositive motions." *Sheehan v. Cent. Puget Sound Reg'l Transit Auth.*, 155 Wn.2d 790, 807, 123 P.3d 88 (2005); *see also Chavez v. Our Lady of Lourdes Hosp.*, 190 Wn.2d 507, 515 n.6, 415 P.3d 224 (2018). Here, the trial court acted in the interest of judicial economy and well within its discretion when it reserved ruling on class certification so that it could determine viability of the underlying claim. *See Sheehan*, 155 Wn.2d at 807. In addition, because we affirm the summary judgment order dismissing Tacoma South's CPA claim, "the class certification issue continues to be moot." *Id.*

[5] Tacoma South argues that the trial court abused its discretion when it denied Tacoma South's motions to compel discovery. We disagree because the trial court did not foreclose Tacoma South's ability to obtain its requested discovery in either challenged order. Instead, the trial court directed the parties to work out a stipulated protective order regarding the scope of discovery, and later deferred resolving the disputed discovery issues until after Integon submitted its own motion for a protective order. To the extent that Tacoma South argues that the trial court abused its discretion in denying its motions to compel by improperly delaying resolution of the discovery dispute, the record before us lacks any indication that Tacoma South objected to the delay. Consequently, that error is unpreserved, and we decline to reach it. RAP 2.5(a).

ATTORNEY FEES

Both Tacoma South and Integon request attorney fees on appeal. We deny Tacoma South's request and grant Integon's request.

A. TACOMA SOUTH'S REQUEST FOR ATTORNEY FEES

Tacoma South requests attorney fees on appeal under RAP 18.1 and RCW 19.86.090. A litigant that brings a successful CPA action is entitled to recover expenses and attorney fees on appeal. RCW 19.86.090; *Svendsen v. Stock*, 143 Wn.2d 546, 560, 23 P.3d 455 (2001). Because Tacoma South does not prevail in its CPA claim, we decline to award Tacoma South attorney fees on appeal.

B. INTEGON'S REQUEST FOR ATTORNEY FEES

Integon requests attorney fees on appeal under RAP 18.9 for having to defend a frivolous appeal. "An appeal is frivolous when the appeal presents no debatable issues on which reasonable minds could differ and is so lacking in merit that there is no possibility of reversal." *Stiles v. Kearney*, 168 Wn. App. 250, 267, 277 P.3d 9 (2012). Tacoma South's failure to perfect the record precluded our ability to address Integon's successful summary judgment motion and thereby foreclosed any possibility of reversal. Thus, under the unique circumstances of this case, Tacoma South's appeal is frivolous. We therefore award fees to Integon for having to defend against a frivolous appeal in an amount to be determined by our court commissioner.

In addition, Integon requests fees based on RCW 4.84.080, which provides an award of costs as attorney fees to the prevailing party "[i]n all actions where judgment is rendered in the . . . court of appeals." RCW 4.84.080(2). Under the statute, the prevailing party is awarded $200. *Id.* Successful litigants in a civil action "'may recover only such attorney fees as the statute or

agreement of the parties provides.'" *Gipson v. Snohomish County.*, 194 Wn.2d 365, 376, 449 P.3d 1055 (2019) (quoting *State ex rel. Macri v. City of Bremerton*, 8 Wn.2d 93, 102, 111 P.2d 612 (1941)). Because Integon has prevailed on appeal, we award costs as attorney fees to Integon. *See id.*

CONCLUSION

With regard to Tacoma South's motions seeking recusal of the trial judge and vacation of the trial judge's rulings, we hold that the trial court did not abuse its discretion because there was insufficient evidence of nefarious ex parte contact to cause a reasonable person to question the trial court's partiality. Because Tacoma South failed to set forth an adequate record to allow us to review the trial court's order granting Integon's motion for summary judgment on the merits, we hold that the trial court's order stands. In addition, we hold that the trial court did not abuse its discretion when it reserved ruling on Tacoma South's motion for class certification prior to deciding Integon's motion for summary judgment. Finally, we hold that the trial court did not abuse its discretion in managing discovery when the trial court deferred resolving the discovery dispute until it was presented with a motion for a protective order.

Accordingly, we affirm.

CRUSER, J.

We concur:

GLASGOW, A.C.J.

VELJACIC, J.

SETH REYNOLDS, ESQ.

October 08, 2021 - 1:09 PM

Filing Petition for Review

Transmittal Information

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