

SUPREME COURT OF THE
STATE OF WASHINGTON
Case No. 94843-7

(Washington Court of Appeals No. 47913-3-II)

STATE FARM FIRE AND CASUALTY COMPANY,
an Illinois corporation,

Respondent,

v.

ROBERT CHARLES JUSTUS,

Petitioner.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Respondent State Farm Fire and Casualty Company (“State Farm,” or “Respondent”) submits this Answer to the Petition for Review (the “Petition”) filed by Appellant Robert Justus (“Justus,” or “Petitioner”).

II. COURT OF APPEALS DECISION

A copy of the Washington Court of Appeals’ decision affirming the trial court’s verdict in favor of State Farm, dated June 27, 2017, is Appendix A to the Petition.

Mr. Justus asserts in Sections I and II of his Petition that he is also seeking review of the appellate decision in a “linked case,” *Justus v. Morgan*, Court of Appeals no. 47196-5-II.¹ However, he was the prevailing party in that case. State Farm, which was the petitioner, is not seeking review of any issues raised in that case, and the Court of Appeals issued its mandate on August 11, 2017. State Farm submits that Mr. Justus’s attempt to seek review of *Justus v. Morgan* is inappropriate and should be disregarded.

¹ The Court of Appeals referred to the superior court that approved the covenant judgment settlement as the “settlement court,” and the superior court that decided the coverage issues that gave rise to the appeal in this case as the “trial court.” State Farm uses this same terminology throughout this Answer.

III. COUNTER-STATEMENT OF ISSUES ON REVIEW

Mr. Justus's statement of the issues presented for review is difficult to parse, but State Farm understands his Petition to request review on the following grounds:

1. Whether review should be accepted under RAP 13.4(b)(1) because the Court of Appeals decision, in deciding what statute of limitations applied to Mr. Justus's wrongful detention claim, is in conflict with this Court's decisions in *Mutual of Enumclaw Ins. Co. v. T&G Construction, Inc.*, 165 Wn.2d 255, 199 P.3d 376 (2008) and/or *Fast v. Kennewick Public Hospital District*, 187 Wn.2d 27, 384 P.3d 232 (2016)?
2. Whether review should be accepted under RAP 13.4(b)(2) because the Court of Appeals decision is in conflict with the unpublished decision in *Justus v. Morgan*, Court of Appeals no. 47196-5-II?
3. Whether review should be accepted under RAP 13.4(b)(4) because this appeal involves an issue of substantial public interest that should be determined by this Court?

State Farm is not seeking review of any issues raised by the Court of Appeals decision in this case.

IV. COUNTER-STATEMENT OF THE CASE

Mr. Justus's Statement of the Case simply quotes a portion of the trial court's findings of fact from the bench trial held in April 2015.² The Court of Appeals quoted these findings after observing that Mr. Justus conceded he was not challenging them.³

However, Mr. Justus's Statement of the Case omits any reference to the record below, as required by RAP 13.4(c)(6), any discussion of the procedures relevant to the issues presented, or any discussion of the State Farm insurance policy that was the focus of the Court of Appeals decision. Accordingly, while agreeing that the trial court's findings of fact quoted by Mr. Justus are established verities, State Farm adds the following statement for further context.

A. NATURE OF THIS DISPUTE

This case presents an insurance coverage dispute involving a personal liability umbrella policy that State Farm issued to William and Donna Morgan.⁴ The policy provides coverage for suits against the Morgans for damages because of a "loss," which the policy defines in pertinent part as the commission of an offense that results in "personal

² CP 2342-2348.

³ Petition for Review, App. A (Court of Appeals decision, pp. 4-6).

⁴ A copy of the policy is in the record as Trial Exhibit 6.

injury.” The policy, in turn, defines “personal injury” to mean injury, other than “bodily injury,” arising out of the offense of “wrongful detention of a person.”

After Mr. Justus filed a damages lawsuit against the Morgans, State Farm provided them a reservation of rights defense, and filed a declaratory judgment action to determine whether coverage applied. While the declaratory judgment action was pending, Mr. Justus and the Morgans entered into a stipulated consent judgment settlement that, as modified, was ultimately approved as reasonable by the settlement court.⁵

The coverage issues in the declaratory judgment action were resolved following a bench trial. The primary issue t decided at trial was whether the stipulated consent judgment settlement between the Morgans and Mr. Justus met the policy requirements for the “personal injury” offense of “wrongful detention of a person.” If it did, State Farm would be required to indemnify the Morgans for the settlement under the personal liability umbrella policy, but if it did not, State Farm would be relieved of

⁵ The reasonableness ruling by the settlement court was the subject of the unpublished Court of Appeals decision in the *Justus v. Morgan*, Court of Appeals no. 47196-5-II. In that decision, the Court of Appeals upheld the settlement court’s determination that the covenant judgment settlement had a reasonable value of \$818,900. It also ruled that the settlement court did not abuse its discretion when it declined to determine which of Mr. Justus’s liability theories would succeed or whether William Morgan’s actions were negligent or intentional, instead leaving those issues to be resolved by the trial court in the declaratory judgment action.

any further coverage obligations. Since State Farm had defended the Morgans, State Farm's duty to defend was not in issue. Rather, the only issue was whether the policy's indemnity coverage applied to the consent judgment settlement.

B. PROCEEDINGS IN THE TRIAL COURT

Following a three-day bench trial, the trial court ruled that coverage did not apply. It reasoned that, while a claim for "wrongful detention of a person" is not a recognized cause of action in Washington, it is substantially equivalent to the torts of false arrest or false imprisonment, both of which are subject to a two-year statute of limitations.⁶ Since Mr. Justus did not file his lawsuit against the Morgans until more than two years after the June 9, 2010 incident, the trial court concluded that any claim for "wrongful detention of a person" was therefore time barred.⁷ Accordingly, coverage for this offense was not established. The trial court also concluded that the undisputed facts presented at trial did not support a theory of negligence, and that Mr. Morgan acted with "the specific intent to cause harm" within the meaning of a policy exclusion.⁸ Although the trial court issued a factual finding that

⁶ CP 2347 (conclusions of law nos. 6-10).

⁷ CP 2347 (conclusion of law no. 11).

⁸ CP 2347-2348 (conclusions of law nos. 12, 15).

Mr. Justus suffered severe post-traumatic stress disorder (PTSD) as a result of the events at issue,⁹ the trial court did not address State Farm’s legal argument as detailed in its trial brief that PTSD is a “bodily injury” excluded from the definition of “personal injury.”¹⁰

C. PROCEEDINGS IN THE COURT OF APPEALS

Division II of the Court of Appeals affirmed. It concluded that the trial court appropriately decided the statute of limitations issue, since the settlement court had deliberately declined to decide whether Mr. Morgan’s actions were negligent or intentional, instead deferring that ruling for adjudication in the declaratory judgment action. It also concluded that the unchallenged findings of fact showed that Mr. Morgan committed only intentional acts, and did not support the conclusion that his liability was grounded in negligence; accordingly the two-year statute of limitations applied. The appellate court did not address the alternative ground relied on by the trial court in concluding that coverage did not apply – i.e., that the claim fell within “the plain language” of the policy exclusion that eliminated coverage for “personal injury when the insured acts with specific intent to cause harm.”¹¹

⁹ CP 2346 (finding of fact no. 27).

¹⁰ CP 2033-2035.

¹¹ CP 2348 (conclusions of law nos. 15 and 16). Nor are these issues raised by Mr. Justus in his Petition for Review. However, State Farm notes that

V. REASONS WHY REVIEW SHOULD BE DENIED

This Court will only accept a petition for review under four circumstances:

- 1) The decision of the Court of Appeals conflicts with a decision of the Supreme Court;
- 2) The decision of the Court of Appeals conflicts with another decision of the Court of Appeals;
- 3) The petition raises a significant question of Washington or United States constitutional law; or
- 4) The petition involves an issue of substantial public interest that should be determined by the Supreme Court.¹²

RAP 13.4(b). The Petition appears to seek review under RAP 13.4(b)(1), (2) and (4). However, it does not explain in any detail why review should be accepted with respect to these criteria. Rather, it primarily focuses on why Petitioner believes the Court of Appeals erred.

The Court of Appeals and the trial court both held that Mr. Justus's damages claim, as encompassed by the stipulated consent judgment settlement, did not qualify for coverage under the personal injury offense

an appellate court may affirm a trial court on any basis supported by the briefing and record below, even if the trial court did not consider it. *Huff v. Wyman*, 184 Wn.2d 643, 648, 361 P.3d 727 (2015); *LaMon v. Butler*, 112 Wn.2d 193, 200-01, 770 P.2d 1027, *cert. denied*, 493 U.S. 814 (1989).

¹² RAP 13.4(b).

of “wrongful detention of a person.” Contrary to Mr. Justus’s argument, the appellate court’s decision on this issue is consistent with this Court’s decisions in *Mutual of Enumclaw Ins. Co. v. T&G Construction, Inc.*, 165 Wn.2d 255, 199 P.3d 376 (2008) and *Fast v. Kennewick Public Hospital District*, 187 Wn.2d 27, 384 P.3d 232 (2016), and it does not conflict with any published decision of the Court of Appeals, nor with the unpublished decision in *Justus v. Morgan*. Finally, the questions presented on this appeal involve a private dispute on unique facts that are not of substantial public interest. This Court should therefore deny Mr. Justus’s Petition.

A. REVIEW IS NOT APPROPRIATE UNDER RAP 13.4(b)(1)

The premise of Mr. Justus’s request for review under RAP 13.4(b)(1) is his naked assertion that, because the statute of limitations issue was decided by the settlement court, the trial court was collaterally estopped from addressing the issue. However, Mr. Justus fails to provide any record citation supporting the factual premise for this assertion. In the absence of such record support, his request for review under RAP 13.4(b)(1) fails.

Although Mr. Justus asserted in his trial brief that the statute of limitations issue had been the subject of prior motion practice in the

settlement court,¹³ he did not present the trial court with any evidence of the settlement court's rulings on the statute of limitations issue to support his argument. Thus, the trial court had no record before it establishing that the statute of limitations issue had actually been decided by motions in the settlement court.

Rather, the only order issued by the settlement court that was submitted to the trial court as part of the evidentiary record at trial was the settlement court's reasonableness ruling.¹⁴ As the Court of Appeals noted, the settlement court expressly stated in that ruling that it "will not make findings as to whether or not or the degree to which Defendant [William Morgan's] actions on June 9th, 2010 were intentional versus negligent."¹⁵ Because the settlement court declined to address this issue, it likewise did not decide the statute of limitations issue.¹⁶ The Court of Appeals held that, under these circumstances, collateral estoppel did not apply because the settlement court's reasonableness ruling did not adjudicate the

¹³ CP 2059.

¹⁴ Trial Exhibit 11 (order on reasonableness of settlement).

¹⁵ Petition for Review, App. A (Court of Appeals decision, pp. 7, 13); Trial Exhibit 11 (order on reasonableness of settlement, attached oral ruling at p. 7, ll. 14-17).

¹⁶ The settlement court's only comment on the statute of limitations in its reasonableness ruling was its observation that, while intentional torts subject to a two-year statute of limitations would be time barred, a negligence claim subject to a three-year statute of limitations would not be time barred. Trial Exhibit 11 (order on reasonableness of settlement, attached oral ruling at p. 12, l. 22 to p. 13, l. 2).

substantive merits of either the liability (negligence vs. intentional conduct) issue or the statute of limitations issue, but instead expressly deferred these rulings for adjudication by the trial court.

The Court of Appeals decision is therefore easily reconciled with this Court's decision in *Mutual of Enumclaw Ins. Co. v. T&G Construction, Inc.*, 165 Wn.2d 255, 199 P.3d 376 (2008). *T&G*, like this case, involved an appeal in a coverage action where the insured's liability for the underlying claim had been fixed by a reasonableness ruling following a consent judgment settlement between the insured and the underlying claimant. In *T&G*, the insurer's principal argument as to why coverage did not apply was that, under its policy's insuring agreement, it was only obligated to pay damages that its insured was "legally obligated to pay," and its insured had a statute of limitation defense to liability that eliminated any legal obligation to pay. The insurer argued that it should have the right to litigate the statute of limitations issue in the coverage action because there was no final decision on the statute of limitations issue in the liability lawsuit, and therefore the issue of whether its insured was in fact legally obligated to pay damages was not resolved.

The Supreme Court rejected this argument. It observed that the settlement court had carefully evaluated the statute of limitations issue as part of its reasonableness ruling, and concluded that the trier of fact was

likely to find that the statute of limitations did not apply. 165 Wn.2d at 261, 264. The Supreme Court also held that the issue of what the insured was “legally obligated to pay” was the exact issue that was determined by the reasonableness ruling. *Id.* at 263. It also noted that the insurer had participated in the reasonableness hearing and had a chance to argue its statute of limitations defense theory in that forum. *Id.* at 261.

Here, by contrast, the coverage issue before the trial court and the Court of Appeals was not whether the Morgans were “legally obligated to pay” so as to bring the claim within the State Farm policy’s insuring agreement. Nor does State Farm dispute that the reasonableness ruling issued by the settlement court established both the fact and amount of the Morgans’ liability. Rather, the primary coverage issue presented to the trial court was whether the Morgans’ liability rested on the covered offense of “wrongful detention of a person,” or instead on some other, non-covered basis. The settlement court expressly declined to decide the legal theory supporting imposition of liability on the Morgans – instead stating that it would “not make findings as to whether or not or the degree to which Defendant [William Morgan’s] actions . . . were intentional versus negligent.”¹⁷ This necessarily, and deliberately, left determination

¹⁷ Petition for Review, App. A (Court of Appeals decision, pp. 7, 13); Trial Exhibit 11 (order on reasonableness of settlement, attached oral ruling at p. 7, ll. 14-17).

of the legal basis for imposition of liability – and specifically, whether the Morgans’ liability was premised on the offense of “wrongful detention of a person” – to the trial court entertaining the coverage action.

Since the settlement court expressly declined to rule on the issue, the trial court therefore had to determine whether Mr. Justus had a viable claim for “wrongful detention of a person” against the Morgans at the time of settlement in order to determine whether coverage applied. Evaluating this issue required that the trial court consider what the elements of such a cause of action involved, and whether such a cause of action was time barred. These were the very legal issues that the settlement court had deliberately declined to decide. The context in which the statute of limitations was presented, and the fact the settlement court expressly declined to decide the issue, readily distinguish this case from *T&G*, where the issue was actually litigated and decided by the settlement court.

Mr. Justus also appears to argue that the Court of Appeals decision is in conflict with *Fast v. Kennewick Public Hospital District*, 187 Wn.2d 27, 384 P.3d 232 (2016). *Fast* held that an action for wrongful death of a child based on medical negligence was governed by the three-year medical negligence statute of limitations set forth RCW 4.16.350(3), which could be tolled under certain circumstances, rather than by the general tort catchall three-year statute of limitations set forth in RCW 4.16.080(2),

which was not subject to tolling. The Court’s decision rested on statutory analysis and accompanying legislative history, from which the Court concluded that the legislature intended to subject wrongful death claims caused by medical negligence to the medical statute of limitations. This case, by contrast, does not involve questions of medical negligence, nor does it involve questions of statutory analysis or legislative history. There is no conflict between the Court of Appeals decision below and this Court’s decision in *Fast*.

Mr. Justus has not established a right to review under RAP 13.4(b)(1).

B. REVIEW IS NOT APPROPRIATE UNDER RAP 13.4(b)(2)

Mr. Justus argues that review should be accepted under RAP 13.4(b)(2) because the Court of Appeals decision, in finding that a wrongful detention claim is an intentional tort subject to the two-year statute of limitations set forth in RCW 4.16.100(1), is in conflict with the Court of Appeals decision in *Justus v. Morgan*, Court of Appeals no. 47196-5-II. However, the decision in *Justus v. Morgan* was not published nor did Mr. Justus seek to have it published.

Because *Justus v. Morgan* is an unpublished decision, it has no precedential value and it cannot be cited by this or other appellate courts as controlling. GR 14.1(a) states: “Unpublished opinions of the Court of

Appeals have no precedential value and are not binding on any court.”¹⁸

Similarly, RCW 2.06.040 states: “Decisions determined not to have precedential value shall not be published.” There is no substantial public interest at play sufficient to justify the use of this Court’s limited resources to review an unreported decision without precedential value. The Petition should be denied on this threshold ground.

Additionally, Mr. Justus nowhere explains in his Petition where the conflict exists between the Court of Appeals decision below and the unpublished decision in *Justus v. Morgan*. Rather, he makes only a confusing argument that, because “wrongful detention of a person” is not a recognized tort in this state, it makes no difference whether Mr. Morgan’s conduct was intentional or negligent. How this assertion relates to the RAP 13.4(b)(2) criteria is both unstated, and unclear.¹⁹

In any event, the Court of Appeals decision and the appellate decision in *Justus v. Morgan* are consistent with each other. In *Justus v. Morgan*, the appellate court concluded that the settlement court was not required to conclusively determine the merits of whether Mr. Justus’s

¹⁸ GR 14.1(a) further provides that unpublished opinions of the Court of Appeals may be cited as nonbinding authorities, if identified as such by the citing party, and may be accorded such persuasive value as the court deems appropriate.

¹⁹ Petitioner’s citation to California authority, *Uhrich v. State Farm Fire & Cas Co.*, 109 Cal. App.4th 598, 135 Cal. Rptr.2d 131, 139 (3d Dist. 2003) does not advance his position. California authority is irrelevant to a RAP 13.4(b) analysis.

liability claims would succeed, but instead was only required to decide whether they had plausible merit. This ruling is supported by *Bird v. Best Plumbing Grp., LLC*, 175 Wn.2d 756, 762-63, 774, 287 P.3d 551 (2012), and *Martin v. Johnson*, 141 Wn.App. 611, 616, 621, 170 P.3d 1198 (2007). The appellate decision in *Justus v. Morgan* therefore did not discuss or decide the question of whether the statute of limitations issue was governed by RCW 4.16.080(2), as Mr. Justus contends, or by RCW 4.16.100(1), as the trial court below concluded.²⁰ Instead, it held that the settlement court properly exercised its discretion when it made “clear and categorical statements” that it was not deciding the merits of Mr. Justus’s claim or the statute of limitations issue, instead leaving those questions for determination in the coverage action.²¹

The Court of Appeals decision and the decision in *Justus v. Morgan*, which were issued on the same day by the same appellate panel, are not in conflict. Read together, it is clear that the appellate court in both cases carefully analyzed the issues presented to ensure that the two decisions were in harmony. Mr. Justus has not established that review is appropriate under RAP 13.4(b)(2).

²⁰ CP 2347 (conclusions of law nos. 9-11).

²¹ Petition for Review, App. B (appellate decision in *Justus v. Morgan*, pp. 5-6, 14-15).

C. REVIEW IS NOT APPROPRIATE UNDER RAP 13.4(b)(4)

Mr. Justus spends little time in his Petition arguing how this case rises to the level of “substantial public interest.” He simply implies that, because the Court of Appeals affirmed the trial court’s decision that coverage does not apply, the coverage provided by the State Farm policy is “illusory.”²² This conclusory, unsupported assertion does not establish the RAP 13.4(b)(4) criteria. Indeed, Mr. Justus never raised an illusory coverage argument in either the trial court or in the Court of Appeals, so it is not properly raised at this late juncture.²³

Moreover, Mr. Justus’s argument fails because the Court of Appeals did not rule that coverage was inapplicable because “wrongful detention of a person” is not a recognized cause of action in this state. Instead, the Court of Appeals affirmed the trial court’s determination that “wrongful detention of a person” is substantially equivalent to the torts of false arrest and false imprisonment, stating that it “assume[d], without deciding, that it is possible to establish a wrongful detention claim in our

²² The “personal injury” coverage provisions of the State Farm policy at issue in this case are contained in policy forms approved by the state’s Insurance Commissioner. RCW 48.18.100(1).

²³ Appellate courts will generally not consider issues raised for the first time on appeal. *State v. McFarland*, 127 Wn.2d 322, 332–33, 899 P.2d 1251 (1995); RAP 2.5(a).

state under a theory of negligence.”²⁴ Thus, the basis of the Court of Appeals decision was simply that the facts of the case, as found by the trial court, did not establish a theory of negligence. Mr. Justus did not challenge any of the trial court’s factual findings.²⁵

Even conceding that the business of insurance generally may be a matter of public interest, this does not mean that every opinion regarding the insurance industry is automatically subject to review.²⁶ Mr. Justus has not identified any reason why the public interest is implicated by the Court of Appeals decision, which merely affirmed the trial court under the unique facts of this case. Nor has he established that the issues presented for review are recurring in nature, or that they impact a large number of persons. Substantial public interest is best served by affirming trial results that are supported by substantial evidence, as the Court of Appeals did here. There is no basis for review under RAP 13.4(b)(4).

²⁴ Petition for Review, App. A (Court of Appeals decision, p. 14).

²⁵ Petition for Review, App. A (Court of Appeals decision, p. 4).

²⁶ A few recent examples of this Court’s denial of petitions for review of decisions involving the insurance industry include: *Moratti ex rei. Tarutis v. Farmers Ins. Co. of Washington*, 173 Wn.2d 1022, 272 P.3d 850 (2012) (denying review of case involving bad faith and consumer protection claims); *Bushnell v. Medico Ins. Co.*, 172 Wn.2d 1005, 257 P.3d 665 (2011) (same); *Indem. Ins. Co. of N. Am. v. City of Tacoma*, 171 Wn.2d 1029, 257 P.3d 662 (2011) (denying review of case related to insurance coverage issues).

D. THIS COURT SHOULD IGNORE OTHER ISSUES RAISED BY THE PETITION THAT DO NOT SATISFY THE REQUIREMENTS OF RAP 13.4(b)

Mr. Justus also presents several arguments that are untethered to the RAP 13.4(b) criteria. This Court should ignore these arguments in evaluating his Petition.

For example, Mr. Justus argues that the Court of Appeals erred when it held that the two-year statute of limitations set forth in RCW 4.16.100 applied to his wrongful detention claim because a claim for wrongful detention is not a recognized claim in this state, he did not plead claims for false arrest or false imprisonment, and thus RCW 4.16.080(2) rather than RCW 4.16.100 should have applied. However, a trial court's decision to apply a statute of limitations is not, standing alone, a recognized ground for review under RAP 13.4(b). As discussed above, the Court of Appeals decision on this issue was supported by applicable Washington case law.²⁷

Mr. Justus also argues that the Court of Appeals erred when it assumed, without deciding, that wrongful detention of a person is a claim in this state, because it never cited any statutory authority to show that it is

²⁷ *Heckart v. City of Yakima*, 42 Wn.App. 38, 708 P.2d 407, *rev. den.* 105 Wn.2d 1003 (1985). See also Petition for Review, App. A (Court of Appeals decision, pp. 6, 14-17).

a claim. However, nothing in Washington law holds that a particular cause of action is recognized only if it is statutorily permitted.

Finally, Mr. Justus makes the odd statement that “Either way you look at it, negligent wrongful detention is not a claim in the state of Washington.”²⁸ This argument would seem to defeat his contention that he had a viable cause of action for negligent wrongful detention that supported coverage under the State Farm policy. In any event, Mr. Justus has failed to link this assertion the RAP 13.4(b) criteria.

VI. CONCLUSION

The Court of Appeals correctly affirmed the trial court’s findings of fact and conclusions of law, and Mr. Justus has failed to establish that review is appropriate under RAP 13.4(b). This Court should therefore deny his Petition for Review.

DATED this 26th day of September, 2017.

SOHA & LANG, P.S.

By: s/Mary R. DeYoung
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²⁸ Petition for Review at p. 3.

DECLARATION OF SERVICE

STATE OF WASHINGTON)
COUNTY OF KING)

I am employed in the County of King, State of Washington. I am over the age of 18 and not a party to the within action; my business address is SOHA & LANG, PS, 1325 Fourth Avenue, Suite 2000, Seattle, WA 98101.

On September 26, 2017, a true and correct copy of **ANSWER TO PETITION FOR REVIEW (with attached Declaration of Service)** was served on parties in this action as indicated:

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Executed on this 26th day of September, 2017, at Seattle, Washington.

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

s/Debbie Low _____
Debbie Low Secretary to
Mary R. DeYoung

SOHA & LANG

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