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No. 36517-4

THE SUPREME COURT OF THE STATE OF WASHINGTON

ALLAN MARGITAN and GINA MARGITAN, husband and wife,

Petitioners,

v.

RISK MANAGEMENT, INC., a Washington corporation and
ALLSTATE PROPERTY AND CASUALTY INSURANCE COMPANY,

Respondents.

**RESPONDENT RISK MANAGEMENT, INC.'S ANSWER TO
PETITION FOR DISCRETIONARY REVIEW**

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I. IDENTITY OF RESPONDENT

Respondent Risk Management, Inc. (“RMI”) opposes Petitioners Allan and Gina Margitans’ (“the Margitans”) Petition for Discretionary Review (“Petition”).

II. COURT OF APPEALS DECISION

The Margitans seek review of the unpublished opinion of the Court of Appeals, Division III, issued on March 3, 2020 (“Court of Appeals Opinion”), which is attached to the Margitans’ Petition as Appendix A.

III. ISSUES PRESENTED FOR REVIEW

Respondent Risk Management, Inc. (“RMI”) acknowledges the Margitans’ statement of the issues for review but believes they are more appropriately stated as follows:

1. Must discretionary review pursuant to RAP 13.4(b)(1) be denied, where the Margitans have failed to identify any Supreme Court decision with which the Court of Appeals Opinion conflicts and this Court’s recent decision in *Keodalah v. Allstate Ins. Co.* directly supports the Court of Appeals’ Opinion?
2. Must discretionary review pursuant to RAP 13.4(b)(4) be denied, where the Petition involves no issue of substantial

public interest because the dispute is entirely private and this Court's decision in *Keodalah v. Allstate Ins. Co.* has authoritatively resolved the issues presented?

IV. STATEMENT OF THE CASE

A. Relationship of the Parties

The Margitans have been insured with Respondent Allstate Property and Casualty Insurance Company ("Allstate") since 1988. *See* CP 4. In 1999, Clifford Walton became an insurance producer for Allstate. CP 44, 139. In approximately 2001, Mr. Walton joined RMI. CP 140. The Margitans became Mr. Walton's clients shortly thereafter. CP 46-47, 140. RMI and Mr. Walton are licensed as "insurance producers" by the Washington State Insurance Commissioner. *See Risk Management Inc., Office of the Insurance Commissioner Washington State*, <https://fortress.wa.gov/oic/consumertoolkit/Licensee/AgencyProfile.aspx?WAOIC=XJ7Y9ia0nfhtedIyMaTY4A%253D%253D> (last visited May 27, 2020); *Clifford C Walton Jr*, Office of the Insurance Commissioner Washington State, <https://fortress.wa.gov/oic/consumertoolkit/Licensee/AgentProfile.aspx?WAOIC=HuKi43uG25P1jwXZd8hFXg%253D%253D> (last visited May 27, 2020). RMI is an independent contractor of Allstate. CP 140. Mr. Walton is both part-owner and an employee of RMI. CP 45.

In 2010, The Margitans purchased, through Mr. Walton and RMI, Allstate Homeowners Policy number 964571633 (“homeowners policy”), which was effective beginning July 29, 2010. *See* CP 49-69. The Margitans’ claims arise from a coverage dispute related to this policy. *See* CP 3-9.

B. Procedural History

1. The Complaint

On November 28, 2017, the Margitans filed a complaint, asserting causes of action against RMI for breach of contract, breach of insurance policy, bad faith, and violation of the Washington State Consumer Protection Act (“CPA”) predicated on RCW 48.01.030 and WAC 284-30-330. *See* CP 3-9.

2. Summary Judgment

On September 7, 2018, RMI filed a motion for summary judgment, seeking dismissal of the Margitans’ claims against it. *See* CP 27-37. On October 5, 2018, the Superior Court granted RMI’s motion in full, dismissing all claims against RMI. *See* CP 1202-05.

3. Reconsideration

The Margitans subsequently moved for reconsideration. *See* CP 1207-22. In their Motion for Reconsideration, the Margitans raised for the first time two new theories of RMI’s liability: 1) that RMI violated RCW

48.30.090¹; and 2) that RMI breached its “special relationship” duty to the Margitans. *See id.* The Margitans did not raise these theories, or the authority cited in support, in their Complaint or summary judgment briefing. *See* CP 3-9, 1021-45.

On November 29, 2018, the Superior Court denied the Margitans’ Motion for Reconsideration. *See* CP 1400-02.

4. Appeal

The Margitans timely appealed dismissal of their claims to the Court of Appeals, Division III. *See* Court of Appeals Opinion. On appeal, the Margitans did not assign error to the dismissal of their breach of contract claim against RMI. *Id.* at 6-7 n.1. Rather, in regards to RMI, they appealed only the Superior Court’s dismissal of their bad faith and CPA claims. *Id.*

On March 3, 2020, the Court of Appeals affirmed dismissal of the Margitans’ claims against RMI. *Id.*

¹ RCW 48.30.090 provides: “No person shall make, issue or circulate, or cause to be made, issued or circulated any misrepresentation of the terms of any policy or the benefits or advantages promised thereby, or the dividends or share of surplus to be received thereon, or use any name or title of any policy or class of policies misrepresenting the nature thereof.”

V. ARGUMENT

A. Standard of Review

The Supreme Court will only accept review of a Court of Appeals decision if the petitioner can establish one of four narrowly enumerated bases:

- (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
- (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or
- (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
- (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b).

B. The Margitans Have Failed to Establish a Valid Basis for Discretionary Review as Required by RAP 13.4(b)

The Margitans base their request for review solely upon RAP 13.4(b)(1) and (4), asserting that 1) the Court of Appeals Opinion is in conflict with a decision of the Supreme Court; and 2) their Petition involves issues of substantial public interest. *See* Petition at 1, 7, 11, 12. However, the Margitans fail to satisfy the requirements of either asserted basis for review.

1. Because the Margitans Cannot Identify Any Supreme Court Decision with Which the Court of Appeals Opinion Conflicts, Review Pursuant to RAP 13.4(b)(1) Must Be Denied

The Margitans seek review of their RCW 48.01.030, WAC 284-30-330, and CPA claims pursuant to RAP 13.4(b)(1).² Petition at 12. Yet the Margitans explicitly concede that the Court of Appeals Opinion does not conflict with any Supreme Court decision on this issue

Margitan finds no case law in Washington State that addressed the issue of [sic] “an insurance producer” is exempt from complying with RCW 48.01.030, WAC 284-30-330 and the CPA.”

Petition at 11. If no Washington case law has addressed this issue, then the Court of Appeals Opinion clearly cannot conflict with any Supreme Court decision. Thus, based upon the Margitans’ own representations, review is not warranted under RAP 13.4(b)(1).

Moreover, the Court of Appeals Opinion directly *aligns* with the Supreme Court’s recent decision in *Keodalah v. Allstate Ins. Co.*, 194 Wn.2d 339, 449 P.3d 1040 (2019), in which this Court dismissed as baseless claims identical to those asserted by the Margitans against RMI. In *Keodalah*, the Court plainly held that “RCW 48.01.030 does not create an implied cause of action for insurance bad faith.” *Id.* at 349. The Court

² For all other issues raised in the Petition, the Margitans’ invoke RAP 13.4(b)(4) as the sole basis for review. Petition at 7, 11.

further held that, because RCW 48.01.030 and WAC 284-30-330 apply only to *insurers*, CPA claims premised on alleged violations of these provisions will not lie against non-insurers like RMI. *Id.* at 350-51. Thus, far from being in conflict with a decision of the Supreme Court, the Court of Appeals Opinion is fully supported by *Keodalah*, which decided issues substantively identical to those raised in the Margitans' Petition.

Because the Court of Appeals Opinion does not conflict with any decision of the Supreme Court, review pursuant to RAP 13.4(b)(1) must be denied.

2. Because the Margitans' Petition Does Not Involve Any Issue of Public Interest, Review Pursuant to RAP 13.4(b)(4) Must Be Denied

The Margitans' second asserted basis for review is RAP 13.4(b)(4): "the petition involves an issue of substantial public interest that should be determined by the Supreme Court."

"A decision that has the potential to affect a number of proceedings in the lower courts may warrant review as an issue of substantial public interest if review will avoid unnecessary litigation and confusion on a common issue." *In re Pers. Restraint of Flippo*, 380 P.3d 413, 413-14 (Wash. 2016).

Case law providing additional context for this rule is scant. However, some guidance may be found in the courts' analysis of public

interest in the context of mootness: “The Supreme Court may, in its discretion, retain and decide an appeal which has otherwise become moot when it can be said that matters of continuing and substantial public interest are involved.” *Sorenson v. Bellingham*, 80 Wn.2d 547, 558, 496 P.2d 512, 518 (1972). To determine whether an otherwise moot matter involves an issue of public interest, courts will consider: “the public or private nature of the question presented, the desirability of an authoritative determination for the future guidance of public officers, and the likelihood of future recurrence of the question.” *Id.* (internal quotations and citations omitted).

Here, a decision on the Margitans’ Petition has absolutely no “potential to affect a number of proceedings in the lower courts” or “avoid unnecessary litigation and confusion on a common issue” because the issues raised—whether bad faith and CPA claims predicated on RCW 48.01.030 and WAC 284-30-330 will lie against non-insurers—have already been decided in *Keodalah. In re Pers. Restraint of Flippo*, 380 P.3d at 413-14. With *Keodalah* as definitive precedent, there can be no confusion on these issues.

In fact, *Keodalah* is already providing clarity and preventing the unnecessary litigation of claims eerily similar to those asserted by the Margitans. In *Kolova v. Allstate Ins. Co.*, No. C19-1730JLR, 2020 U.S.

Dist. LEXIS 22826, at *1-3 (W.D. Wash. Feb. 10, 2020), the plaintiffs voluntarily dismissed their bad faith, CPA, and Insurance Fair Conduct Act claims against their Allstate agent because they recognized that *Keodalah* bars such claims against insurance producers.

Likewise, the mootness factors further establish that the Petition raises no issue of public importance. *See Sorenson*, 80 Wn.2d at 558. The questions presented are entirely private in nature, involving a tripartite coverage dispute between private parties. *Id.* As stated above, there is no need for an “authoritative determination for the future guidance of public officers” because the issues have already been decided by the Supreme Court in *Keodalah*. Similarly, there is no “likelihood of future recurrence” because *Keodalah* has resolved the precise issues underlying the Margitans’ claims. *Id.* Indeed, other litigants have been voluntarily dismissing such claims in light of *Keodalah*. *See Kolova*, No. C19-1730JLR, 2020 U.S. Dist. LEXIS 22826, at *1-3.

Accordingly, the Petition does not involve any issue of substantial public interest, and therefore review pursuant to RAP 13.4(b)(4) must be denied.

VI. CONCLUSION

For the foregoing reasons, RMI respectfully requests that the Court deny the Margitans’ Petition.

Dated this 27th day of May, 2020.

Respectfully submitted,

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DECLARATION OF SERVICE

On said day below, I caused to be served on the following a true and accurate copy of the **RESPONDENT RISK MANAGEMENT, INC.'S ANSWER TO PETITION FOR DISCRETIONARY REVIEW** in Court of Appeals Cause No. 36517-4 in the manner set forth below:

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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.

EXECUTED this 27th day of May, 2020 at Seattle, Washington.

s/Tami L. Foster
Tami L. Foster, Legal Secretary

LEWIS BRISBOIS BISGAARD & SMITH LLP

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