

Case No. 75731-8-I

75731-8

**COURT OF APPEALS, DIVISION ONE,
OF THE STATE OF WASHINGTON**

MOUN KEODALAH and AUNG KEODALAH, husband and wife,
Petitioners/Plaintiffs,

v.

ALLSTATE INSURANCE COMPANY, a corporation, and
TRACEY SMITH and JOHN DOE SMITH, husband and wife,
Respondents/Defendants.

RESPONSIVE BRIEF ON THE MERITS OF
RESPONDENTS/DEFENDANTS
ALLSTATE INSURANCE COMPANY,
TRACEY SMITH, and JOHN DOE SMITH

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I. INTRODUCTION

The plaintiffs ask the Court to expand dramatically the potential liability for insurance bad-faith claims by being the first Washington court to hold that an individual employee of an insurer may be held liable for work that she performed in the scope of her employment. More specifically, the plaintiffs ask the Court to hold that they may pursue an action against Ms. Tracey Smith, an employee of Allstate Insurance Company, based on the allegations that she signed discovery responses and testified at trial and deposition in an earlier lawsuit between one of the plaintiffs and Allstate.

The Court should reject the plaintiffs' request.

First, an agent of a disclosed principal may not be held liable for work performed in the scope of his or her employment unless that person owes a separate duty to the plaintiff.¹ No Washington courts have held that an individual adjuster employee can be liable to an insured for work performed in the scope of their employment. To the contrary, the courts that have considered that argument have squarely rejected it.²

¹ *Annechino v. Worthy*, 175 Wn.2d 630, 638, 290 P.3d 126 (2012) (quoting Restatement (Third) of Agency § 7.02 (2006) (“An agent is subject to tort liability to a third party harmed by the agent's conduct only when the agent's conduct breaches a duty that the agent owes to the third party.”)).

² *Collins v. Quintana*, No. C15-1619RAJ, 2016 WL 337262, at *4 (W.D. Wash. Jan. 28, 2016) (Jones, J.); *Grant v. Unigard Indem. Co.*, No. CV14-00198BJR, 2014 WL 12028484, at *2–3 (W.D. Wash. July 29, 2014) (Rothstein, J.);

This Court should reach the same conclusion. Not only is it correct, but a contrary holding would expand enormously the scope of liability in insurance matters. An insurance company can act only through its employees. Yet under the plaintiffs' proposed rule those employees would always be liable any time an insurer breaches claims handling regulations or acts in bad faith. Plaintiffs in a bad-faith claim could also name as defendants numerous employees of the insurer, making cases more cumbersome and costly for courts and insurers. The Court should avoid such a significant imposition of needless costs on parties and the judicial system.

Second, under Washington law a person may not be held liable in a civil action for his or her role in an earlier lawsuit.³ In this case, the plaintiffs are seeking to do precisely that. They want to recover from Ms. Smith because she signed a discovery response and testified at deposition and trial in a prior lawsuit.⁴ No Washington court has ever held that a

Garoutte v. Am. Fam. Mut. Ins. Co., No. C12-1787MJP, 2013 WL 231104, at *2-3 (W.D. Wash. Jan. 22, 2013) (Pechman, J.); *Rice v. State Farm Mut. Auto. Ins. Co.*, No. C05-5595RJB, 2005 WL 2487975, at *4 (W.D. Wash. Oct. 7, 2005) (Bryan, J.).

³ *Bruce v. Byrne-Stevens & Assocs. Eng'rs, Inc.*, 113 Wn.2d 123, 125, 776 P.2d 666 (1989). *Bruce* was a plurality opinion. But the Washington Supreme Court later adopted the reasoning of the *Bruce* plurality opinion and described it as the "holding" of that case. *Wynn v. Earin*, 163 Wn.2d 361, 370, 181 P.3d 806 (2008). Thus, *Wynn* made the *Bruce* plurality opinion binding authority.

⁴ Clerk's Papers (CP) 7-12 ¶¶ 7.1-9.7.

person may be held civilly liable under such circumstances. Rather, such conduct is protected by absolute immunity.⁵ The Court should respect the long history of this rule and hold that the plaintiffs cannot recover under these circumstances.

Third, the Court should conclude that the plaintiffs cannot assert any claims arising out of earlier conduct, as any other claims are barred by the applicable statute of limitations. By June 24, 2009, the plaintiffs knew or should have known that they might have a cause of action arising out of Allstate’s handling of Mr. Keodalah’s claim.⁶ Indeed, the plaintiffs’ attorney threatened to bring suit against Allstate if Allstate failed to respond favorably to her demand.⁷ Despite that knowledge, the plaintiffs waited until August 4, 2015 to file this suit⁸—more than six years later and well past the expiration of the applicable statutes of limitations.⁹ Their claims for any prelitigation conduct have thus expired.

⁵ *Bruce*, 113 Wn.2d at 125.

⁶ CP 6 ¶ 6.9; *see also* CP 100–104.

⁷ CP 104.

⁸ CP 1 (showing filing date).

⁹ *Moratti ex rel. Tarutis v. Farmers Ins. Co.*, 162 Wn.App. 495, 254 P.3d 939, 942 (2011) (“A cause of action generally accrues for purposes of the commencement of the statute of limitation when a party has a right to apply to court for relief.”) (citation omitted). “An action for bad faith handling of an insurance claim sounds in tort.” *Safeco Ins. Co. v. Butler*, 118 Wn.2d 383, 823 P.2d 499, 503 (1992). Under RCW 4.16.080(2), the applicable statute of limitations for such a tort is three years. A claim under the Consumer Protection Act must be brought within four years of its accrual. RCW 19.86.120.

The Court should therefore affirm the superior court's dismissal of the plaintiffs' claims against Ms. Smith.

II. COUNTER-STATEMENT OF THE ISSUES

1. Under Washington law, an agent of a disclosed principal may be held liable for conduct within the scope of his or her employment only if that person owed an independent duty to the plaintiff.¹⁰ No Washington courts have held that an individual adjuster employee can be liable to an insured for work performed in the scope of their employment. And no court has ever held that an insurance company employee must sign discovery pleadings or testify favorably to an insured. Under these circumstances, should the Court conclude that Ms. Smith owed or breached an independent duty to the plaintiffs?

2. Washington law holds that a person may not be held liable in a second civil action for conduct in an earlier action.¹¹ In this case, the plaintiffs seek to hold Ms. Smith liable for her conduct in an earlier civil action. Should this Court permit the plaintiffs' claim against Ms. Smith to proceed?

3. Under Washington law, a claim for insurance bad faith must be brought within three years of the claim's accrual.¹² A claim for a

¹⁰ *Annechino*, 175 Wn.2d at 638.

¹¹ *Bruce*, 113 Wn.2d at 125.

¹² RCW 4.16.080(2).

Consumer Protection Act (CPA) violation must be brought within four years of the claim's accrual.¹³ In this case, the plaintiffs knew or should have known that they might have bad-faith and CPA claims more than six years before bringing this lawsuit. Should the Court allow the plaintiffs to press claims for conduct occurring more than four years before the filing of the suit?

III. FACTUAL BACKGROUND¹⁴

A. More Than Six Years Before Filing This Lawsuit, the Plaintiffs Knew or Should Have Known That They Had Potential Bad-Faith and CPA Claims Against Allstate

Plaintiff Moun Keodalah was involved in a collision with a motorcyclist in April 2007 when he (Mr. Keodalah) pulled forward from a stop sign into the path of the motorcycle.¹⁵ At that time he was insured under an Allstate motor vehicle policy (“the Policy”), which included Underinsured Motorist (UIM) coverage.¹⁶

¹³ RCW 19.86.120.

¹⁴ Because this appeal arises from a CR 12(b)(6) motion, the facts section sets forth the plaintiffs' allegations. *See Tenore v. AT&T Wireless Servs.*, 136 Wn.2d 322, 330, 962 P.2d 104 (1998). The defendants/respondents do not agree with all of those allegations, and they reserve the right to challenge them should this case be remanded.

¹⁵ CP 2 ¶¶ 4.1–4.6.

¹⁶ CP 2 ¶¶ 3.5–3.7.

In April 2008, Mr. Keodalah demanded that Allstate pay him \$25,000, the limit of the UIM policy.¹⁷ On July 11, 2008, Ed Sumabat, an Allstate employee, told Mr. Keodalah that Allstate had assessed him as being 70 percent at fault for the collision.¹⁸ Mr. Sumabat also conveyed to Mr. Keodalah Allstate's calculation of his medical expenses and lost wages.¹⁹ Allstate offered \$1,600 to settle his UIM claim.²⁰

On August 6, 2008, Mr. Keodalah asked Allstate to provide the basis for its evaluation of his claim.²¹ On August 11, 2008, Mr. Sumabat told Mr. Keodalah that Allstate declined to provide him with a copy of a report prepared by its accident reconstructionist.²²

On June 24, 2009, Mr. Keodalah's counsel, Vonda Sargent, sent Allstate a written notice under the Insurance Fair Conduct Act, RCW chapter 48.30.²³ In that letter, Ms. Sargent asserted that Allstate had acted unreasonably:

It is unreasonable for Allstate to not only find Mr. Keodalah 70% liable for the collision . . . but also to spurn our attempts to ascertain how they could have logically

¹⁷ CP 6 ¶ 6.1.

¹⁸ CP 6 ¶ 6.3.

¹⁹ CP 6 ¶¶ 6.4–6.5.

²⁰ CP 6 ¶ 6.6.

²¹ CP 6 ¶ 6.7.

²² CP 6 ¶ 6.8.

²³ CP 6 ¶ 6.9; CP 100–04. (Ms. Sargent also represents the Keodalas in this matter.)

come to this conclusion by refusing to provide us with materials from their investigation.²⁴

Ms. Sargent also expressly identified four insurance regulations that, she asserted “will apply to [Mr. Keodalah’s] claim”: WAC 284-30-330 (6), (7), (12), and (13).²⁵ Ms. Sargent also stated that “an insurer is subject to liability under the Insurance Fair Conduct Act, RCW chapter 48.30, if it violates other insurance claims practices regulations codified in WAC Chapter 284-30.” And she claimed that

[i]t would be unreasonable of Allstate to compel Mr. Keodalah to institute or submit to expensive, time-consuming litigation or arbitration to recover the amount due under his personal injury protection coverage.²⁶

Ms. Sargent ended the letter by threatening to bring suit:

Please respond in writing within 20 days if Allstate will agree to do the right thing and agree to pay for Mr. Keodalah’s losses. Otherwise, I will bring a lawsuit on their behalf to obtain the full benefits of his insurance policy and the remedies and penalties provided for in the Insurance Fair Conduct Act.²⁷

On July 17, 2009, Allstate increased its offer to \$5,000.²⁸

The plaintiffs did not accept that offer. Instead, on June 28, 2012—almost three years later—Keodalah filed a lawsuit in King County

²⁴ CP 102.

²⁵ CP 103. The IFCA notice refers to “the Jones’ claim.” The error is apparently the result of copying and pasting.

²⁶ CP 103.

²⁷ CP 104.

²⁸ CP 7 ¶¶ 6.10–6.11.

Superior Court seeking payment of benefits under the Policy.²⁹ He prevailed in that suit, and Allstate paid the judgment entered against it.³⁰

B. Despite Knowing of Their Potential Claims for Insurance Bad Faith and Violation of the CPA, the Plaintiffs Waited More than Six Years to Bring This Action

As noted above, the plaintiffs sent their first IFCA notice to Allstate on June 24, 2009.³¹ Almost six years later, on April 15, 2015, Mr. Keodalah sent Allstate a second IFCA notice letter arising out of the same accident and the same insurance claim.³² As in his first letter, Mr. Keodalah's second IFCA letter again challenged Allstate's failure to pay promptly, its alleged claims-handling violations, and "Allstate's uncooperative and unreasonable settlement practices prior to litigation, *during the action and trial* it forced plaintiff Keodalah to institute and endure, *and in its post-judgment actions and failures.*"³³

The plaintiffs filed this second lawsuit on August 4, 2015³⁴—more than three years after Mr. Keodalah filed his first lawsuit against Allstate and *more than six years* after receiving Allstate's response to his IFCA notice. The Keodalas named as defendants Allstate and Tracey Smith, an

²⁹ CP 7 ¶ 7.1

³⁰ CP 12 ¶ 9.7.

³¹ CP 6 ¶ 6.9; CP 100–03.

³² CP 12 ¶ 9.8.

³³ CP 12 ¶ 9.8 (emphasis added).

³⁴ CP 1.

Allstate employee who signed discovery responses and offered testimony related to the case.³⁵

The complaint includes a long list of factual allegations relating to Mr. Keodalah's accident and Allstate's actions. The complaint groups these factual allegations into six sections:

1. "Facts Related to Mr. Keodalah's April 2, 2007 Collision";³⁶
2. "Facts Related to Allstate's Claim Handling";³⁷
3. "Facts Related to Allstate's Interactions with Its Insured";³⁸
4. "Facts Related to Litigation";³⁹
5. "Facts Related to Trial";⁴⁰
6. "Facts Related to Post-Trial Proceedings."⁴¹

As suggested by these subheadings, the first three sections of factual allegations focus on the accident and Mr. Keodalah's interactions with Allstate before he filed his first lawsuit. These sections contain absolutely no allegations relating to Ms. Smith. Instead, the plaintiffs' allegations name and concern four *other* Allstate employees—Celia A.

³⁵ See CP 8 ¶¶ 7.17, 7.20–7.23. The plaintiffs also named "John Doe Smith" as a defendant.

³⁶ CP 2:16 (reformatted for clarity).

³⁷ CP 3:15 (reformatted for clarity).

³⁸ CP at 6:9 (reformatted for clarity).

³⁹ CP 7:5 (reformatted for clarity).

⁴⁰ CP 9:5 (reformatted for clarity).

⁴¹ CP 11:14.

Hart,⁴² Scott McFarland,⁴³ Robert Bjorback, Jr.,⁴⁴ and Ed Sumabat⁴⁵—as well as Richard Chapman, an outside consultant hired by Allstate.⁴⁶ Only sections four, five, and six name or concern Ms. Smith.

According to the complaint, the plaintiffs first became aware of Ms. Smith on December 4, 2012, when Allstate responded to Mr. Keodalah’s discovery requests in the underlying action.⁴⁷ The complaint fails to identify a single act by Ms. Smith before signing Allstate’s discovery responses, let alone allege any wrongful conduct by her before that time. Instead, its allegations against Ms. Smith are directed solely toward her conduct in the first round of litigation:

7.13 Defendant Allstate, through its attorney, Jodi Held, and its claim representative, defendant Smith, responded [to Keodalah’s discovery requests] on December 4, 2012.

...

7.17 Defendant Allstate designated Allstate adjustor Tracey Smith as its CR 30(b)(6) representative on February 28, 2013.

...

7.20 Defendant Allstate testified, through its designee defendant Smith, that it did not know when it made its liability decision.

7.21 Defendant Allstate testified, through its designee defendant Smith, that it did not know when it

⁴² CP 3–4 ¶ 5.2.

⁴³ CP 4–5 ¶ 5.3.

⁴⁴ CP 5–6 ¶ 5.5.

⁴⁵ CP 6 ¶¶ 6.3–6.5, 6.8.

⁴⁶ CP 5 ¶ 5.4.

⁴⁷ CP 7 ¶ 7.11.

determined the value of plaintiff Keodalah's claim for damages.

- 7.22 Defendant Allstate's attorney, Marilee Erickson, and its corporate designee defendant Tracey Smith, alleged that Keodalah had run the stop sign and was therefore at fault.
- 7.23 Defendant Allstate subsequently admitted, through its designee defendant Smith, that plaintiff Keodalah had not run a stop sign.
- 7.24 Defendant Allstate's designee Smith alleged plaintiff Keodalah had been on his cell phone and was therefore at fault.⁴⁸

These constitute the entirety of the plaintiffs' factual allegations regarding Ms. Smith. Through the rest of the complaint, the plaintiffs set forth only allegations of law regarding Ms. Smith.

C. Procedural History of This Action

Allstate moved to dismiss the complaint in this second action under Civil Rule 12(b)(6).⁴⁹ On August 1, 2016, the trial court entered an order granting in part and denying in part Allstate's motion.⁵⁰ Specifically, the trial court dismissed all of the plaintiffs' claims against Tracey Smith and their claims against Allstate under the IFCA.⁵¹ The court denied Allstate's motion to dismiss the plaintiffs' claims on the basis of res judicata or claim splitting, and it denied Allstate's motion to dismiss

⁴⁸ CP 7–8.

⁴⁹ CP 46–106.

⁵⁰ CP 154–56.

⁵¹ CP 155:4–7.

the claims against Allstate that arose from conduct during Keodalah's first lawsuit.⁵²

This Court later granted discretionary review as to the plaintiffs' IFCA claims and their claims against Ms. Smith. Following entry of this Court's order granting review, the Washington Supreme Court issued its opinion in *Perez-Crisantos v. State Farm Fire & Casualty Co.*,⁵³ holding that violations of the Washington insurance regulations, standing alone, do not create an IFCA cause of action. The plaintiffs have now abandoned their IFCA claim.⁵⁴

Thus, this Court must decide only whether the plaintiffs have stated a claim against Ms. Smith for (a) signing a discovery response or (b) testifying at deposition and trial.

IV. ARGUMENT

The Court should affirm the Superior Court's order dismissing the plaintiffs' claims against Ms. Smith.

The Washington appellate courts review de novo an order granting a motion to dismiss under CR 12(b)(6).⁵⁵ A court should dismiss a

⁵² CP 155:8–12.

⁵³ 187 Wn.2d 669, 389 P.3d 476 (2017).

⁵⁴ Plaintiffs/Appellants' Opening Brief on the Merits at 2 n.2. Although the plaintiffs have abandoned their appeal as to Allstate, Allstate joins in this brief with Ms. Smith.

⁵⁵ *FutureSelect Portfolio Mgmt., Inc. v. Tremont Grp. Holdings, Inc.*, 180 Wn.2d 954, 962, 331 P.3d 29 (2014).

complaint under CR 12(b)(6) if the plaintiff cannot prove any set of facts consistent with the complaint that would entitle the plaintiff to relief.⁵⁶

In deciding a CR 12(b)(6) motion, the courts presume that all factual allegations in the plaintiff's complaint are true.⁵⁷ But the courts need not accept a complaint's legal conclusions as true.⁵⁸ “If a plaintiff's claim remains legally insufficient even under his or her proffered hypothetical facts, dismissal pursuant to CR 12(b)(6) is appropriate.”⁵⁹ Further, if a litigant does not proffer hypothetical facts, a reviewing court has no obligation to exercise its own imagination to supplement the litigants.⁶⁰

In this case, the complaint demonstrates that the plaintiffs cannot recover against Ms. Smith:

1. The plaintiffs' claims against Ms. Smith must fail because Ms. Smith was acting as the agent of a disclosed principal and did not breach any independent duty to the plaintiffs.

2. The plaintiffs' allegations concerning Ms. Smith arise solely out of her role in the earlier litigation. Under the witness immunity

⁵⁶ *Bravo v. Dolsen Cos.*, 125 Wn.2d 745, 750, 888 P.2d 147 (1995).

⁵⁷ *Tenore v. AT&T Wireless Servs.*, 136 Wn.2d 322, 330, 962 P.2d 104 (1998).

⁵⁸ *Haberman v. Washington Pub. Power Supply Sys.*, 109 Wn.2d 107, 120, 744 P.2d 1032 (1987).

⁵⁹ *Gorman v. Garlock, Inc.*, 155 Wn.2d 198, 215, 118 P.3d 311 (2005).

⁶⁰ *West v. Thurston Cty.*, 169 Wn.App. 862, 867 n.3, 282 P.3d 1150 (2012).

privilege, she cannot be held liable in a second case for her role in the prior lawsuit. Their claims must therefore fail.⁶¹

3. The plaintiffs have not alleged that Ms. Smith engaged in any conduct other than her role in the earlier litigation. Even if she had engaged in any such conduct, the applicable statutes of limitations bar the plaintiffs' claims relating to any such conduct.

In short, the superior court did not err in dismissing the plaintiffs' claims against Ms. Smith. This Court should therefore affirm that dismissal.

⁶¹ In reply, the plaintiffs may argue that the defendants did not argue to the trial court the issue of liability for litigation conduct. Not so. Defendants raised that issue in the trial court, and both parties briefed it. *See* CP 60:16–61:20, esp. 60:16 (“Plaintiffs’ claims based on litigation conduct fail as a matter of law.”); 66:21.5 – 22.5 (“ . . . Plaintiff cannot base bad faith and CPA claims on litigation-related conduct.”); 117:15–118:2 (plaintiffs’ response); 145:10–19. The plaintiffs may also argue that the superior court denied the defendants’ motion to dismiss as to litigation conduct and that the defendants did not seek review of that portion of the order. But Ms. Smith prevailed on all of the plaintiffs’ claims against her. She is entitled to argue in the alternative for affirmance of the superior court’s order. *See Mudarri v. State*, 147 Wn.App. 590, 606–07, 196 P.3d 153 (2008) (affirming on alternate grounds a trial court’s dismissal for failure to state a claim); RAP 2.4(b) (“The appellate court will, at the instance of the respondent, review those acts in the proceeding below which if repeated on remand would constitute error prejudicial to respondent.”). The federal appellate courts affirm on alternate grounds orders to dismiss for failure to state a claim. *See, e.g., Livid Holdings Ltd. v. Salomon Smith Barney, Inc.*, 403 F.3d 1050, 1055, 1058 (9th Cir. 2005). Because Washington’s civil rules were based on the Federal Rules of Civil Procedure, a federal court’s interpretation of the federal rules is highly persuasive in determining the effect of Washington’s rules. *Am. Disc. Corp. v. Saratoga W., Inc.*, 81 Wn.2d 34, 499 P.2d 869 (1972). Accordingly, this Court may affirm the order of dismissal as to Ms. Smith on alternate grounds—especially where, as here, the issue was raised in the trial court.

A. **An Individual Claims Adjuster Cannot Be Held Personally Liable for Insurance Bad Faith or Breach of the CPA for Signing Discovery Responses or Testifying at Deposition or Trial**

The law strongly compels the holding that an individual claims adjuster employee may not be held personally liable for work performed in the ordinary course of her employment. No Washington court has reached the conclusion the plaintiffs urge here—especially not in the factual context at issue here. The Court should therefore reject the plaintiffs’ attempt to work a sea change in insurance law by creating a whole new category of defendants potentially subject to claims.

1. **Not a Single Case Permits Imposition of Liability on an Individual Employee Under the Circumstances at Issue Here**

In several decades of litigation, no state or federal court in Washington has ever accepted the plaintiffs’ argument that individual adjuster employees may be liable on bad faith or CPA claims. Instead, under Washington law an employee of a company acting within the scope of employment can be personally liable to a third party “only when the agent’s conduct breaches a duty that the agent owes to the third party.”⁶²

⁶² *Annechino v. Worthy*, 175 Wn.2d 630, 638, 290 P.3d 126 (2012) (quoting Restatement (Third) of Agency § 7.02 (2006) (“An agent is subject to tort liability to a third party harmed by the agent’s conduct only when the agent’s conduct breaches a duty that the agent owes to the third party.”)).

The plaintiffs cite *Eastwood v. Horse Harbor Foundation* for the proposition that ““an employee who tortiously causes injury to a third person may be held personally liable to that person regardless of whether he or she committed the tort while acting within the scope of employment.””⁶³ But in *Annechino*, decided two years later, the Washington Supreme Court explained the restriction on the rule sketchily set forth in *Eastwood*.⁶⁴ Thus, the Court must analyze Ms. Smith’s potential liability under *Annechino*, and not the earlier *Eastwood*.

Under *Annechino*, the plaintiffs’ claims against Ms. Smith necessarily fail. She was obviously the agent of a disclosed principal, Allstate. And the plaintiffs have not offered any factual allegations from which a trier of fact could conclude that she breached any duty that she might have owed the plaintiffs.

The complaint sets forth factual allegations regarding only Ms. Smith’s role in the earlier litigation—that is, her signing of discovery responses and testimony at deposition and the trial of the earlier matter. For this case, it doesn’t matter whether Ms. Smith might have owed the plaintiffs some duty in other circumstances—for example, before the filing

⁶³ 170 Wn.2d 380, 241 P.3d 1256 (2010) (quoting 27 Am. Jur. 2d Employment Relationship § 409 (2004)).

⁶⁴ *Annechino*, 175 Wn.2d at 638.

of the litigation, or outside the confines of the litigation—although such acts cannot give rise to individual adjuster liability either. The plaintiffs have focused their allegations against Ms. Smith *solely on her conduct in regard to the earlier lawsuit*.⁶⁵

On the facts that plaintiffs have put at issue, Ms. Smith neither owed nor breached an independent duty to the plaintiffs. Not a single case stands for the proposition that an individual employee adjuster owes a duty to an insured in signing discovery responses. Not a single case stands for the proposition that an individual employee adjuster owes a duty to an insured when testifying, or a duty to testify favorably to the insured (or indeed, even to avoid committing perjury). As discussed further below,⁶⁶ the Washington cases hold that there is no such rule for *anyone*. Instead, our courts hold unanimously and unambiguously that a party cannot recover against a person because of his or her role in prior litigation—not even against a party’s own medical expert who allegedly committed malpractice committed in the course of a prior lawsuit.⁶⁷

⁶⁵ Because the plaintiffs have not proffered any “hypothetical facts,” the Court need not indulge them by creating alternative facts. *See West*, 169 Wn.App. at 867 n.3. Instead, the Court should analyze the plaintiffs’ claims only in light of the factual allegations set out in their complaint.

⁶⁶ *See infra* section IV.B.1, pp. 26–31.

⁶⁷ *See Wynn v. Earin*, 163 Wn.2d 361, 370, 181 P.3d 806 (2008).

Given that *even a physician does not have an independent duty to a patient under such circumstances*, this Court should conclude that independent employee adjusters do not owe any such duty.

Because Ms. Smith neither owed nor breached any independent duty to the plaintiffs in regard to the conduct at issue, the Court should affirm the trial court's order dismissing all claims against her.

2. **The Courts That Have Addressed This Issue Have Rejected the Plaintiffs' Approach**

The Washington law on this issue is unambiguous—and entirely unfavorable to the plaintiffs.

As an initial matter, the plaintiffs cannot assert against Ms. Smith a claim for breach of the duty of insurance good faith. The duty of good faith in the insurance context arises from two sources: (1) the insurance contract and (2) the quasi-fiduciary relationship between an insured and his or her insurer.⁶⁸ Because there was no contract between Ms. Smith and the plaintiffs, she did not owe them a duty of good faith.

In accordance with the *Tank* analysis, in *International Ultimate v. St. Paul Fire & Marine*, this Court held explicitly that “the CPA does not contemplate suits against employees of insurers.”⁶⁹ The plaintiffs argue

⁶⁸ *Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 391, 715 P.2d 1133 (1986).

⁶⁹ 122 Wn.App. 736, 758, 87 P.3d 774 (2004).

that *International Ultimate* was wrongly decided, relying on *Panag v. Farmers Insurance Co.*⁷⁰ But *Panag* did not overrule *International Ultimate*, which still remains good law.

The federal courts applying Washington law have also concluded that individual adjusters may not be held personally liable. In *Garoutte v. American Family Mutual Insurance Co.*, the plaintiff insured filed suit against an insurer and its adjuster employee alleging common law insurance bad faith and violation of the CPA.⁷¹ Judge Pechman held that the adjuster could not be held personally liable on either theory. *First*, no cause of action existed “because [the adjuster] acted within the scope of his employment.”⁷² *Second*, Judge Pechman held that Washington law does not impose an independent duty of good faith on insurance adjusters, separate from the duty of good faith placed on the insurer that employs them.⁷³ Accordingly, the court dismissed all claims against the adjuster personally. Notably, *Garoutte* was decided after *Panag*, yet that did not cause the court to reach a different conclusion or reject *International Ultimate* as no longer good law.

⁷⁰ 166 Wn.2d 27, 204 P.3d 885 (2009).

⁷¹ No. C12-1787MJP, 2013 WL 231104, at *2-3 (W.D. Wash. Jan. 22, 2013) (Pechman, J.).

⁷² *Id.* at *2 (citing *Mercado v. Allstate Ins. Co.*, 340 F.3d 824, 826 (9th Cir. 2003)).

⁷³ *Id.*

Similarly, in *Rice v. State Farm Mutual Automobile Insurance Co.*, the plaintiff sued both his UIM insurer and an adjuster employee for bad faith and CPA violations.⁷⁴ Although the insurer and adjuster were both Washington residents, the insurer removed the case to federal court, asserting that the adjuster was fraudulently joined. The plaintiff moved to remand, arguing that Washington law imposed duties of good faith on the adjuster himself, as opposed to merely on his employer (the plaintiff's insurer). Judge Bryan rejected that argument, holding there was no such duty and explaining that the adjuster was not an "insurer" within the meaning of the insurance statutes and regulations that imposed good faith duties on insurers.⁷⁵

In *Collins v. Quintana*, Judge Jones followed the same line of authority in dismissing dismiss bad faith claims against an individual insurance adjuster arising from her handling of an auto accident claim:

Plaintiff names Ms. Quintana, Mercury's insurance adjuster in this claim, as a separate Defendant. **Both the Ninth Circuit and the Western District of Washington interpreting Washington law have held no cause of action exists against the employee of an insurance company if the employee is acting within the scope of their employment. . . .** Ms. Quintana was well within her scope of employment when assessing and denying the insurance claim and Plaintiff's allegations do not reveal any

⁷⁴ No. C05-5595RJB, 2005 WL 2487975, at *3-4 (W.D. Wash. Oct. 7, 2005) (Bryan, J.).

⁷⁵ *Id.* at *3.

more. In fact, Plaintiff's allegations substantively require Ms. Quintana to have done her job: adjust the claim. As such, no individual cause of action may be asserted against Ms. Quintana.⁷⁶

In *Grant v. Unigard Indemnity Co.*,⁷⁷ Judge Rothstein reached the same conclusion. In *Grant*, the plaintiffs sued their insurer, an outside adjuster, and an individual employee of the outside adjuster.⁷⁸ The court granted the individual employee's motion to dismiss the claims against him, citing *Garoutte*, *International Ultimate*, and *Annechino*.⁷⁹

Against that authority, the plaintiffs offer *Merriman v. American Guarantee & Liability Insurance Co.*⁸⁰ and *Lease Crutcher Lewis WA, LLC v. National Union Fire Insurance Co.*⁸¹ Neither case helps them, as neither case concerns claims against individual adjuster employees. Instead, both cases relate solely to companies that step wholly into the insurer's shoes and thereby take over the insurer's statutory and regulatory duties in handling claims. Recognizing that the facts before him raised a

⁷⁶ No. C15-1619RAJ, 2016 WL 337262, at *4 (W.D. Wash. Jan. 28, 2016) (citations omitted; emphasis added). *Collins* was decided seven years after *Panag* was published. Yet, as in *Garoutte*, the court in *Collins* did not conclude that *International Ultimate* was no longer good law in light of *Panag*.

⁷⁷ No. CV14-00198BJR, 2014 WL 12028484, at *2-3 (W.D. Wash. July 29, 2014) (Rothstein, J.) (citing *Int'l Ultimate* and *Garoutte*). *Grant*, too, was decided years after *Panag* was published, yet the court still followed *International Ultimate*.

⁷⁸ *Id.* at *1.

⁷⁹ *Id.* at *2-4.

⁸⁰ --- Wn.App. ---, --- P.3d. ---, No 33929-7-III, 2017 WL 1330469 (Wash. App. Apr. 11, 2017).

⁸¹ No. C08-1862RSL, 2009 WL 3444762 (W.D. Wash. Oct. 20, 2009).

different issue, Judge Lasnik expressly stated that he was *not* deciding the issue of individual adjuster liability:

The issue presented in *Rice*, namely **whether the statute gives rise to a bad faith claim against individuals directly employed by the insurer**, need not be determined by this Court.⁸²

Lease does not resolve the individual adjuster liability issue here in part because the court explicitly said that it didn't. But *Lease* also does not resolve that issue because the insurer in *Lease* hired its sister company to “carry out fundamental insurance functions [of claims handling] in its place.”⁸³ Thus, *Lease* simply does not involve individual adjusters performing their job duties as employees of insurers.

Merriman involves fundamentally the same set of facts as *Lease*—a point made by the *Merriman* court itself.⁸⁴ Both cases instead concern corporate parties that stepped entirely into the insurer's shoes, assuming its decision-making authority and its obligations under the regulations governing claims handling. Those parties thus essentially became the insurer, and they consequently assumed the insurer's statutory obligation to act in good faith. Not surprisingly, the courts held that, *where a party assumes the role of an insurer*, it takes on the duties of an insurer. That

⁸² *Id.* at *2 n.1 (emphasis added).

⁸³ *Id.* at *2

⁸⁴ 2017 WL 1330469, at *7.

rule does not at all contradict the rule of *International Ultimate* or its progeny in the federal courts. The Court need not vary from that rule, but should instead continue to adhere to its precedent.

3. **The Language of RCW 48.01.030 Also Confirms That Individual Insurance Company Employees May Not Be Held Liable for Insurance Bad-Faith or CPA Claims Arising Out of the Performance of Their Duties**

The plaintiffs argue that the Legislature’s inclusion of the term “representatives” in RCW 48.01.030 means that individual insurance company employees may be held liable for insurance bad faith and violation of the CPA. But the term does not assist them. To the contrary, its use in the statute devastates their argument.

The term “representatives” has been in the statute for decades, but the plaintiffs have failed to cite a single case relying on the term to support the imposition of personal liability against an individual employee.

The Washington regulations that implement RCW 48.01.030 support Allstate’s interpretation. Those regulations were promulgated by the agency charged with enforcing Washington’s fair insurance claims handling regulations—the Office of the Insurance Commissioner. They expressly apply only to “all insurers”⁸⁵ and those “engaged in the business

⁸⁵ WAC 284-30-310.

of insurance, authorized or licensed to issue or who issues any insurance policy or insurance contract in this state.”⁸⁶ Individual adjuster employees do not meet those criteria or the statutory definition of “insurer.”⁸⁷ Accordingly, under those regulations individual adjuster employees acting within the scope of their employment cannot be liable for bad faith or violation of the CPA and IFCA—just as *International Ultimate, Rice, Garoutte, Collins*, and *Grant* correctly held.

The plaintiffs claim that the Insurance Commissioner cannot narrow the scope of RCW 48.01.030 and thus that the regulatory definition does not apply. But this Court should “accord[] substantial weight” to the Insurance Commissioner’s interpretation:

Where an administrative agency is charged with administering a special field of law and endowed with quasi-judicial functions because of its expertise in that field, *the agency's construction of statutory words and phrases and legislative intent should be accorded substantial weight when undergoing judicial review.*⁸⁸

In this case, the Court should give special deference to the Insurance Commissioner’s interpretation of the term “representatives.” The Legislature itself did not choose to use the term “employee.” The

⁸⁶ WAC 284-30-320(8).

⁸⁷ See RCW 48.01.050 (defining “insurer” as the person or entity “engaged in the business of making contracts of insurance.”).

⁸⁸ *Overton v. Wash. State Econ. Assistance Auth.*, 96 Wn.2d 552, 555, 637 P.2d 652 (1981) (citation omitted; emphasis added).

term “representatives” can extend to “employees” only through an act of construction. The Court should therefore give substantial weight to the Insurance Commissioner’s construction of the term to exclude employees. The term “representatives” should instead extend only to obvious contexts—for example, to independent contractors who actually assumed the insurers’ duties, as in *Merriman* and *Lease*, instead of to individual employees performing the job duties set for them by their employers.

Indeed, the Legislature’s use of the term “representatives” confirms that RCW 48.01.030 does not extend to individual employees of insurance companies. Had the Legislature intended that the statute cover individual employees, it could have done so simply by using the term “employees” instead of or in addition to “representatives.”

Elsewhere in RCW chapter 48, the Legislature demonstrated that it knew how to use the term “employees” when it wanted to do so. For example, RCW 48.17.062(1) provides that “[i]n this section, the term ‘insurer’ does not include an insurer's officers, directors, *employees*, subsidiaries, or affiliates.”⁸⁹

Because the Legislature knows how to use the term “employees” when it wishes to do so, the Court should conclude that it deliberately

⁸⁹ Emphasis added.

chose *not* to include the term “employees” in RCW 48.01.030. Further, the Court should therefore defer to the Legislature and conclude that the duties established by RCW 48.01.030 do not extend to “employees.”⁹⁰

That construction of the statute conforms with the Insurance Commissioner’s construction.

These considerations demonstrate why plaintiffs’ out-of-state cases are irrelevant.⁹¹ The Montana and West Virginia courts did not consider the Washington Insurance Commissioner’s interpretation of the Washington statute. Nor did those courts consider the fact that our Legislature knows how to use the term “employees” when it wishes to do so.

In summary, Washington law is clear: an individual employee of an insurance company may not be held liable for insurance bad faith or violations of the CPA arising out of the performance of her duties.

⁹⁰ See, e.g., *Manary v. Anderson*, 176 Wn.2d 342, 357, 292 P.3d 96 (2013) (“Where the Legislature omits language from a statute, intentionally or inadvertently, this court will not read into the statute the language that it believes was omitted.”).

⁹¹ See *Taylor v. Nationwide Mut. Ins. Co.*, 214 W. Va. 324, 589 S.E.2d 55 (W. Va. 2003); *O’Fallon v. Farmers Ins. Exch.*, 260 Mont. 233, 859 P.2d 1008 (Mont. 1993).

4. The Court Should Decline to Extend Liability in the Dramatic Fashion Requested by the Plaintiffs

As set out above, neither the statutes nor the case law support extending liability to individual employees of insurance companies. Of course, an insurance company can act only through its employees. For any insurance claim, many insurance company employees may be involved. In this case, the plaintiffs themselves interacted with four Allstate employees involved in the adjustment of their claim.⁹² If this Court were to be the first to adopt the plaintiffs' rule, then each of those four employees, as well possibly many others, would be subject to suit, causing a sea change in insurance law. The Court should decline to significantly extend liability in the way that the plaintiffs desire.

Importantly, insureds would not benefit directly from naming individual employees as defendants. After all, a plaintiff can have only one recovery for his or her injuries. The fact that ten defendants, rather than one, might be liable would not increase the quantum of the plaintiff's recovery.

Nor would the threat of liability create any obvious incentive for insurance company employees to do their work better. Employees already

⁹² CP 3-4 ¶ 5.2, 4-5 ¶ 5.3, 5-6 ¶ 5.5, 6 ¶¶ 6.3-6.5, 6.8.

have an incentive to do their work well: if they don't, they risk adverse employment consequences, including losing their jobs.

Thus, extending liability to individual employees will not directly assist insureds; it will merely make litigation more cumbersome and expensive.⁹³ That increased expense may create an incentive for insurers to settle cases—and perhaps to settle cases at a higher level. But those are not legitimate purposes for extending liability.

The Court should therefore decline to extend bad-faith and CPA liability to individual insurance company employees.

B. The Litigation Privilege Bars the Imposition of Any Tort or Tortlike Liability on Ms. Smith Deriving from Her Testimony at Deposition and Trial

The plaintiffs' claims against Ms. Smith fail for a second reason: they seek to hold her liable for signing discovery responses and testifying at deposition and trial. Under Washington law, a person may not be held liable for such litigation conduct in a later civil action.⁹⁴ The Court

⁹³ It appears likely that plaintiffs' attorneys wish to name individual employees to prevent removal of these actions to the federal courts, on the apparent belief that federal courts are a less favorable forum to plaintiffs than state courts.

⁹⁴ *Bruce v. Byrne–Stevens & Assocs. Eng'rs, Inc.*, 113 Wn.2d 123, 125, 776 P.2d 666 (1989); *Wynn v. Earin*, 163 Wn.2d 361, 369–70, 181 P.3d 806 (2008) (“The general rule is that witnesses in judicial proceedings are absolutely immune from suit founded on their testimony.”).

should therefore affirm the superior court's order dismissing the plaintiffs' claims against Ms. Smith.

1. Washington Law Forbids Imposing Liability on Persons Arising from Their Conduct in Earlier Litigation

The Washington courts have uniformly rejected attempts to hold parties or witnesses liable for conduct in prior lawsuits.

In *Ellwein v. Hartford Accident and Indemnity Co.*, the Washington Supreme Court effectively rejected the plaintiffs' approach, holding that insurers must be free to fully defend their positions in litigation over UIM benefits:

UIM coverage requires that a UIM insurer be free to be adversarial within the confines of the normal rules of procedure and ethics. To require otherwise would contradict the very nature of UIM coverage.⁹⁵

Any contrary rule would severely hamstring an insurer's ability to pursue all meritorious defenses in litigation for fear of creating new liability based on litigation conduct.⁹⁶

The holding in *Ellwein* is consistent with the general rule that a person may not be held liable in a second action for his or her conduct in a

⁹⁵ 142 Wn.2d 766, 780–81, 15 P.3d 640 (2001).

⁹⁶ See *Stegall v. Hartford Underwriters Ins. Co.*, C08-0668-MJP, 2009 WL 54237, at *2–3 (W.D. Wash. Jan. 7, 2009) (dismissing bad faith claims based on post-litigation conduct).

prior action.⁹⁷ The U.S. Supreme Court recognized the deep roots of this rule: “The immunity of parties and witnesses from subsequent damages liability for their testimony in judicial proceedings was well established in English common law.”⁹⁸ And in *Wynn v. Earin*, our supreme court explained that “[o]verwhelming authority gives weight to the witness immunity rule.”⁹⁹

Thus, under Washington law, “witnesses in judicial proceedings are *absolutely immune from suit* based on their testimony.”¹⁰⁰ This common-law rule serves “to preserve the integrity of the judicial process by encouraging full and frank testimony.”¹⁰¹ Without this immunity, witnesses might be reluctant to come forward to testify, or they might distort their testimony out of fear of subsequent liability.¹⁰² The privilege

⁹⁷ See, e.g., *Wynn*, 163 Wn.2d at 369–70 (“The general rule is that witnesses in judicial proceedings are absolutely immune from suit founded on their testimony.”); David K. DeWolf and Keller W. Allen, “Witness Immunity,” 16 Wash. Prac.: Tort Law and Prac. § 12:2 (4th ed. 2013) (“As a general rule, witness in judicial proceedings are absolutely immune from tort liability based on their testimony.” (citations omitted)).

⁹⁸ *Briscoe v. LaHue*, 460 U.S. 325, 330–31 (1983) (footnote omitted).

⁹⁹ *Wynn*, 163 Wn.2d at 379–80; see also *id.* at 379 n.4 (citing numerous cases).

¹⁰⁰ *Bruce*, 113 Wn.2d at 125, 776 P.2d 666 (1989); *Dexter v. Spokane Cty. Health Distr.*, 76 Wn.App. 372, 376, 884 P.2d 1353 (1994) (“All witnesses are immune from all claims arising out of all testimony.” (citing *Bruce*, 113 Wn.2d at 125–27)).

¹⁰¹ *Bruce*, 113 Wn.2d at 126.

¹⁰² *Deatherage v. Examining Bd. of Psychology*, 134 Wn.2d 131, 136–37, 948 P.2d 828 (1997).

also recognizes that court rules suffice to ensure that witnesses testify accurately:

[T]he rule also rests on the safeguards against false or inaccurate testimony which inhere in the judicial process itself. . . . [R]eliability is ensured by [the witness's] oath, the hazard of cross examination and the threat of prosecution for perjury.¹⁰³

The defense of absolute immunity avoids *all* liability that might arise from the prior testimony.¹⁰⁴ The defense avoids liability even if a witness deliberately lies at deposition¹⁰⁵ or trial.¹⁰⁶ And, because there is no cause of action for alleged perjury in an earlier lawsuit, there is no cause of action for conspiracy to commit perjury in an earlier lawsuit.¹⁰⁷

Our supreme court has recognized that “[t]his same immunity applies to statements made preliminary to testifying.”¹⁰⁸ For example, the privilege applies to work performed by an expert witness in preparation for giving testimony.¹⁰⁹ The privilege also extends to reports prepared in

¹⁰³ *Bruce*, 113 Wn.2d at 126 (citation omitted).

¹⁰⁴ *McNeal v. Allen*, 95 Wn.2d 265, 267, 621 P.2d 1285 (1980).

¹⁰⁵ *W.G. Platts, Inc. v. Platts*, 73 Wn.2d 434, 440, 438 P.2d 868 (1968).

¹⁰⁶ *Dexter*, 76 Wn.App. at 376.

¹⁰⁷ *W.G. Platts*, 73 Wn.2d at 440–41. Washington courts have long recognized that there is no civil cause of action for perjury: “[F]rom earliest times the giving of false testimony has not been treated as a wrong actionable in civil proceedings.” *Id.* at 440. *See also Dexter*, 76 Wn.App. at 375 (citing cases).

¹⁰⁸ *W.G. Platts*, 73 Wn.2d at 440.

¹⁰⁹ *Bruce*, 113 Wn.2d at 136 (absolute immunity extends to “acts and communications which occur in connection with the preparation of . . . testimony”).

preparation for giving testimony.¹¹⁰ Thus, this rule extends generally to

“pleadings or communications in civil actions at law”:

Allegations in pleadings or communications in civil actions at law, made to or filed in the court on behalf of an insurance company by its agent or attorney, are absolutely privileged communications if they have a reasonable relevancy to the matter in issue or proposed to be put in issue, and afford no ground of an action for defamation.¹¹¹

Further, under this rule a party can have no liability for having served allegedly false interrogatory responses in a prior lawsuit.¹¹²

Washington courts have permitted only narrow exceptions to the litigation privilege. In *Deatherage*, our supreme court held that the privilege did not prohibit a professional disciplinary proceeding against an expert witness.¹¹³ In *Wynn*, our supreme court held that the privilege did not prohibit a disciplinary action under the Health Care Information

¹¹⁰ *Childs v. Allen*, 125 Wn.App. 50, 56, 105 P.3d 411 (2004) (no liability for report or testimony of certified chemical dependency counselor in prior case); *Gustafson v. Mazer*, 113 Wn.App. 770, 745–46, 53 P.3d 743 (2002) (no liability for report or testimony of psychologist in prior case).

¹¹¹ “Testimony of Witness as Basis for Civil Action in Damages,” 55 A.L.R.2d 828 (1957). The Restatement (Second) of Torts § 588 (1977) states that “[a] witness is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding or as a part of a judicial proceeding in which he is testifying, if it has some relation to the proceeding.” Our supreme court has held that the privilege is not limited to actions for defamation. *See, e.g., Wynn*, 163 Wn.2d at 373.

¹¹² *Morales v. Coop. of Am. Physicians, Inc., Mut. Prot. Trust*, 180 F.3d 1060, 1062 (9th Cir. 1999).

¹¹³ *Deatherage*, 134 Wn.2d at 140.

Act.¹¹⁴ But in both cases the court recognized that the privilege does prohibit a later civil action based on conduct in an earlier lawsuit.

In *FMC Technologies, Inc. v. Edwards*, Judge Coughenour of the Western District of Washington held that the litigation privilege would not prohibit a claim alleging a “larger actionable conspiracy.”¹¹⁵ But even in that case Judge Coughenour recognized that “discovery responses and deposition testimony generally are covered by the litigation privilege.”¹¹⁶

This case does not involve an exception to the litigation privilege. It is not a disciplinary proceeding, and the plaintiffs have not alleged any “larger actionable conspiracy.” Thus, the general rule applies. Under that rule, Ms. Smith may not be held liable for testifying or signing discovery responses in the earlier lawsuit.

2. The Litigation Privilege Bars the Plaintiffs’ Claims Against Ms. Smith Deriving from Her Conduct in the Earlier Litigation

The plaintiffs’ claims against Ms. Smith derive solely from her conduct in prior litigation. Thus, the litigation privilege bars their claims against her.

¹¹⁴ *Wynn*, 163 Wn.2d at 373.

¹¹⁵ 464 F. Supp. 2d 1063, 1070 (W.D. Wash. 2006).

¹¹⁶ *Id.*

As noted above, the complaint’s factual allegations concern only Ms. Smith’s conduct in signing discovery responses and testifying.¹¹⁷ And, although the plaintiffs mention “hypothetical facts” in their opening brief, they have not proffered any such hypothetical facts that would permit them to state a claim.¹¹⁸ Instead, their briefing in both the trial court and this Court relies only on factual allegations relating to Ms. Smith’s litigation conduct.

In opposing Allstate’s motion to dismiss in the superior court, the plaintiffs pointed solely to Ms. Smith’s litigation conduct:

In responding to Keodalah’s discovery requests, Smith stated Keodalah failed to stop at the stop sign . . . , despite the fact she had the SPD report, which found the motorcyclist at fault, . . . and the TCA report, which found Keodalah stopped and the motorcyclist was at fault. . . . She later again testified, as a Rule 30(b)(6) representative, that Keodalah ran the stop sign, but then admitted he had not. . .

She then later testified at trial that when Allstate first stated Keodalah failed to stop, it knew that statement was not true. . . . And, despite the fact she testified that there was no evidence that Keodalah failed to yield other than the fact there was a collision . . . , she maintained that position.

Smith also testified at the deposition that Keodalah had been on his cell phone, but then she admitted he was not. . . . She again testified at trial that Keodalah was on his cell phone at the time of the collision, and refused to change her

¹¹⁷ The complaint also contains a number of *legal* allegations, but the Court need not consider those allegations to be true for purposes of a CR 12(b)(6) motion. *See Haberman*, 109 Wn.2d at 120.

¹¹⁸ Because the plaintiffs have not set forth any hypothetical facts, this Court need not invent any for them. *See West*, 169 Wn.App. at 867 n.3.

position regarding liability after learning he was not on his cell phone. . . .

Also *at trial*, *she testified* that Keodalah was 70 percent at fault, . . . despite the fact *she also testified* that Allstate relied upon the eyewitness statements, SPD report, which did not find fault, and TCA report, which did not find fault, to reach that conclusion. . . . *She also testified* that Allstate refused to change its position regarding liability after it learned that but for the speed of the motorcycle the collision would not have occurred, and she conceded the TCA report did not support defendants' finding of fault. . .

¹¹⁹

And in their opening brief on appeal, the plaintiffs again attempt to support their bad-faith claim by pointing to their factual allegations regarding Ms. Smith's response to discovery requests, her testimony at deposition, and her testimony at trial—all of which are protected by the litigation privilege.¹²⁰

Other allegations demonstrate that the plaintiffs' claims against Ms. Smith rest on her litigation conduct. The plaintiffs interacted with several other Allstate employees in the handling of their claim before Ms. Smith entered the picture in litigation. In particular, the plaintiffs allege that a different Allstate employee, Ed Sumabat, took the actions and made the statements about which the plaintiffs now complain.¹²¹ Mr. Sumabat—not Ms. Smith—told Mr. Keodalah that Allstate assessed him

¹¹⁹ CP 123 (citations omitted).

¹²⁰ Plaintiffs'/Appellants' Opening Brief on the Merits at 28–29.

¹²¹ See CP 6 ¶¶ 6.3–6.8.

(i.e., Mr. Keodalah) as being 70 percent at fault.¹²² Mr. Sumabat—not Ms. Smith—told Mr. Keodalah the figure at which Allstate assessed the medical expenses.¹²³ Mr. Sumabat—not Ms. Smith—told Mr. Keodalah the figure at which Allstate assessed Mr. Keodalah’s lost wages.¹²⁴ Mr. Sumabat—not Ms. Smith—offered Mr. Keodalah \$1,600 to settle his claim.¹²⁵ And Mr. Sumabat—not Ms. Smith—told Mr. Keodalah that Allstate would not provide a copy of a report prepared by an accident reconstructionist.¹²⁶

Despite Mr. Sumabat’s role in this matter, the plaintiffs chose to sue Ms. Smith, not Mr. Sumabat. And their complaint and their briefing focus *exclusively* on Ms. Smith’s conduct in the earlier litigation. By affirmatively identifying *other* Allstate employees as responsible for the challenged conduct before the prior lawsuit, plaintiffs denied themselves the opportunity to argue that Ms. Smith is liable for that conduct.

As set out above, under Washington law a plaintiff may not bring a claim against a person because of his or her conduct in prior litigation.¹²⁷

This Court should adhere to that rule and affirm the superior court’s

¹²² CP 6 ¶ 6.3.

¹²³ CP 6 ¶ 6.4.

¹²⁴ CP 6 ¶ 6.5.

¹²⁵ CP 6 ¶ 6.6.

¹²⁶ CP 6 ¶ 6.8.

¹²⁷ *See, e.g., Wynn*, 163 Wn.2d at 370.

dismissal of the plaintiffs' claims against Ms. Smith. If the Court fails to do so, then the plaintiffs could presumably bring another later suit based on Allstate's conduct in this suit—and another suit after that, and another suit after that, ad infinitum. The Court should reject that invitation to endless litigation.

3. The Cases on Which the Plaintiffs May Rely Are Not on Point

In reply, the plaintiffs may rely on cases such as *Tavakoli v. Allstate Property and Casualty Insurance Co.*,¹²⁸ *Lains v. American Family Mutual Insurance Co.*,¹²⁹ and *Babai v. Allstate Insurance Co.*¹³⁰ None of these cases is on point. None concerns a claim brought against a party for conduct during a prior lawsuit. None concerns claims arising out of a party's or witness's testimony, the filing of an answer, or the signing of discovery responses. And none of the cases offers even a shred of analysis of the many cases cited above.

Instead, these cases concern instances in which insurance companies continued to adjust claims after a lawsuit was filed, and the alleged liability was based on the insurer's claim adjustment, instead of on

¹²⁸ No. C11-1587RAJ, 2013 WL 153905 (W.D. Wash. Jan. 15, 2013) (cited by plaintiffs at CP 117).

¹²⁹ No. C14-1982JCC, 2015 WL 4523294 (W.D. Wash. July 27, 2015) (cited by plaintiffs at CP 118)

¹³⁰ No. C12-1518JCC, 2013 WL 1880441 (W.D. Wash. Apr. 24, 2015) (cited by plaintiffs at CP 118).

acts in the litigation. An insurer doesn't adjust a claim by answering a complaint, responding to discovery requests, or offering a witness's testimony at deposition or trial. Such conduct is merely the defense of a lawsuit (which an insurer must be free to do).¹³¹ Thus, *Takavoli*, *Lains*, and *Babai* simply aren't on point.¹³²

Even if these federal court cases were on point—and they aren't—they couldn't overcome even one of the many Washington cases holding that a person may not be held liable for his or her conduct in earlier litigation.

This Court should adhere to this long-standing Washington rule and hold that the plaintiffs cannot recover against Ms. Smith for her conduct in the earlier litigation.

C. Ms. Smith Did Not Interact with the Plaintiffs Before the Earlier Lawsuit; Even If She Had, She Could Not Be Held Liable in This Action

¹³¹ See *Ellwein*, 142 Wn.2d at 780-81.

¹³² Even insofar as Mr. Keodalah's claim was still considered "open" during his prior lawsuit, the plaintiffs expressly pled and argue *only* that Ms. Smith may be held liable because of her conduct during the prior litigation in answering discovery and testifying at deposition and trial. They do not identify any actions she took with respect to adjusting his claim. And the Court may assume that any other contacts between the parties in the prior litigation occurred between counsel for the parties.

**Because the Applicable Statutes of Limitations
Have Expired**

As set out above, the plaintiffs cannot successfully assert any claims against Ms. Smith arising out of her role in the earlier lawsuit. And their complaint demonstrates further that the plaintiffs cannot assert any claims against Ms. Smith connected with conduct before that earlier lawsuit.

Most notably, the plaintiffs haven't alleged that Ms. Smith interacted with them at all before they filed their first lawsuit, or even that she interacted with them at all outside of that lawsuit.¹³³ Nor have they offered any "hypothetical facts" from which the Court might conclude that Ms. Smith could be held liable.¹³⁴ Thus, they have no basis at all for pursuing any claims against Ms. Smith.

Even if the plaintiffs had made such allegations, their complaint demonstrates that they could not recover on them. As noted above, on June 24, 2009, one of the plaintiffs' attorneys, Ms. Vonda Sargent, sent an IFCA notice to Allstate.¹³⁵ That notice demonstrates that the plaintiffs knew or should have known that they might have not only an IFCA claim against Allstate but also bad-faith and CPA claims. Indeed, Ms. Sargent's

¹³³ See CP 1-7:4 (plaintiffs' factual allegations regarding events before they filed the first lawsuit).

¹³⁴ See generally Plaintiffs'/Appellants' Opening Brief on the Merits.

¹³⁵ CP 100-04.

June 2009 letter complains of the same conduct set out in the first three factual sections of the complaint in this action.¹³⁶

Ms. Sargent's letter expressly identified four insurance regulations that, she asserted, "will apply to [Mr. Keodalah's] claim": WAC 284-30-330 (6), (7), (12), and (13).¹³⁷ She stated that "an insurer is subject to liability under the Insurance Fair Conduct Act if it violates other insurance claims practices regulations codified in WAC Chapter 284-30." And she claimed that

[i]t would be unreasonable of Allstate to compel Mr. Keodalah to institute or submit to expensive, time-consuming litigation or arbitration to recover the amount due under his personal injury protection coverage.¹³⁸

Ms. Sargent ended the letter by threatening to bring suit:

Please respond in writing within 20 days if Allstate will agree to do the right thing and agree to pay for Mr. Keodalah's losses. Otherwise, I will bring a lawsuit on their behalf to obtain the full benefits of his insurance policy and the remedies and penalties provided for in the Insurance Fair Conduct Act.¹³⁹

The June 2009 letter demonstrates unequivocally that the plaintiffs' own attorney had actual knowledge, not just imputed knowledge, of the facts necessary to support their current claims for any

¹³⁶ CP at 2:16 (reformatted for clarity).

¹³⁷ CP 103.

¹³⁸ CP 103.

¹³⁹ CP 104.

prelitigation conduct. Because the plaintiffs' attorney was fully aware of those facts, those claims had accrued by that time.¹⁴⁰ Accordingly, the plaintiffs were obligated to bring suit within the statutory period for the claims.

Tort claims, including bad-faith claims, must be brought within three years of their accrual.¹⁴¹ CPA claims must be brought within four years of their accrual.¹⁴² The plaintiffs were thus obligated to bring their bad-faith claim no later than June 25, 2012, and their CPA claim no later than June 25, 2013. They chose not to do so. Thus, any claims that they might have had against Ms. Smith arising out of prelitigation conduct expired long before the plaintiffs filed this lawsuit on August 4, 2015.

The plaintiffs cannot save these claims by relying on a continuing tort theory. Although Washington recognizes a continuing tort doctrine in some contexts, no court has applied that doctrine to bad-faith claims.¹⁴³

¹⁴⁰ See *Moratti ex rel. Tarutis v. Farmers Ins. Co.*, 162 Wn.App. 495, 254 P.3d 939, 942 (2011) ("A cause of action generally accrues for purposes of the commencement of the statute of limitation when a party has a right to apply to court for relief.") (citation omitted).

¹⁴¹ See *Safeco Ins. Co. v. Butler*, 118 Wn.2d 383, 389, 823 P.2d 499 (1992) (an action for bad faith handling of an insurance claim sounds in tort); RCW 4.16.080 (statute of limitations applicable to tort claims).

¹⁴² RCW 19.86.120.

¹⁴³ *Walker v. Metropolitan Prop. & Cas. Ins. Co.*, No. C12-0173JLR, 2013 WL 942554, at * 4n.4 (W.D. Wash. Mar. 8, 2013) (citing *Lenk v. Life Ins. Co.*, No. CV-10-5018LRS, 2010 WL 5173207, at *3 (E.D. Wash. Dec. 13, 2010) (rejecting plaintiff's argument that continuing tort doctrine applies to bad-faith claims).

And even where the Washington courts recognize the continuing tort doctrine, they hold that discovery of the tort begins the statutory period.¹⁴⁴ Thus, a bad-faith claim begins running when an insured receives a denial of a claim.¹⁴⁵

Because the plaintiffs and their attorney actually knew that they might have a cause of action more than four years before bringing this suit, they cannot take advantage of the continuing tort doctrine. This Court should therefore decline to permit the plaintiffs to pursue claims against Ms. Smith arising out of the prelitigation events identified in their complaint.

V. CONCLUSION

No Washington court has ever held that an individual adjuster employee can be liable for common law bad faith or violation of the CPA simply for doing his or her job. To the contrary, the law compels the conclusion that an individual employee of an insurer may *not* be held liable for insurance bad-faith or violation of the CPA. The plaintiffs have not provided any reason for this Court to reverse course and change that longstanding rule. And they have especially not done so in this case, where they seek to hold Ms. Smith liable for signing discovery responses

¹⁴⁴ See, e.g., *Caughell v. Group Health Coop.*, 124 Wn.2d 217, 236–37, 876 P.2d 898 (1994) (medical malpractice).

¹⁴⁵ *Dees v. Allstate Ins. Co.*, 933 F. Supp. 2d 1299, 1310 (W.D. Wash. 2013).

and testifying in an earlier lawsuit—acts protected by absolute immunity under the litigation privilege.

The Court should conclude that the plaintiffs' complaint fails to state a claim against Ms. Smith and therefore *affirm* the superior court's order of dismissal.

DATED this 30th day of May, 2017.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that I am an employee of FOX ROTHSCHILD LLP, attorneys for defendants/respondents in this matter, and that on May 30, 2017, I (a) filed with the Clerk of the Court the Responsive Brief on the Merits of Respondents/Defendants Allstate Insurance Company, Tracey Smith, and John Doe Smith (“Responsive Brief”) and (b) served a true and correct copy of the Responsive Brief in the manner stated below:

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I declare under the penalty of perjury under the laws of the State of Washington that the foregoing is true and correct and that this declaration was executed on the 30th day of May, 2017, at Seattle, Washington.



Courtney R. Tracy

FOX ROTHSCHILD LLP

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