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No. 95867-0

SUPREME COURT
OF THE STATE OF WASHINGTON

MOUN KEODALAH and AUNG KEODALAH, husband
and wife,

Plaintiffs-Respondents,

v.

ALLSTATE INSURANCE COMPANY, a corporation,
and TRACEY SMITH and JOHN DOE SMITH, husband
and wife,

Defendants-Petitioners.

PETITIONERS' ANSWER TO AMICUS CURIAE BRIEFS

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I. INTRODUCTION

This case concerns whether the individual employees of insurance companies who handle insurance claims are personally liable to the same extent as their employers for decisions they make while doing their jobs. Contrary to the Court of Appeals' decision and the arguments made by the Washington State Association for Justice Foundation (WSAJF) as *amicus curiae*, such an extraordinary remedy is not provided by statute, either expressly or impliedly. Furthermore, providing such a remedy is unnecessary, runs contrary to an overall statutory scheme that recognizes the subordinate position of employee adjusters, runs contrary to the rule in every state that has considered the issue, and would undermine the express purposes of the insurance code, including as stated in RCW 48.01.030. Finally, subjecting the employees of insurance companies to personal liability would expose them to all of the detrimental impacts of being a defendant in a civil damages action (*e.g.*, potential impairment of credit), without any showing that doing so will advance the goal of assuring good-faith conduct in the claims-adjustment process.

Through this Answer, the Petitioners—Tracey Smith, who was named a party to this lawsuit based on her work handling claims as an Allstate employee, and Allstate—adopt the arguments made by the other *amici curiae*: (1) the American Insurance Association, the National Association of Mutual Insurance Companies, and the Property Casualty

Insurers Association of America (“Insurer Association Amici”)¹; (2) GEICO General Insurance Company; (3) the Washington Defense Trial Lawyers (WDTL); and (4) the Coalition against Insurance Fraud.² This Court should reverse the Court of Appeals.

II. ANSWERING ARGUMENT

A. Insurance-company employees who handle claims should not be subject to personal liability for the decisions they make on behalf of their employers.

1. Analysis of the *Bennett v. Hardy* factors is necessary to determine whether RCW 48.01.030 provides an implied right of action.

Contrary to WSAJF’s argument, holding adjusters personally liable for bad faith is not merely “an application of the common law bad faith cause of action that has been recognized in Washington since 1941.” *WSAJF Brief* at 14. In actuality, no Washington appellate court has ever held an adjuster liable under Washington’s common law of insurance bad faith. The Court of Appeals certainly did not hold that Ms. Smith is subject to liability under the common law. It held that she owed Keodalah a duty under RCW 48.01.030 and that “she can be sued for breaching *this duty*.” *Slip Op.* at 5 (emphasis added). The common law was not stated as a source of the liability recognized by the Court of Appeals, undoubtedly because the common law has never been a source for such liability.

¹ The Insurer Association Amici’s brief notes that the American Insurance Association and the Property Casualty Insurers Association of America recently merged to form the American Property Casualty Insurance Association. *Insurer Ass’n Brief* at 1.

² The Washington insurance commissioner elected not to file an amicus-curiae brief in this case, despite this Court’s specific invitation to do so.

As support for the notion that the duty in RCW 48.01.030 is actionable, the Court of Appeals cited *Ellwein v. Hartford Accident & Indemnity Co.*, 142 Wn.2d 766, 15 P.3d 650 (2001), *overruled on other grounds by Smith v. Safeco Insurance Co.*, 150 Wn.2d 478, 78 P.2d 1274 (2003). Viewed in the context of this Court’s overall development of the law in this area, it becomes clear that this Court cited the statute in *Ellwein* and certain other decisions not because it is the source of a duty actionable at common-law, but merely because it is a legislative statement of public policy that is consistent with the common-law duty. *See St. Paul Fire & Marine Ins. Co. v. Onvia, Inc.*, 165 Wn.2d 122, 129-30, 196 P.3d 664 (2008); *Ellwein*, 142 Wn.2d at 775-76; *Indus. Indem. Co. of the Nw., Inc. v. Kallevig*, 114 Wn.2d 907, 916-17, 792 P.2d 520 (1990). Petitioners agree with the Insurer Association Amici that this Court’s “passing observations” regarding RCW 48.01.030 in these cases were dicta and do not constitute an actual holding of this Court supportive of what the Court of Appeals has done here. *Insurer Ass’n Brief* at 10-22.

The basis for common-law bad faith has always been the common law itself, not a statute. WSAJF ignores that provisions substantially similar to RCW 48.01.030 existed for at least 30 years before this Court recognized common-law bad faith in 1941, yet it would be nearly another 50 years before this Court would cite the statute in connection with common-law liability, in *Kallevig*. *See* 1911 WASH. LAWS, ch. 49, art. 1 § 1 (Appx. C to *Petitioners’ Suppl. Brief*); *Burnham v. Comm’l Cas. Ins. Co. of Newark, N.J.*, 10 Wn.2d 624, 623-38, 117 P.2d 644 (1941); *Kallevig*, 114 Wn.2d at

916-17. WSAJF also ignores that, even since *Kallevig*, this Court has addressed bad-faith tort liability without citing RCW 48.01.030. *E.g.*, *Smith*, 150 Wn.2d at 484-85; *Safeco Ins. Co. of Am. v. Butler*, 118 Wn.2d 383, 389, 832 P.2d 499 (1992).

Significantly, this Court has never cited RCW 48.01.030 as a basis to impose broader liability than the common law already does, as Division One did here. Not until this case has this Court been presented with the issue of whether RCW 48.01.030 provides a right of action.

Not every duty or requirement created by the Legislature is actionable in tort. *See, e.g., Frias v. Asset Foreclosure Servs., Inc.*, 181 Wn.2d 412, 422-29, 334 P.3d 529 (2014). Because RCW 48.01.030 undisputedly does not expressly provide a right of action, this Court must determine whether it impliedly does so. In *Bennett v. Hardy*, 113 Wn.2d 912, 784 P.2d 1258 (1990), this Court adopted a test for determining whether breach of a statutory requirement is actionable in tort. That test was not applied by the Court of Appeals here (presumably because it concluded the issue was resolved in *Ellwein*), but as argued by the Insurer Association Amici, that test must be applied to determine whether RCW 48.01.030 impliedly provides a right of action. *See Insurer Ass'n Brief* at 10-11.

WSAJF's decision not to address the *Bennett* factors directly is telling, given the factors were set forth in Petitioners' Supplemental Brief (and previously by other amici curiae³) as the structure for this Court's

³ *Insurer Ass'n Memorandum in Support of Petition for Review* at 8-10.

analysis. *See WSAJF Brief* at 6 n.1. WSAJF gives as their excuse for not doing so the fact that Petitioners did not reference *Bennett* in their petition for review, but offers no authority for why this Court should thus choose not to engage in precisely the analysis employed by this Court ever since *Bennett* for determining whether to recognize an implied right of action under a Washington statute.⁴

2. RCW 48.01.030 does not create an implied right of action for bad faith against “all persons” involved in insurance matters.

(a) Amici curiae do not dispute that the Insurance Code was enacted for the benefit of the public at large, and not insureds specifically.

WSAJF does not dispute that the Insurance Code was enacted to benefit the public at large, and not insureds specifically. *See Petitioners’ Suppl. Brief* at 6-8. This strongly indicates the legislature did not intend to provide an implied right of action. *See Adams v. King Cty.*, 164 Wn.2d 640, 654, 192 P.3d 891 (2008).

(b) Amici curiae point to no indication of legislative intent to provide a right of action against employee adjusters.

WSAJF points to the broad scope of the insurance code, per RCW 48.01.020, as supposed evidence of legislative intent to provide an actionable duty in RCW 48.01.030. *WSAJF Brief* at 6. Certainly, the

⁴ Most recently this Court applied the *Bennett* test to reject an implied right of action under the Consumer Electronic Mail Act in favor of the recipient of unsolicited text messages, *see Wright v. Lift, Inc.*, 189 Wn.2d 718, 406 P.3d 1149 (2017), and to recognize an implied right of action under the Zachary Lystedt Law, *see Swank v. Valley Christian School*, 188 Wn.2d 663, 398 P.3d 1108 (2018).

insurance code governs “all persons having to do with” insurance. RCW 48.01.020. But that broad statement gives little indication whether claims-handling employees should be subject to personal liability for insurer bad faith. A better indication of legislative intent specific to the question at hand is the legislature’s treatment of adjusters, referenced by the Insurer Association Amici, in chapter 48.17 RCW. *Insurer Ass’n Brief* at 12.

Employee adjusters serve at the pleasure of their employers. They are required to follow internal claims-handling guidelines. They have limited discretion and authority and are supervised under a chain of command. The legislature, through the insurance code, has recognized the subordinate role of insurer-employed claim handlers by regulating their employers—*not* the employees themselves. Insurers are subject to substantial regulation, oversight, and discipline by the insurance commissioner. *See, e.g.*, ch. 48.05 RCW. But while independent and public adjusters must similarly be licensed by the commissioner and are subject to penalties for misconduct, RCW 48.17.060(2), .063(2)-(4), .530, .560, one who handles claims as a “salaried employee of an insurer” is exempt from these requirements. RCW 48.17.010(1); *see Petitioners’ Suppl. Brief* at 18 n.13. Indeed, such an employee is *not an “adjuster”* as that term is used in the code. RCW 48.17.010(1) (“A salaried employee of an insurer...is not deemed to be an ‘adjuster’ for the purpose of this chapter.”). Holding employee claim handlers personally liable for insurer bad faith based on RCW 48.01.030 would be inconsistent with the legislative choice that

insurer claims-handling misconduct be addressed by oversight of the insurer and not its employees.⁵

Contrary to WSAJF's argument, the insurance code's broad prohibition of unfair or deceptive acts or practices does not evidence contrary legislative intent. Although the insurance code provides generally that "[n]o person engaged in the business of insurance shall engage...in unfair or deceptive acts or practices," the specific, defined practices that pertain to claims handling apply only to conduct "of the insurer." RCW 48.30.010(1), (2); WAC 284-30-330. Likewise, the statutory cause of action provided by the Insurance Fair Conduct Act for unreasonable denial of a claim for coverage or payment of benefits to a first-party claimant is available only against "an insurer." RCW 48.30.015(1), (2).

WSAJF is incorrect that Montana, Texas, and West Virginia allow bad-faith claims against employee adjusters. None of those states has authorized bad-faith actions against adjusters, let alone under a statute "similar to RCW 48.01.030," as WSAJF claims. *WSAJF Brief* at 12 n.4. Instead, those states held that adjusters were subject to liability under the

⁵ Even more fundamentally, WSAJF concedes that "[t]o be liable, an adjuster must in fact be engaged in 'the business of insurance.'" *WSAJF Brief* at 4 (quoting RCW 48.01.030); *see also id.* at 14-15. Yet it is not at all clear that claims-department employees are so engaged. The insurance code defines "insurance" as "a contract whereby one undertakes to indemnify another or pay a specified amount upon determinable contingencies." RCW 48.01.040. To be sure, employee adjusters in carrying out their job duties deal with matters relating to insurance, and the insurance code charges an insurers' representatives with "the duty of preserving inviolate the integrity of insurance." RCW 48.01.030. But insurers alone are truly engaged in "the business of insurance." *See Riccatone v. Colorado Choice Health Plans*, 315 P.3d 203, 208-11 (Colo. 2013) (holding that "a person engaged in the business of insurance" includes only persons subject to liability on the insurance contract).

Unfair Trade Practices Act, a model act promulgated by the National Association of Insurance Commissioners that has not been adopted in Washington. *See O'Fallon v. Farmers Ins. Exch.*, 260 Mont. 233, 859 P.2d 1008, 1014 (1993); *Liberty Mut. Ins. Co. v. Garrison Contractors*, 966 S.W.2d 482, 484-86 (Tex. 1998)⁶; and *Taylor v. Nationwide Mut. Ins. Co.*, 214 W. Va. 324, 589 S.E.2d 55, 60-62 (2003).

Liability under the Unfair Trade Practices Act is premised on finding a specific unfair claims settlement practice. *See* MONT. CODE ANN. §§ 33-18-102(1), 33-18-201; TEX. INS. CODE ANN. § 541.003; W. VA. CODE §§ 33-11-3, 33-11-4. That is fundamentally different than imposing personal liability for breach of a broad duty of good faith. Indeed, Texas and West Virginia have *rejected* adjuster bad-faith liability. *Crocker v. Am. Nat. Gen. Ins. Co.*, 211 S.W.3d 928, 937 (Tex. App. 2007); *Grubbs v. Westfield Ins. Co.*, 430 F. Supp. 2d 563, 569 (N.D. W. Va. 2006).

In fact, other than Washington, every state among the more than twenty that have considered the issue has rejected liability of employee or

⁶ Texas subsequently repealed the statute addressed in *Liberty Mutual*, but adopted similar provisions. *See* TEX. INS. CODE ANN. § 541.003.

independent adjusters for bad faith.⁷ Yet WSAJF points to no adverse consequences in that clear majority of states to suggest that rejecting personal liability is harmful or fails to protect consumers. That should weigh heavily with this Court, when contemplating whether to adopt a rule that so many jurisdictions have considered and rejected.

⁷ Courts have held specifically that an *employee* adjuster owes no duty to the insured in at least the following cases: *Youngs v. Sec. Mut. Ins. Co.*, 3 Misc. 3d 244, 775 N.Y.S.2d 800, 801 (N.Y. Sup. Ct. 2004); *Silon v. American Home Assur. Co.*, 2009 WL 1090700, at *2-3 (D. Nev. 2009); *Reto v. Liberty Mut. Ins.*, 2018 WL 3752988, at *2 (E.D. Pa. 2018). In addition, the majority rule is that an independent (outside) adjuster is not subject to liability to an insured. If an independent adjuster is not subject to liability, then certainly an in-house, employee adjuster is not, either. Courts have rejected bad-faith tort liability for independent adjusters in at least the following cases: *Akpan v. Farmers Ins. Exch., Inc.*, 961 So.2d 865, 874 (Ala. Civ. App. 2007); *Continental Ins. Co. v. Bayless & Roberts, Inc.*, 608 P.2d 281, 287-88 (Alaska 1980) (but may be liable for negligence); *Meineke v. GAB Bus. Servs., Inc.*, 195 Ariz. 564, 991 P.2d 267, 271 (Ariz. Ct. App. 1999); *Sanchez v. Lindsey Morden Claims Servs., Inc.*, 72 Cal. App. 4th 249, 84 Cal. Rptr. 2d 799, 803 (1999); *Riccatone v. Colorado Choice Health Plans*, 315 P.3d 203, 206-07 (Colo. Ct. App. 2013) (but may be liable if steps into insurer's shoes); *Danielsen v. USAA Cas. Ins. Co.*, 2015 WL 7458513, at *2-3 (D. Conn. 2015); *King v. Nat'l Sec. Fire & Cas. Co.*, 656 So.2d 1338, 1339 (Fla. Dist. Ct. App. 1995) (but may be liable for intentional tort); *Lodholtz v. York Risk Servs. Group*, 778 F.3d 635, 640-43 (7th Cir 2015) (applying Indiana law); *Wolverton v. Bullock*, 35 F. Supp. 2d 1278, 1280-81 (D. Kan. 1998); *Baugh v. Parish Gov't Risk Mgmt. Agency*, 715 So.2d 645, 647 (La. Ct. App. 1998); *Bass v. California Life Ins. Co.*, 581 So.2d 1087, 1089-90 (Miss. 1991) (but may be liable for gross negligence); *Haney v. Fire Ins. Exch.*, 277 S.W.3d 789, 792-93 (Mo. Ct. App. 2009); *Morvay v. Hanover Ins. Cos.*, 127 N.H. 723, 506 A.2d 333, 334-35 (1986) (but may be liable for negligence); *Columbia Energy Grp. v. Fisher*, 47 A.D.3d 486, 851 N.Y.S.2d 12, 13 (2008); *Koch v. Bell, Lewis & Associates, Inc.*, 176 N.C. App. 736, 627 S.E.2d 636, 638-39 (2006) (adopting the majority rule and holding that it applied even more clearly under the circumstances, where the claimant was not the insured); *Trinity Baptist Church v. Bhd. Mut. Ins. Servs., LLC*, 341 P.3d 75, 84-86 (Okla. 2014); *Bleday v. OUM Group*, 435 Pa. Super. 395, 645 A.2d 1358, 1363 (1994); *Robertson Stephens, Inc. v. Chubb Corp.*, 473 F. Supp. 2d 265, 280 (D. R.I. 2007); *Charleston Dry Cleaners & Laundry, Inc. v. Zurich Am. Ins. Co.*, 355 S.C. 614, 586 S.E.2d 586, 588-89 (2003); *Crocker v. Am. Nat. Gen. Ins. Co.*, 211 S.W.3d 928, 937 (Tex. App. 2007); *Hamill v. Pawtucket Mut. Ins. Co.*, 179 Vt. 250, 892 A.2d 226, 230 (2005); *Grubbs v. Westfield Ins. Co.*, 430 F. Supp. 2d 563, 569 (N.D. W. Va. 2006) (but may be liable under Unfair Trade Practices Act).

(c) This Court’s precedents rule out finding an actionable duty of good faith on the part of adjusters.

Turning to this Court’s explication of the common law, WSAJF is wrong that the good-faith duty’s basis in the quasi-fiduciary relationship between the insurer and its insured “has not limited the duty.” *WSAJF Brief* at 9. This Court has consistently restricted bad-faith actions to that relationship. *See Murray v. Mossman*, 56 Wn.2d 909, 911-12, 355 P.2d 985 (1960); *Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 386, 715 P.2d 1133 (1986); *see also Petitioners’ Suppl. Brief* at 11-13. Furthermore, the statutory duty is rooted in the quasi-fiduciary relationship, just like the common-law duty. *Mahler v. Szucs*, 135 Wn.2d 398, 414, 957 P.2d 631 (1998).

Contrary to WSAJF’s suggestion, the fact that a UIM insured has a reasonable expectation of good faith, despite being in an adversarial posture in relation to the insurer, does not indicate that bad-faith actions may be brought by or against persons outside the insurer-insured relationship, such as an employee adjuster. This Court has held that the “dependence and heightened trust” that gives rise to the quasi-fiduciary relationship exists “perhaps even more so...in the first party context, where the insurer’s interests might be opposed to the insured’s and the insured is particularly vulnerable and dependent on the insurer’s honesty and good faith.” *Van Noy v. State Farm Mut. Auto. Ins. Co.*, 142 Wn.2d 784, 793 n.2d, 16 P.3d 574 (2001). The insurer-insured relationship determines the existence of an actionable duty.

WSAJF's arguments ultimately miss that the reason the insurer is said to be a quasi-fiduciary is that an insurance contract places the insurer in a position of trust: the insurer accepts premiums from the insured in exchange for agreeing to defend the insured against litigation and indemnify the insured against liability, within the terms and limitations of the insurance policy. *See Tank*, 105 Wn.2d at 385. This is a "high stakes" proposition for both parties to an insurance contract. *Id.*; *see also GEICO Brief* at 5.

It is undisputed, including by WSAJF, that an adjuster is not a party to that insuring relationship. *See Petitioners' Suppl. Brief* at 14. Employee adjusters do not participate in the "high stakes"; they are just doing their jobs. "[T]he duty of the insurance company to use good faith in the handling of a claim against the insured springs from a fiduciary relationship," *Murray*, 56 Wn.2d at 912, and that relationship does not exist between an insured and an employee in an insurer's claims department. For acts within the scope of an employee claims adjuster's employment, the adjuster should be answerable to her employer—only—and not the insured.

(d) The consequences of personal liability for adjusters would be detrimental to the public interest in the business of insurance.

WSAJF seems to suggest that policy considerations warrant this Court's recognition of personal liability of adjusters as a matter of common law, regardless of whether the legislature intended an actionable duty to exist under RCW 48.01.030—an issue not previously addressed by the parties or the Court of Appeals. But as explained by Petitioners and by other

amici curiae in the context of whether RCW 48.01.030 provides an actionable duty, the opposite is true: personal liability would undermine the public policies that expressly underlie the insurance code, including as stated in RCW 48.01.030—the very statute the Court of Appeals held provides an actionable duty.

WSAJF cites only one specific supposed policy justification for personal liability: to deter conduct by adjusters that “benefits insurers over insureds.” *WSAJF Brief* at 14. This asserted justification is unpersuasive because insurers are well incentivized to deter and prevent bad-faith conduct by their employees. Insurers must act through their employees, including their adjusters, and are vicariously liable for their employees’ acts and omissions. *See GEICO Brief* at 9-10. Where bad faith is established, the insured is entitled to extracontractual remedies—limitless coverage for third-party claims and consequential damages in first-party cases. *Safeco Ins. Co. of Am. v. Butler*, 118 Wn.2d 383, 393-94, 823 P.2d 499 (1992); *Coventry Assocs. v. Am. States Ins. Co.*, 136 Wn.2d 269, 284, 961 P.2d 933 (1998); *see also Insurer Ass’n Brief* at 4. Insurers are also subject to liability for violating the Consumer Protection Act and the Insurance Fair Conduct Act, both of which provide for exemplary damages. RCW 19.86.090; RCW 48.30.015(2).

WSAJF does not explain how the existing remedies are insufficient to deter misconduct in claims handling.⁸ Given the harsh penalties available against insurers, insurers are incentivized to train their claims employees well and closely monitor their work. Furthermore, a claims-department employee who acts in bad faith toward insureds will not last long in that position, given the high stakes for the insurer. As mentioned by the Insurer Association Amici, that operates as a substantial deterrent to misconduct. *See Insurer Ass'n Brief* at 7.

The *true* reasons why personal liability is sought appear to be *tactical*: inflating settlement value and forum shopping. *See Insurer Ass'n Brief* at 4-5; *GEICO Brief* at 12-14. That is presumably why multiple lawsuits against adjusters and attorneys have been filed since Division One's decision (including another lawsuit against Ms. Smith⁹) or remanded to state court after being removed to federal court. *See GEICO Brief* at 6-7 (referencing appendices); *WDTL Brief* at 3, 10 (referencing appendices). But those are not valid considerations supporting personal liability.

The countervailing policy considerations far outweigh any justification for imposing personal liability on adjusters as a means to further deter bad-faith conduct. The legislature in RCW 48.01.030 sought to protect the public interest, but imposing personal liability on employee

⁸ While WSAJF does not presume to assert that the existing remedies are inadequate to *compensate* insureds, putting an employee's assets on the table will add little to nothing to an insured's compensation in a bad-faith action, in the rare event that her employer becomes insolvent and unable to satisfy a judgment. *See Insurer Ass'n Brief* at 4; *GEICO Brief* at 10-11.

⁹ *WDTL Brief*, Appx. E1.

adjusters would do just the opposite. The personal consequences to employee adjusters of being subject to litigation—*e.g.*, credit, reputation, employment, personal well-being—cannot be overstated. *See Insurer Ass’n Brief* at 6; *GEICO Brief* at 11-12. Forcing employee adjusters—despite their subordinate status and exemption from direct regulatory oversight and continuing-education requirements—to put their personal fortunes on the line and be *personally* responsible for knowing and complying with our state’s high standards of good faith imposes too great a burden on those individuals. *See Insurer Ass’n Brief* at 5-6. The inevitable harms to the insurance industry and to consumers—*e.g.*, increased delays, increased costs, increased premiums, and potential conflicts of interest—are also substantial. *See Insurer Ass’n Brief* at 6-7.

In addition, Petitioners share the concerns of the Insurer Association Amici and WDTL that, given the broad language of RCW 48.01.030, the logical import of a decision that adjusters are subject to liability under that statute is that “all persons” working on insurance matters—including attorneys, building contractors, and many others—are subject to liability. *See Insurer Ass’n Brief* at 8-9; *see generally WDTL Brief*. And as discussed by the Coalition against Insurance Fraud, personal liability for adjusters also undermines anti-fraud measures enacted by the legislature by incentivizing adjusters to pay questionable claims rather than risk liability for bad faith. *See generally Coalition Brief*.

Finally, WSAJF makes no effort to come to grips with the personal consequences for adjusters like Ms. Smith, if they are subjected to the

liability WSAJF supports. No one is making a personal fortune as an insurance adjuster. Adjusters are quintessential white-collar, middle-class workers. Like anyone at their income level, the task of providing for themselves and their families is a struggle, with little margin for error. A couple of lawsuits is all it can take to impair a middle-class person's credit rating and imperil their ability to take out that second home loan needed to spare a child the crushing burden that is college debt in today's America. That *will be* the effect of an affirmance of the decision of the Court of Appeals, and this Court should be loath to go down that path without being given compelling reasons for doing so. WSAJF has failed to provide the Court with any such reasons.

B. Employee adjusters should not be subject to liability for claims-handling decisions under the Consumer Protection Act.

Similar to the common-law duty of good faith, this Court has restricted per se CPA liability to the insurer-insured relationship. This Court has consistently held that only an insured may bring a per se CPA action against an insurer based on breach of the statutory duty of good faith. *Tank*, 105 Wn.2d at 394-95; *Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 43 n.6, 204 P.3d 885 (2009). WSAJF offers no compelling rationale for expanding the scope of CPA liability to allow insureds to prosecute per se CPA actions against employee adjusters and hold them personally liable for actual and exemplary damages, without establishing bad faith or intentional misconduct. WSAJF does not dispute that only an

insurer can be liable based on committing unfair claims settlement practices defined in WAC 284-30-330. *See Petitioners' Suppl. Brief* at 20.

Moreover, the Insurer Association Amici offer a related, but distinct, reason why employee adjusters are not subject to liability under the CPA because of their subordinate status: they do not personally engage in “trade or commerce” when they handle insurance claims. *Insurer Ass'n Brief* at 13-15.

The CPA applies only to acts or practices “in the conduct of any trade or commerce.” RCW 19.86.020. As the Insurer Association Amici observe, this Court has applied that limitation to bar CPA claims that target the “substantive quality of services provided,” as opposed to the “entrepreneurial or commercial aspects of professional services.” *Michael v. Mosequera-Lacy*, 165 Wn.2d 595, 602-03, 200 P.3d 695 (2009) (quoting *Ramos v. Arnold*, 141 Wn. App. 11, 20, 169 P.3d 482 (2007)). Thus, in *Michael*, a dentist was not subject to CPA liability for acts taken in the practice of dentistry. *Id.* at 604. A CPA claim similarly was not viable against a residential appraiser who allegedly omitted defects from an appraisal report. *Ramos*, 141 Wn. App. at 20-21.

Assuming that the decisions made in the process of handling an insurance claim may properly be deemed activities in trade or commerce, it is insurers who engage in that trade or commerce, not their employees personally. As stated by the Insurer Association Amici, “Adjusters, as salaried employees of insurance companies, have no entrepreneurial or commercial stake whatsoever in the handling of any given claim.” *Insurer*

Ass'n Brief at 14. Employee adjusters simply furnish labor for their employers, which under the CPA is not commerce. *Id.* at 13-15 (citing RCW 19.86.070). Absent this limitation, every employee of every company would be subject to potential CPA liability, for acts taken at the direction and on behalf of an employer.

Although the CPA is to be “liberally construed that its beneficial purposes may be served,” RCW 19.86.920, nothing in the CPA expressly subjects mere employees to CPA liability for acts taken on behalf of their employers. If a corporate officer participates in the wrongful conduct, or with knowledge approves of the conduct, then the officer, as well as the corporation, is liable for violation of the CPA. *State v. Ralph Williams' Nw. Chrysler Plymouth, Inc.*, 87 Wn.2d 298, 322, 553 P.2d 423 (1976). But a mere employee who acts at the direction of and on behalf of a corporation stands on a different footing. The CPA’s beneficial purposes are well served by holding insurers vicariously liable for the acts of their employees, and consumers have nothing to gain by holding the employees personally liable.

III. CONCLUSION

This Court should reverse the Court of Appeals and hold that employee adjusters are not subject to personal liability for bad faith or under the CPA based on conduct within the scope of their employment.

Respectfully submitted this 12th day of February, 2019.

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CERTIFICATE OF SERVICE

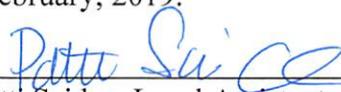
The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

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