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No. 95867-0

SUPREME COURT
OF THE STATE OF WASHINGTON

MOUN KEODALAH and AUNG KEODALAH, husband and wife,

Respondents,

v.

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

Petitioners.

SUPPLEMENTAL BRIEF OF RESPONDENTS

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I. INTRODUCTION

Moun Keodalah submitted an underinsured-motorist (UIM) claim to his insurer, Allstate, after an uninsured driver caused him serious injuries. During what evolved into an unduly grueling claim process, Allstate's UIM adjuster, Tracey Smith, deliberately lied, asserted facts that contradicted her and Allstate's investigations, and failed to deal with Keodalah honestly or with lawfulness of purpose. Indeed, she even lied under oath. Keodalah thus filed suit against Smith alleging a bad-faith and a CPA claim. The trial court dismissed the claims under CR 12(b)(6). Division I properly reversed.

The sole issue is whether RCW 48.01.030—which imposes a good-faith duty on insurers and “their representatives”—imposes an independent, good-faith duty on employee adjusters that subjects them to bad-faith and CPA claims on breach. It does. This Court has long recognized that, if an entity that owes an RCW 48.01.030 good-faith duty breaches that duty, it may be subject to bad-faith and CPA actions. *See, e.g., Ellwein v. Hartford Accident & Indem.*, 142 Wn.2d 766, 775, 15 P.3d 640 (2001), *overruled on other grounds by Smith v. Safeco Ins.*, 150 Wn.2d 478, 78 P.3d 1274 (2003); *Salois v. Mut. of Omaha Ins. Co.*, 90 Wn.2d 355, 359, 581 P.2d 1349 (1978). The statute's term “representative” is unambiguous and includes employee adjusters in its ordinary definition. Thus, as Division I correctly held, they owe an RCW 48.01.030 duty and are subject to bad-faith and CPA claims.

Division I properly applied bad-faith precedent and well-established statutory interpretation principles and reached the correct holding. Indeed, Division III also recently reached the same decision concerning corporate adjusters. *Merriman v. Am. Guar. & Liab. Ins.*, 198 Wn. App. 594, 396 P.3d 351 (2017), *review denied*, 189 Wn.2d 1038. Because Division I’s holding is correct—and Smith and *amici*’s arguments fail—this Court should affirm.

II. SUPPLEMENTAL STATEMENT OF THE CASE

Division I correctly set forth both the action’s factual and procedural history. Slip Op. at 2-4. Keodalah relies on Division I’s recitation as well as that he set forth in his brief to Division I. *See* Appellants’ Br. at 3-7.

III. SUPPLEMENTAL ARGUMENT¹

A. A statutory interpretation analysis confirms employee adjusters owe an independent RCW 48.01.030 good-faith duty that subjects them to bad-faith and CPA claims; no further analysis is required.²

Division I relied on well-settled statutory interpretation principles to conclude that employee adjusters are subject to bad-faith and CPA claims. Slip Op. at 5-6 (quoting *Merriman*, 198 Wn. App. at 611-12). No further analysis is required. This Court should affirm Division I’s decision.

¹ This Court reviews CR 12(b)(6) dismissals *de novo*. *FutureSelect Portfolio Mgmt., Inc. v. Tremont Grp. Hold., Inc.*, 180 Wn.2d 954, 962, 331 P.3d 29 (2014). It reviews statutory-interpretation matters *de novo*. *In re Parental Rights to KJB*, 187 Wn.2d 592, 596, 387 P.3d 1072 (2017). Case-law interpretation is also a question of law subject to *de novo* review. *State v. Willis*, 151 Wn.2d 255, 261, 87 P.3d 1164 (2004).

² To avoid undue repetition, Keodalah relies largely on his Division I briefing to detail the statutory-interpretation argument. Appellants’ Br.; Appellants’ Reply Br. He discusses the issue here to address Smith’s and *amici*’s arguments.

1. *RCW 48.01.030 imposes a good-faith duty on employee adjusters that subjects them to insurance bad-faith claims on breach.*

This Court has long recognized that both the common law *and* our Legislature—via RCW 48.01.030—impose good-faith duties. *E.g.*, *Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 386, 715 P.3d 1133 (1986); *Mahler v. Szucs*, 135 Wn.2d 398, 414, 957 P.2d 632 (1998). It has also long recognized that entities who owe RCW 48.01.030 duties are subject to bad-faith claims for duty breaches. *Tank*, 105 Wn.2d at 386 (“The imposition of an insurer’s duty of good faith by both the courts and the Legislature . . . has resulted in lawsuits alleging breach”); *Ellwein*, 142 Wn.2d at 775 (“RCW 48.01.030 imposes a duty to act in good faith upon insurers, and violation of that duty may give rise to a tort action for bad faith.”). Because a straightforward application of well-settled statutory interpretation tenets confirms employee adjusters owe an RCW 48.01.030 duty, they are subject to bad-faith claims on breach. No further analysis is required.³

Statutory interpretation is primarily concerned with determining the Legislature’s intent. *In re Parental Rights to KJB*, 187 Wn.2d 592, 596, 387 P.3d 1072 (2017). Courts first look to the statute’s plain language. *Guillen*

³ Smith argues, citing *Pain Diagnostics & Rehab. Assocs., P.S. v. Brockman*, 97 Wn. App. 691, 697, 988 P.2d 972 (1999), that the Insurance Code does not create a private right of action. *E.g.*, Pet. Review at 6 & n.2. However, this Court has recognized RCW 48.01.030 imposes an actionable good-faith duty. *Tank*, 105 Wn.2d at 386; *Ellwein*, 142 Wn.2d at 775. Thus, Smith’s argument fails.

v. Pearson, 195 Wn. App. 464, 471, 381 P.3d 149 (2016). They must give undefined terms their plain and ordinary meanings unless a contrary intent is indicated. *State v. Ervin*, 169 Wn.2d 815, 820, 239 P.3d 354 (2010). If the statute’s meaning is plain on its face, a court must give effect to the plain meaning and not consider other sources of intent. *Guillen*, 195 Wn. App. at 471. Unambiguous language needs no construction. *KJB*, 387 P.3d at 597.

Our Legislature included within Title 48 a good-faith duty owed by *all persons*, including both insurers *and their representatives*:

The business of insurance is one affected by the public interest, requiring that *all persons* be actuated by good faith, abstain from deception, and practice honesty and equity in all insurance matters. Upon the insurer, the insured, their providers, *and their representatives* rests the duty of preserving inviolate the integrity of insurance.

RCW 48.01.030 (emphasis added). It broadly defined the term “person” to include individuals. *Id.* 48.01.070. Thus, employee adjusters clearly fall in the statute’s “all persons” language. Slip Op. at 5; *see also Merriman*, 198 Wn. App. at 611-12. Moreover, though RCW 48.01.030 does not define “representative”, the term is both plain and unambiguous, Slip Op. at 5-10; *Merriman*, 198 Wn. App. at 611-13; *Lease Crutcher Lewis, LLC v. Nat’l Union Fire Ins. Co. of Pitts.*, No. CO8-1862 RSL, 2009 U.S. Dist. LEXIS 97899, at *4-8 (W.D. Wash. Oct. 20, 2009),⁴ and encompasses adjusters in

⁴ *Lease Crutcher* held that corporate adjusters owe an actionable RCW 48.10.030 duty. 2009 U.S. Dist. LEXIS 97899, at *4-8. While Smith cited to several Western District of

its plain meaning. Op. at 4-5; *see also Merriman*, 198 Wn. App. at 611-13. Thus, adjusters owe an RCW 48.01.030 good-faith duty and are subject to bad-faith claims. *Tank*, 105 Wn.2d at 386; *Ellwein*, 142 Wn.2d at 775. That straightforward analysis resolves the issue.

Smith nevertheless argues RCW 48.01.030 is unclear as to whether it imposes a good-faith duty on representatives independently or “strictly in their representative capacity.” Pet. Review at 11. However, the statute does not indicate the Legislature intended to impose a limited duty. Indeed, the statute’s plain language indicates otherwise. For this Court to determine the statute imposes a limited duty, as Smith suggests, it must read language into the statute the Legislature did not include.⁵ Statutory interpretation tenets forbid that result. *State v. Dennis*, 191 Wn.2d 169, 173, 421 P.3d 944 (2018) (courts “may not add words ‘to an unambiguous statute when the legislature has chosen not to include that language.’”). Smith’s argument, thus, fails. The statute’s unambiguous language controls.

Smith and *amici* also incorrectly argue that Division I’s holding will impose actionable good-faith duties on many entities—as “representatives”

Washington cases below that held employee adjusters do not owe an independent good-faith duty, *e.g.*, *Rice v. State Farm Mut. Auto. Ins. Co.*, No. C05-5595, 2005 WL 2487975 (W.D. Wash. Oct. 7, 2005); *Garoutte v. Am. Fam. Mut. Ins. Co.*, No. C12-1787, 2013 U.S. Dist. LEXIS 8559 (W.D. Wash. Jan. 22, 2013), those cases improperly apply Washington law. *See* Appellants’ Br. at 21-26, 34 n.15; Slip Op. at 7-8. *Lease* was properly decided, and its reasoning is equally applicable to employee adjusters.

⁵ For example, the statute would have to say that it imposes a good-faith duty on insurer “representatives in their representative capacity.”

or “providers”—on which the Legislature could not have meant to impose a good-faith duty.⁶ *E.g.*, Amici Br. Re Pet. Review at 7-8. For example, they argue that imposing a good-faith duty on “providers”⁷ would subject entities such as building contractors to bad-faith liability. However, as *Merriman* noted, the Legislature added “providers” to RCW 48.01.030 “to capture the activities of ‘cappers’”, *i.e.*, “persons who, ‘acting under an agreement or understanding that they will receive a pecuniary benefit refer claimants with real or imagined claims, injuries, or property damage to service providers.’” 198 Wn. App. at 613 n.6. Thus, “providers” has a clear intent and does not sweep in the entities over which Smith and *amici* express concern. Nor does the term “representatives” create bad-faith or CPA claims against insureds’ attorneys—as *amici* argue—because they are engaged in the practice of law, not the business of insurance or commerce. *See, e.g.*, RCW 48.01.030; *Short v. Demopolis*, 103 Wn.2d 52, 691 P.2d 163 (1984). Thus, Smith and *amici*’s “slippery slope” arguments also fail.

A straightforward application of statutory interpretation principles alone resolves the employee-adjuster-liability issue. The analysis confirms

⁶ *Amici* also argue Division I’s opinion is “remarkable” because it holds that both an insurer and insured owe an RCW 48.01.030 good-faith duty. Amici Br. Re Pet. Review at 7. But this Court has also so held. *Mahler*, 135 Wn.2d at 414. The scope of an insured’s duty and an insurer’s potential enforcement mechanism—*e.g.*, coverage denial—are not issues here.

⁷ Division I did not discuss providers. Moreover, this Court need not determine the other entities that may owe an RCW 48.01.030 duty. The question is not before the Court.

that RCW 48.01.030 imposes a good-faith duty on employee adjusters. And, because this Court has recognized bad-faith actions may lie against entities that breach an RCW 48.01.030 duty, employee adjusters are subject to such actions for breaching the duty. *Tank*, 105 Wn.2d at 386; *Ellwein*, 142 Wn.2d at 775;⁸ *see also* Appellants' Br. at 26-29 (applying the facts to demonstrate a bad-faith cause of action exists here).

2. *The good-faith duty RCW 48.01.030 imposes on employee adjusters subjects them to CPA claims on breach.*

The CPA is to be “liberally construed so that its beneficial purpose may be served.” *Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 37, 204 P.3d 885 (2009). It provides:

Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

RCW 19.86.020. It also establishes a private right of action. *Id.* 19.86.090.

While RCW 19.86.020 does not delineate those entities that may not engage in the unlawful behavior, the CPA's definitions provide, in part, that

⁸ Smith argues Division I's decision is contrary to other states' decisions. She lists them largely from a footnote list in *Lodholtz v. York Risk Services Group*, 778 F.3d 635 (7th Cir. 2015). Of the cases Smith cites, only three were from that states' high courts: Oklahoma, South Carolina, and Vermont. None of those three cases cite to a statute imposing a good-faith duty like RCW 48.01.030. She also fails to note that the supreme courts of Montana and West Virginia, applying statutory interpretation principles to statutes in their states, have held that employee adjusters can be held personally liable. *O'Fallon v. Farmers Ins. Exch.*, 260 Mont. 233, 859 P.2d 1008 (Mont. 1993) (holding an employee adjuster is subject to a common-law bad-faith action for violating Mont. Code Ann. § 33-18-201); *Taylor v. Nationwide Mut. Ins.*, 214 W. Va. 324, 589 S.E.2d 55 (W. Va. 2003); *see also* Appellants' Br. at 17-21 (discussing *O'Fallon* and *Taylor* in detail).

“‘[p]erson’ shall include, where applicable, natural persons”. *Id.* 19.86.010.

Relying in part on the CPA’s definitions, this Court has held:

The CPA, on its face, shows a carefully drafted attempt to bring within its reaches *every* person who conducts unfair or deceptive acts or practices in *any* trade or commerce. RCW 19.86.010(1) and (2); RCW 19.86.020.

Short, 103 Wn.2d at 60-61. Therefore, the CPA unambiguously includes employee adjusters in its scope. And, because RCW 48.01.030 good-faith breaches subject entities to CPA claims, *Salois*, 90 Wn.2d at 359,⁹ employee adjusters are subject to CPA claims on breach. *See also* Appellants’ Br. at 35-39 (applying the facts to demonstrate a CPA cause of action exists).¹⁰

B. RCW 48.01.030’s good-faith duty requires no special relationship between employee adjusters and insureds, and a breach is actionable without any such relationship.

The straightforward statutory interpretation analysis detailed above resolves the current issue. No further analysis is needed. Contrary to Smith’s claim, no special relationship between an insured and adjuster is required.

This Court has made clear that two sources impose insurance good-faith duties: the common law and RCW 48.01.030. *E.g.*, *Tank*, 105 Wn.2d

⁹ As this Court noted in *Salois*, “[the jury’s verdict] that defendant breached its duty of good faith . . . proves a violation of RCW 48.01.030. [Thus], defendant’s actions were unlawful. Likewise, [the] actions were against public policy in view of the legislature’s mandate of a public interest in the business of insurance. It follows, and we conclude, that the defendant’s actions were a per se violation of RCW 19.86.020.” 90 Wn.2d at 359.

¹⁰ Montana and West Virginia have held that employee adjusters can be personally liable under statutes in those states using reasoning that tracks the analysis used here. *O’Fallon*, 260 Mont. 233; *Taylor*, 214 W. Va. 324; *See also* Appellants’ Br. at 17-21 (discussing *O’Fallon* and *Taylor* in detail).

at 386-87. In *Tank*, this Court considered, in part, what “an insurer’s duty of good faith entail[s] when [it] defends under a reservation of rights”. *Id.* at 386. The Court began its analysis by reviewing “the evolution of the duty of good faith imposed on insurers in this state”. *Id.* at 386. It first noted the common law has long imposed a good-faith duty on insurers. It explained the duty arose from the fiduciary (or fiduciary-like)¹¹ relationship between insurers and insureds. *Id.* at 385-86. However, after the Court stated “[t]he duty of good faith has been imposed on the insurance industry in this state by a long line of judicial decisions”, it clarified, citing RCW 48.01.030, that “[n]ot only have the courts imposed on insurers a duty of good faith, the Legislature has imposed it as well.” *Id.* at 386.

The Court went on to define the nature and scope of the insurer’s reservation-of-rights good-faith duty with reference to the duty’s common-law fiduciary-relationship origin. *Id.* at 387-88. Based on that origin, the Court held an insurer’s duty rises above that good-faith normally demands; instead, it “requires fair dealing and equal consideration for the insured’s interests.” *Id.* at 385-87. Since that time, this Court has continued to define an insurer’s duty’s nature and scope with reference to the duty’s common-law fiduciary-like origin and has applied that nature and scope to both the

¹¹ See *Safeco Ins. Co. v. Butler*, 118 Wn.2d 383, 823 P.2d 499 (1992) (holding the insurer-insured relationship is not a true fiduciary relationship).

insurer's common-law and RCW 48.01.030 good-faith duties. *See, e.g., Van Noy v. State Farm*, 142 Wn.2d 784, 790-95, 16 P.3d 574 (2001) (relying on the fiduciary origin to explain an insurer's duty in the first-party context); *Ellwein*, 142 Wn.2d at 778-81 (discussing fiduciary origin but decreasing the duty in the UIM context due to the adversarial nature); *see also Butler*, 118 Wn.2d 383.

This approach makes clear sense. In enacting RCW 48.01.030, the Legislature did not indicate that it intended to impose a good-faith duty on insurers that was more or less demanding than the common-law duty. Thus, applying the nature and scope of the prior common-law duty—based on the fiduciary origins—to insurers is appropriate. However, the Legislature did decide to apply a good-faith duty to entities beyond the insured and insurer. It is entitled to do so. *See, e.g., Schumacher v. Williams*, 107 Wn. App. 793, 797-800, 28 P.3d 792 (2001) (discussing the fact the Legislature had created survival, wrongful death, and vulnerable adult statute claims).¹² And it did not state a fiduciary relationship as to the other statutory entities is required.

Because this Court has never had to decide an issue concerning an RCW 48.01.030 good-faith duty outside of the insurer's, it has continued to

¹² Smith argued below that Washington courts cast bad-faith claims in terms of an insurer's duty to an insured with an intent to limit claims to only insurer defendants. However, the courts framed the issue with insurers in mind because they had only been asked to address insurers in bad-faith claims; the courts' wording of the cause of action does not eliminate causes of action against the adjuster, but rather reflect the issues the courts were deciding.

discuss and define the insurer’s duty in relation to the fiduciary origin. *See, e.g., Van Noy*, 142 Wn.2d at 790-95; *Ellwein*, 142 Wn.2d at 778-81. But this Court has not held a fiduciary-like relationship is required for the RCW 48.01.030 duty to exist. It has, however, consistently recognized that the Legislature has imposed a duty under RCW 48.01.030 that is distinct from the common-law duty. *Tank*, 105 Wn.2d at 386-87; *St. Paul Fire & Marine Ins. v. Onvia, Inc.*, 165 Wn.2d 122, 130, 196 P.3d 664 (2008) (first noting—citing to *Tank*’s historical discussion—the fiduciary origin in detailing the duty scope, but also stating “[b]oth Washington courts and the legislature have consistently imposed a duty of good faith on the insurance industry.”); *Indus. Indem. Co. v. Kallevig*, 114 Wn.2d 907, 916, 792 P.2d 520 (1990) (providing that “RCW 48.01.030 requires insurers to act in good faith in dealing with their insureds.”); *Ellwein*, 142 Wn.2d at 775 (“RCW 48.01.030 imposes a duty to act in good faith upon insurers, and violation of that duty may give rise to a tort action for bad faith.”).¹³

Nor has this Court—as Smith suggests—limited bad-faith actions to only an insurer-insured relationship. In *Tank*—on which Smith relies for her proposition—the Court refused to recognize a bad-faith action between an

¹³ *See also Barstad v. Stewart Title Guar. Co.*, 145 Wn.2d 528, 543-44, 39 P.3d 984 (2002) (“RCW 48.01.030 holds persons in the insurance industry to a good faith standard and has been frequently applied when an insurer denies claim coverage or acts unreasonably when processing a claim. We have interpreted ‘bad faith,’ potentially in violation of RCW 48.01.030, as an act that is unreasonable, frivolous or unfounded.” (citations omitted)).

insured and a third party. *Tank*, 105 Wn.2d at 392-95. However, it did not do so based on a fiduciary relationship. Rather, it noted the third parties had asserted claims against insurers based on regulations that did not explicitly grant third parties the right to enforce regulations and showed no intent to create such rights. *Id.* at 393. Thus, the Court determined that the Insurance Commissioner—not third parties—should have the enforcement right.¹⁴

Notably, *Tank* also specifically discussed *Gould v. Mut. Life Ins.*, 37 Wn. App. 756, 683 P.2d 207 (1984). While it did so to harmonize its holding with *Gould*, the discussion in *Gould* is instructive as to the current issue. In that case, an insurance company denied a wife’s life-insurance claim, and she alleged that it and two of its attorneys acted in bad faith and violated the CPA. 37 Wn. App. at 757-58. Specifically, she alleged “[t]hat the actions of [the two attorneys] were not limited to rendering services as attorneys of the [insurer], but included participation in an managing the wrongful and bad faith conduct as agents of the insurer” *Id.* at 757-58.

In concluding that liability existed, the court noted that “[t]he law is clear that corporate officers and agents can incur personal liability under the

¹⁴ The Court also noted that only insureds may bring *per se* CPA actions. *Tank*, 105 Wn.2d at 395. It relied on *Transamerica Title Ins. Co. v. Johnson*, 103 Wn.2d 409, 418, 693 P.2d 697 (1985). *Transamerica* relied on *Green v. Holm*, 28 Wn. App. 135, 622 P.2d 869 (1981), and *Green* relied on *Rice v. Life Ins. Co. of N. America*, 25 Wn. App. 479, 609 P.2d 1387 (1980). *Rice* explained that the Legislature had limited the remedy under RCW 19.86.020 to the insured. 25 Wn. App. at 484-85. Thus, this limitation does not demonstrate a special relationship is necessary.

[CPA]”. *Id.* at 759. It then held that if the claims were true, “[the attorneys] acted as de facto corporate officers¹⁵ and in that capacity engaged in conduct for which personal liability can be imposed. . . . It follows that the fact that [the attorneys] are attorneys at law would not protect them from liability imposed on proof of the allegations of the complaint.” *Id.* at 760.¹⁶

This Court also did not—as Smith claims—limit bad-faith or CPA claims to only an insurer-insured relationship in *Murray v. Mossman*, 56 Wn.2d 909, 355 P.2d 985 (1960). While it noted a fiduciary relationship is lacking between an insurer and a third-party, it more thoroughly explained:

The cases assign different reasons for the result attained, but, basically, it is that the insured’s right of recovery against the insurance company sounds in tort, and is bottomed on negligence or bad faith. For the company’s conduct to be legally wrongful, it must contravene some duty which the law attaches to the relationship between the parties. Liability for negligence is imposed only for injuries resulting from the particular hazard against which the duty of due care required protection to be given. The duty of an insurance company to protect its insured in the settlement of claims cannot

¹⁵ The court was not clear in what it meant when saying the two attorneys had become *de facto* officers. There was no allegation the attorneys exercised company management. Nevertheless, the opinion states officers and agents can incur personal liability.

¹⁶ Two cases, *Manteufel v. Safeco Ins. Co. of Am.*, 117 Wn. App. 168, 68 P.3d 1093 (2003), and *Int’l Ultimate v. St. Paul Fire & Marine*, 122 Wn. App. 736, 87 P.3d 774 (2004), have held that this overruled *Gould sub silentio* in *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 744 P.2d 1032 (1987). To the extent that *Haberman* held that CPA claims are not viable against attorneys unless the claims involve the entrepreneurial or commercial aspects of the practice of law, *Haberman*, 109 Wn.2d at 169, that may be correct. But as *Manteufel* recognizes, *Gould* did not permit a claim against attorneys; it permitted a claim against persons who had become adjusters on the claim. 117 Wn. App. at 174. Moreover, *Haberman* did not overrule *Gould* to the extent *Gould* held that officers and agents can incur personal liability for bad faith and CPA violations. This is certainly true where agents owe an independent duty—a duty RCW 48.01.030 imposes upon employee adjusters.

consistently be extended to include protection to one who is prosecuting a claim against the insured.

Id. at 912 (internal citations omitted). In other words, the insurer's duty is intended to protect an insured in claims settlement; it was not intended to, and could not be consistently extended to, third parties. *Mossman* does not address RCW 48.01.030, does not hold an RCW 48.01.030 good-faith duty requires a fiduciary-like relationship, does not hold a good-faith duty arises only from such a relationship, and does not preclude bad-faith claims by first-party insureds against their insurer's adjuster.

Contrary to Smith's claim, this Court has not consistently held that a good-faith duty exists solely because of a special relationship between an insurer and insured. Nor has it held bad-faith claims may only lie between an insurer and insured due to such relationship. Rather, it has discussed the relationship as the genesis for the common-law good-faith duty, *e.g.*, *Tank*, 105 Wn.2d at 386-87; *Van Noy*, 142 Wn.2d at 790-95, and to establish the nature and scope of an insurer's duty. The Court has also consistently held an RCW 48.01.030 duty exists as well. *Tank*, 105 Wn.2d at 386-87; *see also St. Paul*, 165 Wn.2d at 130; *Kallevig*, 114 Wn.2d at 916; *Barstad*, 145 Wn.2d at 543-44; *Ellwein*, 142 Wn.2d at 775. RCW 48.01.030 places a duty on employee adjusters, and they are subject to bad-faith and CPA claims.¹⁷

¹⁷ Smith also argues that adjusters should not be held liable because they are insurer agents. Pet. Review at 9. However, if the adjusters owe their own independent duty, they can be

- C. The Court need not conduct a *Bennett v. Hardy* analysis because it has already recognized RCW 48.01.030 breaches are actionable as bad-faith claims, and the analysis is irrelevant to the CPA.

Amici argue that this Court needs to conduct a *Bennett v. Hardy*, 113 Wn.2d 912, 784 P.2d 1258 (1990), analysis to determine if an implied cause of action exists under RCW 48.01.030.¹⁸ *Amici* Br. Re Pet. Review at 8-10. The Court should decline to consider this argument because Smith failed to raise it below. *Ruff v. Cty. of King*, 125 Wn.2d 697, 704 n.2, 887 P.2d 886 (1995) (noting the Court need not consider issues only *amici curiae* raise). But even had the issue been properly raised or preserved, a *Bennett* analysis is unnecessary for the bad-faith claim and is irrelevant to the CPA claim.

Courts conduct a *Bennett* analysis to decide whether the law should recognize an implied cause of action under a statute that provides protection to a specified class of persons but creates no remedy. *Bennett*, 113 Wn.2d at 920. It requires consideration of whether (1) a plaintiff is in “the class for whose ‘especial’ benefit the statute was enacted;” (2) the explicit or implicit legislative intent supports creating a remedy; and (3) “implying a remedy is consistent with the underlying purpose of the legislation.” *Id.* at 920-21.

held individually liable. *See, e.g., Annechino v. Worthy*, 175 Wn.2d 630, 638, 290 P.3d 126 (2012)). RCW 48.01.030 imposes an independent good-faith duty on employee adjusters that can subject them to bad-faith and CPA claims. Thus, Smith’s argument fails.

¹⁸ Despite the fact the employee-adjuster-liability issue was briefed to the US District Court for the Western District of Washington, *cf. Keodalah v. Allstate Ins. Co.*, No. C15-01412, 2016 U.S. Dist. LEXIS 121747 (W.D. Wash. Mar. 25, 2016), King County Superior Court, and Division I, Smith never argued a *Bennett* analysis was necessary or proper. Nor did she raise the issue to this Court. *Amici* are the only entities to raise the issue.

A *Bennett* analysis is irrelevant to Keodalah's CPA claim. The CPA explicitly provides a private right of action. RCW 19.86.090. And, because the CPA applies to individuals such as Smith, *see Short*, 103 Wn.2d at 60-61, and her RCW 48.01.030 good-faith duty breach is actionable under the CPA's express provisions, *Salois*, 90 Wn.2d at 359, the analysis ends. No *Bennett* analysis is required as to Keodalah's CPA claim.

Similarly, a *Bennett* analysis is also not necessary as to Keodalah's bad-faith claim because this Court has already recognized that breaches of RCW 48.01.030's good-faith duty are actionable. *E.g.*, *Ellwein*, 142 Wn.2d at 775 ("RCW 48.01.030 imposes a duty to act in good faith upon insurers, and violation of that duty may give rise to a tort action for bad faith."). And as this Court has held, "*Stare decisis* promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *State v. Johnson*, 188 Wn.2d 742, 756, 399 P.3d 507 (2017). This Court, therefore, does not lightly set precedent aside; it requires a clear showing that the rule is both incorrect and harmful. *Id.* at 757; *Deggs v. Asbestos Corp. Ltd.*, 186 Wn.2d 716, 381 P.3d 32 (2016). Smith and *amici* have not shown either that the rule is incorrect or harmful. Thus, the Court should not engage in a *Bennett* analysis.

D. Adjuster liability does not negatively impact the insurance industry and does benefit insureds.

Finally, Smith and *amici* both argue that employee adjuster liability will increase litigation costs, drive adjusters who fear personal liability out of the Washington market, and otherwise adversely impact the insurance industry. *E.g.*, Pet. Review at 13; Amici Br. Re Pet. Review at 4-6. But no evidence supports the speculation. Indeed, Montana and West Virginia have imposed personal liability on employee insurance adjusters for 25 years and 15 years respectively, *O'Fallon v. Farmers Ins. Exch.*, 260 Mont. 233, 859 P.2d 1008 (Mont. 1993); *Taylor v. Nationwide Mutual Ins. Co.*, 214 W. Va. 324, 589 S.E.2d 55 (W. Va. 2003), and no evidence indicates that any of the negative impacts that Smith and *amici* predict have occurred there. Indeed, neither the legislatures nor courts of those states have reversed their rules. This provides strong evidence that those states' insurance industries have not suffered detrimental impacts due to adjuster liability.

Moreover, employee adjuster liability does—contrary to Smith and *amici*'s claims—benefit insureds. For example, bad-faith and CPA claims serve a vital preventive role to deter harmful conduct. *Davis v. Baugh Indus. Contractors*, 159 Wn.2d 413, 419-20, 150 P.3d 545 (2007) (abandoning the “completion-and-acceptance doctrine” in part because it “undermines the deterrent effect of tort law.”). Insureds are entitled to be treated fairly and

honestly, and they want their claims to be properly paid. This has long been a staple of our public policy. *E.g.*, RCW 48.01.030. And, while both bad-faith and CPA suits provide a remedy when that does not occur, foreclosing such conduct before bad-faith or CPA suits are ever necessary is a primary goal. Adjuster liability provides a valuable deterrent safeguard that aims to avoid bad-faith and CPA litigation, protect insureds interests, and promote proper claims handling before a need to initiate bad-faith or CPA litigation. For example, insurers have, in the past, encouraged adjusters to engage in bad-faith conduct through incentive programs. *See, e.g., Niver v. Travelers Indem. Co.*, 433 F. Supp. 2d 968, 980-82 (N.D. Iowa 2006). In such cases, both insurers and employees are motivated to engage in bad-faith conduct. No institutional incentive, *i.e.*, adverse employment consequences, exist to deter bad-faith conduct in those types of scenarios. Civil liability can act as an additional deterrent to an adjuster engaging in bad-faith conduct.

IV. CONCLUSION

Smith engaged in egregious conduct during Keodalah's claim. She lied, misrepresented facts, and asserted facts that contradicted Allstate's and her own investigations. Indeed, even *amici* state they "do not condone the handling of any claim in the manner described in the [Division I's] opinion." Bad-faith and CPA claims—both available under the law—are appropriate mechanisms to both address and deter such conduct in the future. This Court

should affirm Division I's decision. Keodalah should be awarded costs on appeal.

Respectfully submitted this 7th day of December, 2018.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies under the penalty of perjury under the laws of the State of Washington that on this date I caused to be served in the manner below a true and correct copy of the foregoing *Supplemental Brief of Respondents* on the facilities and to the parties mentioned below as indicated:

ELECTRONIC ORIGINAL TO:

Washington Supreme Court	<input type="checkbox"/>	Via U.S. Mail
Supreme Court Clerk	<input type="checkbox"/>	Via Messenger Service
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415 12th Avenue SW	<input type="checkbox"/>	Via Email
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SIGNED at Seattle, Washington this 7th day of December, 2018.



Tonya Arico

No. 95867-0

SUPREME COURT
OF THE STATE OF WASHINGTON

MOUN KEODALAH and AUNG KEODALAH, husband and wife,

Respondents,

v.

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

Petitioners.

APPENDIX TO SUPPLEMENTAL BRIEF OF RESPONDENTS

Division I’s Slip Opinion	001-014
RCW 48.01.030	015
RCW 19.86.010	016
RCW 19.86.020	017
RCW 19.86.090	018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

MOUN KEODALAH and AUNG
KEODALAH, husband and wife,

Petitioners,

v.

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

Respondents.

No. 75731-8-I

DIVISION ONE

PUBLISHED OPINION

FILED: March 26, 2018

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STATE OF WASHINGTON
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LEACH, J. — This court accepted Moun Keodalah's request for discretionary review of the trial court's dismissal of his bad faith and Consumer Protection Act (CPA)¹ claims against Tracey Smith, the Allstate insurance adjuster who handled his claim. RCW 48.01.030 imposes a duty of good faith on all persons engaged in the business of insurance, including individual adjusters. And the CPA does not require that a contractual relationship exist between the parties. Thus, we hold that an individual insurance adjuster may be liable for bad faith and CPA violations. We reverse and remand for further proceedings consistent with this opinion.

¹ Ch. 19.86 RCW.

FACTS

Keodalah and a motorcyclist collided in April 2007. After Keodalah stopped at a stop sign and began to cross the street in his truck, a motorcyclist struck him. The collision killed the motorcyclist and injured Keodalah. Keodalah had purchased auto insurance from Allstate Insurance Company. Keodalah's insurance policy provided underinsured motorist (UIM) coverage. The motorcyclist was uninsured.

The Seattle Police Department (SPD) investigated the collision. The SPD determined the motorcyclist was traveling between 70 and 74 m.p.h. in a 30 m.p.h. zone. SPD reviewed Keodalah's cell phone records. They showed that Keodalah was not using his cell phone at the time of the collision.

Allstate also investigated the collision. Allstate interviewed several witnesses who said the motorcyclist was traveling faster than the speed limit, had proceeded between cars in both lanes, and had "cheated" at the intersection. Allstate hired an accident reconstruction firm, Traffic Collision Analysis Inc. (TCA), to analyze the collision. TCA found that Keodalah stopped at the stop sign, the motorcyclist was traveling at a minimum of 60 m.p.h., and the motorcyclist's "excessive speed" caused the collision.

Keodalah asked Allstate to pay him the limit of his UIM policy, \$25,000. But Allstate refused. It offered \$1,600 to settle the claim based on an

assessment that Keodalah was 70 percent at fault. After Keodalah asked Allstate to explain its evaluation,² Allstate increased its offer to \$5,000.

Keodalah sued Allstate, asserting a UIM claim. Allstate designated Smith as its CR 30(b)(6) representative. Although Allstate possessed both the SPD report and TCA analysis, Smith claimed that Keodalah had run the stop sign and had been on his cell phone. Smith later admitted, however, that Keodalah had not run the stop sign and had not been on his cell phone. Before trial, Allstate offered Keodalah \$15,000 to settle the claim. Keodalah refused and again requested the \$25,000 policy limit. The case proceeded to a jury trial.

At trial, Allstate contended that Keodalah was 70 percent at fault. The jury determined the motorcyclist to be 100 percent at fault and awarded Keodalah \$108,868.20 for his injuries, lost wages, and medical expenses.

Keodalah filed a second lawsuit against Allstate and included claims against Smith. These included IFCA violations, insurance bad faith, and CPA violations. Allstate and Smith moved to dismiss the complaint under CR 12(b)(6). The trial court granted the motion in part. It dismissed Keodalah's claims against Smith and certified the case for discretionary review under RAP 2.3(b)(4).³

² He made this request under the Washington Insurance Fair Conduct Act (IFCA), RCW 48.30.010-.015.

³ This court may accept discretionary review where "[t]he superior court has certified . . . that the order involves a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review

This court granted discretionary review of the three issues: (1) whether IFCA creates a private cause of action for violation of a regulation, (2) whether an individual insurance adjuster may be liable for bad faith, and (3) whether an individual insurance adjuster may be liable for violation of the CPA. Later, our Supreme Court decided Perez-Crisantos v. State Farm Fire & Casualty Insurance Co.,⁴ which forecloses Keodalah's IFCA claim. We now decide the other two issues involving bad faith and the CPA.

ANALYSIS

The two issues before this court present unresolved legal questions on which courts have divided.⁵ We review legal questions de novo.⁶

Bad Faith

First, we must decide whether insureds may bring bad faith claims against individual insurance adjusters. RCW 48.01.030 imposes a duty of good faith on "all persons" involved in insurance, including the insurer and its representatives.

of the order may materially advance the ultimate termination of the litigation." RAP 2.3(b)(4).

⁴ 187 Wn.2d 669, 672, 389 P.3d 476 (2017) (holding that the IFCA does not create an independent private cause of action for violation of a regulation).

⁵ Smith makes two arguments to show that she should prevail. She asserts that the statutes of limitations bar the action and that she cannot be liable for conduct in an earlier litigation. But because we did not accept discretionary review of these issues, we do not consider them. See Johnson v. Recreational Equip., Inc., 159 Wn. App. 939, 959 n.7, 247 P.3d 18 (2011); City of Bothell v. Barnhart, 156 Wn. App. 531, 538 n.2, 234 P.3d 264 (2010), aff'd, 172 Wn.2d 223, 257 P.3d 648 (2011).

⁶ King v. Snohomish County, 146 Wn.2d 420, 423-24, 47 P.3d 563 (2002).

The business of insurance is one affected by the public interest, requiring that all persons be actuated by good faith, abstain from deception, and practice honesty and equity in all insurance matters. Upon the insurer, the insured, their providers, and their representatives rests the duty of preserving inviolate the integrity of insurance.^[7]

A person who violates this duty may be liable for the tort of bad faith.⁸ RCW 48.01.070 defines “person” as “any individual, company, insurer, association, organization, reciprocal or interinsurance exchange, partnership, business trust, or corporation.” Smith was engaged in the business of insurance and was acting as an Allstate representative. Thus, under the plain language of the statute, she had the duty to act in good faith. And she can be sued for breaching this duty.

Division Three used this analysis in Merriman v. American Guarantee & Liability Insurance Co.⁹ Merriman interpreted the insurance bad faith statute to permit claims against corporate insurance adjusters.¹⁰ The court reasoned,

RCW 48.01.030 unambiguously applies to “[t]he business of insurance,” imposing requirements on “all persons,” and rests the duty of preserving inviolate the integrity of insurance on, among others, “[the] representatives” of the insurer. “Person” is defined by RCW 48.01.070 to mean “any individual, company, insurer,

⁷ RCW 48.01.030.

⁸ Ellwein v. Hartford Accident & Indem. Co., 142 Wn.2d 766, 775, 15 P.3d 640 (2001), overruled on other grounds by Smith v. Safeco Ins. Co., 150 Wn.2d 478, 78 P.3d 1274 (2003).

⁹ 198 Wn. App. 594, 396 P.3d 351 (2017), review denied, 189 Wn.2d 1038 (2018).

¹⁰ Merriman, 198 Wn. App. at 612.

association, organization, reciprocal or interinsurance exchange, partnership, business trust, or corporation.” As an adjuster contracted by American Guarantee to act as its claims administrator, York was, at all relevant times, a “person” engaged in “the business of insurance” and a representative of American Guarantee.^[11]

In Lease Crutcher Lewis WA, LLC v. National Union Fire Insurance Co.,¹²

a federal district court judge applied a similar analysis. The Lease court reasoned,

The insurance code of Washington applies to “all insurance transactions . . . and all persons having to do therewith” [RCW 48.01.020]. “Persons” is defined to include corporations such as AIG Domestic Claims. RCW 48.01.070. More importantly, the legislature has expressly imposed an obligation of good faith on those who represent insurers and insureds.^[13]

Lease went on to observe that the plaintiff alleged that the corporate adjuster “acted on behalf of and with authority from” the insurer.¹⁴

Smith attempts to distinguish our case. She correctly notes that it involves an individual insurance adjuster while Merriman and Lease involved third-party companies adjusting claims. We do not find this distinction significant. Both Merriman and Lease relied on the broad statutory definition of “person” to decide that corporate adjusters owe a duty of good faith. The code’s broad definition of

¹¹ Merriman, 198 Wn. App. at 611-12 (alterations in original).

¹² No. C08-1862RSL, 2009 WL 3444762 (W.D. Wash. Oct. 20, 2009).

¹³ Lease, 2009 WL 3444762, at *2. Lease mistakenly cites RCW 48.10.020 instead of RCW 48.01.020 for the quoted language about the scope of the code.

¹⁴ Lease, 2009 WL 3444762, at *2.

“person” includes both individuals and corporations and does not make any distinction between the duties they owe. Nothing in the statute limits the duty of good faith to corporate insurance adjusters or relieves individual insurance adjusters from this duty. The duty of good faith applies equally to individuals and corporations acting as insurance adjusters.

Smith relies on Garoutte v. American Family Mutual Insurance Co.¹⁵ There, a different federal district court judge reached a different conclusion. Garoutte does not persuade us. Garoutte specifically relied on the following sentence: “Upon the insurer, the insured, their providers, and their representatives rests the duty of preserving inviolate the integrity of insurance.”¹⁶ The court stated that “the text of this sentence makes clear that it does not create a cause of action against representatives of insurance companies; otherwise, it would also create a cause of action for bad faith against “the insured.”¹⁷ But Washington courts have expressly stated that the statute does impose a duty of good faith on both the insureds and the insurer.¹⁸ Garoutte also found the

¹⁵ No. C12-1787MJP, 2013 WL 231104, at *2 (W.D. Wash. Jan. 22, 2013).

¹⁶ RCW 48.01.030, cited in Garoutte, 2013 WL 231104, at *2.

¹⁷ Garoutte, 2013 WL 231104, at *2.

¹⁸ Mahler v. Szucs, 135 Wn.2d 398, 414, 957 P.2d 632 (1998) (“Both insurer and insured, having entered into an insurance contract, are bound by the common law duty of good faith and fair dealing, as well as the statutory duty ‘to practice honesty and equity in all insurance matters.’ RCW 48.01.030.”), overruled on other grounds by Matsyuk v. State Farm Fire & Cas. Co., 173 Wn.2d 643, 272 P.3d 802 (2012); Mut. of Enumclaw Ins. Co. v. Dan Paulson Constr., Inc., 132 Wn. App. 803, 810, 134 P.3d 240 (2006) (“Both insurer and

distinction between a corporate adjuster and individual employee adjuster significant. But the court did not explain this significance and merely stated that Lease “explicitly confined its reasoning to the duties of third-party corporate entities, not to individuals directly employed by insurers.”¹⁹ Lease stated that it need not decide “whether [RCW 48.01.030] gives rise to a bad faith claim against individuals directly employed by the insurer.”²⁰ But the reasoning in Lease applies equally to claims against individuals. Lease determined that insurance adjusters are representatives, who owe a duty of good faith under RCW 48.01.030.²¹ Just as corporate insurance adjusters are representatives, so too are individual employee insurance adjusters.

Smith urges us to use the Washington Administrative Code (WAC) to interpret the relevant statutory language. She contends that the regulations apply only to “insurers” and if the legislature had meant the duty of good faith to

insured are obligated to exercise good faith.” (citing RCW 48.01.030)), rev'd on other grounds, 161 Wn.2d 903, 169 P.3d 1 (2007); see also St. Paul Fire & Marine Ins. Co. v. Onvia, Inc., 165 Wn.2d 122, 130, 196 P.3d 664 (2008) (noting that the good faith duty exists between an insurer and an insured).

¹⁹ Garoutte, 2013 WL 231104, at *2.

²⁰ Lease, 2009 WL 344762, at *2 n.1 (distinguishing the issue in Rice v. State Farm Mut. Auto. Ins. Co., No. C05-5595RJB, 2005 WL 2487975 (W.D. Wash. Oct. 7, 2005)). A later decision by the same district court judge assumed for purposes of the decision that an employee of an insurance company owes a duty of good faith under RCW 48.01.030. See Ro v. Everest Indem. Ins., C16-0664RSL, 2016 WL 4193868, at *2 (W.D. Wash. Aug. 9, 2016) (distinguishing Lease, 2009 WL 344762, on a different basis).

²¹ Lease, 2009 WL 344762, at *2.

apply to employees it could have said so.²² We agree that the regulations focus on insurers. But the insurance code is broader and expressly applies to “all persons” having to do with insurance transactions.²³ In addition, the regulations specifically state, “This regulation is not exclusive, and acts performed, whether or not specified herein, may also be deemed to be violations of specific provisions of the insurance code or other regulations.”²⁴ Thus, the regulations do not purport to alter the plain meaning of RCW 48.01.030. And they could not.²⁵

²² See WAC 284-30-310.

²³ RCW 48.01.020 (“All insurance and insurance transactions in this state, or affecting subjects located wholly or in part or to be performed within this state, and all persons having to do therewith are governed by this code.”).

²⁴ WAC 284-30-310.

²⁵ Lease also considered and rejected this argument:

Although courts regularly consider administrative rules when resolving ambiguities in a statute, they “should not defer to an agency’s interpretation of a statute if that interpretation conflicts with the statutory mandate.” Bostain v. Food Exp., Inc., 159 [Wn.]2d 700, 727, 153 P.3d 846 (2007). In this case, the statute is unambiguous: both the insurer and its representative must act in good faith toward the insured. If the regulations stated otherwise, the administrative agency would have exceeded its power by promulgating rules that amend or change the legislative enactment. Wash. Pub. Ports Ass’n v. Dep’t of Revenue, 148 [Wn.]2d 637, 646, 62 P.3d 462 (2003). The issue is inapposite, however, because the regulations do not, in fact, contradict the statutory mandate. Although the administrative agency has chosen to focus its regulations on the conduct of insurers, at least one regulation expressly governs the conduct of an insurer’s agent (WAC 284-30-350(2)). In addition, the regulations are not exclusive: “acts performed, whether or not specified herein, may also be deemed to be violations of specific provisions of the insurance code or other regulations.” WAC 284-30-310. Thus, the regulations do not preclude a finding that

Finally, Smith asserts that she cannot be liable because she was acting within the scope of her employment. She relies on Annechino v. Worthy²⁶ for the proposition that an employee is personally liable to a third party only when that agent owes a duty to the third party. Annechino does not support Smith's position because, as explained above, she did owe a duty to Keodalah. RCW 48.01.030 imposed a duty of good faith on Smith, not just on her employer. Smith cannot avoid personal liability for bad faith on the basis of her employment.

In sum, we agree with Division Three's decision in Merriman and further hold that RCW 48.01.030 imposes a duty of good faith on corporate and individual insurance adjusters alike.

CPA

Next, we consider whether Smith can be liable for a violation of the CPA. The CPA prohibits "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce."²⁷ The CPA serves to deter unfair or deceptive acts or practices, protect the public, and foster fair and

an adjuster must act in good faith pursuant to the clear mandate of RCW 48.01.030.

Lease, 2009 WL 3444762, at *2 (distinguishing Rice, 2005 WL 2487975).

²⁶ 175 Wn.2d 630, 638, 290 P.3d 126 (2012) ("[A]n 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." (quoting RESTATEMENT (THIRD) OF AGENCY § 7.02) (AM. LAW INST. 2006))).

²⁷ RCW 19.86.020.

honest competition.²⁸ The legislature has stated that the CPA is to be “liberally construed [so] that its beneficial purposes may be served.”²⁹

The Supreme Court described the elements of a CPA claim in Hangman Ridge Training Stables, Inc. v. Safeco Title Insurance Co.³⁰ To prevail on a CPA claim, a plaintiff must show (1) an unfair or deceptive act or practice, (2) that act or practice occurs in trade or commerce, (3) a public interest impact, (4) injury to the plaintiff in his or her business or property, and (5) a causal link between the unfair or deceptive act and the injury.³¹

Smith claims that this court has added a sixth element to the five Hangman Ridge elements: the parties must have a contractual relationship. She relies on this court’s opinion in International Ultimate, Inc. v. St. Paul Fire & Marine Insurance Co.³² International Ultimate stated, without supporting authority, that “[t]o be liable under the CPA, there must be a contractual relationship between the parties.”³³ International Ultimate then determined that

²⁸ RCW 19.86.920 (“The legislature hereby declares that the purpose of this act is to complement the body of federal law governing restraints of trade, unfair competition and unfair, deceptive, and fraudulent acts or practices in order to protect the public and foster fair and honest competition.”); Sign-O-Lite Signs, Inc. v. DeLaurenti Florists, Inc., 64 Wn. App. 553, 564, 825 P.2d 714 (1992) (stating that “the clear purpose of the CPA is to deter and protect against unfair or deceptive acts or practices”).

²⁹ RCW 19.86.920.

³⁰ 105 Wn.2d 778, 719 P.2d 531 (1986).

³¹ Hangman Ridge, 105 Wn.2d at 780.

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

³³ Int’l Ultimate, 122 Wn. App. at 758.

an insured could not sue an insurer's adjuster because "the CPA does not contemplate suits against employees of insurers."³⁴ But International Ultimate is inconsistent with the Washington Supreme Court's more recent decision in Panag v. Farmers Insurance Co. of Washington.³⁵ In Panag, our Supreme Court declined to add a sixth element to the Hangman Ridge test that would require proof of a consumer transaction between the parties.³⁶ The court reasoned that requiring a consumer relationship is inconsistent with the plain language of the CPA and undermines the purposes it serves.³⁷

The CPA itself, the purposes for which it was enacted, and our cases do not support the argument that a CPA claim must be predicated on an underlying consumer or business transaction. The CPA allows "[a]ny person who is injured in his or her business or property by a violation" of the act to bring a CPA claim. RCW 19.86.090 (emphasis added). Nothing in this language requires that the plaintiff must be a consumer or in a business relationship with the actor.^[38]

We cannot reconcile International Ultimate with Panag. And we must follow the Supreme Court's more recent controlling decision.

³⁴ Int'l Ultimate, 122 Wn. App. at 758.

³⁵ 166 Wn.2d 27, 204 P.3d 885 (2009).

³⁶ Panag, 166 Wn.2d at 38.

³⁷ Panag, 166 Wn.2d at 39.

³⁸ Panag, 166 Wn.2d at 39. Further, the Supreme Court has allowed CPA claims to proceed in other circumstances when no contractual relationship between the parties exists. In deeds of trust cases, for example, a mortgagee may bring a CPA claim against the trustee though no direct contract exists between them. Lyons v. U.S. Bank Nat'l Ass'n., 181 Wn.2d 775, 794, 336 P.3d 1142 (2014); Klem v. Wash. Mut. Bank, 176 Wn.2d 771, 782-83, 295 P.3d 1179 (2013).

Merriman uses this analysis. Merriman explained,

The International Ultimate court provided no authority for that statement; it conflicts with our Supreme Court's identification of the five elements of a CPA claim in Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 784-85, 719 P.2d 531 (1986), and later cases; and it cannot survive the Supreme Court's holding in Panag that a CPA claim need not arise from a consensual business transaction or a business relationship. Panag, 166 Wn.2d at 38-39.^[39]

Keodalah need not show the existence of a contractual relationship with Smith to establish a CPA claim against her.

The other cases Smith cites do not persuade us. Smith cites the federal district court cases Garoutte, Collins v. Quintana,⁴⁰ and Grant v. Unigard Indemnity Co.⁴¹ that hold no cause of action exists against the employee of an insurance company. But these cases relied on International Ultimate, which we do not follow, and the Ninth Circuit decision, Mercado v. Allstate Insurance Co.,⁴² which is distinguishable. In conclusion, individual insurance adjusters can be liable for a violation of the CPA.

³⁹ Merriman, 198 Wn. App. at 626 n.11.

⁴⁰ No. C15-1619RAJ, 2016 WL 337262, at *4 (W.D. Wash. Jan. 28, 2016) (bad faith claim).

⁴¹ No. CV14-00198BJR, 2014 WL 12028484, at *2 (W.D. Wash. July 29, 2014) (CPA claim).

⁴² 340 F.3d 824 (9th Cir. 2003). Mercado applied the California rule that insurance agents are not independently liable for negligent failure to provide adequate insurance. Mercado, 340 F.3d at 826. Here, by contrast, and as explained above, an agent can be individually liable for insurance bad faith and under Washington's CPA.

CONCLUSION

We reverse. We hold that an individual employee insurance adjuster can be liable for bad faith and a violation of the CPA. We remand to the trial court for further proceedings consistent with this opinion.

Leach, J.

WE CONCUR:

Speckman, J.

COX, J.

[Rev. Code Wash. \(ARCW\) § 48.01.030](#)

Statutes current through the 2018 Regular Session

Annotated Revised Code of Washington > Title 48 Insurance (Chs. 48.01 — 48.195) > Chapter 48.01 Initial Provisions (§§ 48.01.010 — 48.01.280)

48.01.030. Public interest.

The business of insurance is one affected by the public interest, requiring that all persons be actuated by good faith, abstain from deception, and practice honesty and equity in all insurance matters. Upon the insurer, the insured, their providers, and their representatives rests the duty of preserving inviolate the integrity of insurance.

History

1995 c 285 § [16](#); 1947 c 79 § .01.03; Rem. Supp. 1947 § 45.01.03.

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[Rev. Code Wash. \(ARCW\) § 19.86.010](#)

Statutes current through the 2018 Regular Session

Annotated Revised Code of Washington > Title 19 Business Regulations — Miscellaneous (Chs. 19.02 — 19.385) > Chapter 19.86 Unfair Business Practices — Consumer Protection (§§ 19.86.010 — 19.86.920)

19.86.010. Definitions.

As used in this chapter:

- (1)**“Person” shall include, where applicable, natural persons, corporations, trusts, unincorporated associations and partnerships.
- (2)**“Trade” and “commerce” shall include the sale of assets or services, and any commerce directly or indirectly affecting the people of the state of Washington.
- (3)**“Assets” shall include any property, tangible or intangible, real, personal, or mixed, and wherever situate, and any other thing of value.

History

1961 c 216 § 1.

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[Rev. Code Wash. \(ARCW\) § 19.86.020](#)

Statutes current through the 2018 Regular Session

Annotated Revised Code of Washington > Title 19 Business Regulations — Miscellaneous (Chs. 19.02 — 19.385) > Chapter 19.86 Unfair Business Practices — Consumer Protection (§§ 19.86.010 — 19.86.920)

19.86.020. Unfair competition, practices, declared unlawful.

Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

History

1961 c 216 § 2.

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[Rev. Code Wash. \(ARCW\) § 19.86.090](#)

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Annotated Revised Code of Washington > Title 19 Business Regulations — Miscellaneous (Chs. 19.02 — 19.385) > Chapter 19.86 Unfair Business Practices — Consumer Protection (§§ 19.86.010 — 19.86.920)

19.86.090. Civil action for damages — Treble damages authorized — Action by governmental entities.

Any person who is injured in his or her business or property by a violation of [RCW 19.86.020](#), [19.86.030](#), [19.86.040](#), [19.86.050](#), or [19.86.060](#), or any person so injured because he or she refuses to accede to a proposal for an arrangement which, if consummated, would be in violation of [RCW 19.86.030](#), [19.86.040](#), [19.86.050](#), or [19.86.060](#), may bring a civil action in superior court to enjoin further violations, to recover the actual damages sustained by him or her, or both, together with the costs of the suit, including a reasonable attorney's fee. In addition, the court may, in its discretion, increase the award of damages up to an amount not to exceed three times the actual damages sustained: PROVIDED, That such increased damage award for violation of [RCW 19.86.020](#) may not exceed twenty-five thousand dollars: PROVIDED FURTHER, That such person may bring a civil action in the district court to recover his or her actual damages, except for damages which exceed the amount specified in [RCW 3.66.020](#), and the costs of the suit, including reasonable attorney's fees. The district court may, in its discretion, increase the award of damages to an amount not more than three times the actual damages sustained, but such increased damage award shall not exceed twenty-five thousand dollars. For the purpose of this section, "person" includes the counties, municipalities, and all political subdivisions of this state.

Whenever the state of Washington is injured, directly or indirectly, by reason of a violation of [RCW 19.86.030](#), [19.86.040](#), [19.86.050](#), or [19.86.060](#), it may sue therefor in superior court to recover the actual damages sustained by it, whether direct or indirect, and to recover the costs of the suit including a reasonable attorney's fee.

History

2009 c 371 § [1](#); 2007 c 66 § [2](#); 1987 c 202 § 187; 1983 c 288 § 3; 1970 ex.s. c 26 § 2; 1961 c 216 § 9.

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