Supreme Court No. 95867-0

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 75731-8-I

COURT OF APPEALS, DIVISION ONE
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.

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONERS

Allstate Insurance Company and Tracey Smith, respondents in the Court of Appeals, file this petition for review.

II. COURT OF APPEALS DECISION

Allstate and Smith seek review of the published decision of the Court of Appeals, Division One, filed March 26, 2018, in *Keodalah v. Allstate Insurance Co.*, No. 75731-8-I. A copy of the slip opinion is attached as Appendix A. The Court of Appeals denied Allstate and Smith's timely motion for reconsideration on April 20, 2018.

III. ISSUE PRESENTED FOR REVIEW

An agent is subject to personal liability to a third party only to the extent the agent personally owes that party a duty, independent of the duty owed by the principal. Deciding an issue of first impression in Washington, the Court of Appeals in this case diverged from 20 other states to make Washington the only state where employees of insurance companies who adjust claims owe an actionable, independent duty of good faith to insureds.

Washington undisputedly imposes a duty of good faith in the context of insurance claims, under both common law and statute. But this Court has long held that the duty springs from the special relationship of insurer and insured and has refused to recognize an actionable duty beyond the context of that relationship. This case thus presents the issue: Does an employee claims adjuster, despite lacking any legal relationship with an insured, owe an actionable, independent duty of good faith to the insured? This issue warrants review under RAP 13.4(b)(1) and (4).

IV. STATEMENT OF THE CASE

The Court of Appeals reviewed the partial grant of Allstate and Smith's motion to dismiss Plaintiffs' complaint under CR 12(b)(6) for failure to state a claim upon which relief can be granted. CP 149. The following facts, which Allstate and Smith reserve the right to dispute, are taken from the complaint.

The operator of a speeding motorcycle collided with Plaintiff Moun Keodalah's vehicle after Keodalah pulled forward from a stop sign into an intersection. CP 2. Keodalah was injured in the accident. CP 2. Keodalah was insured under a policy with Allstate Insurance Company, while the motorcyclist, who died in the accident, was uninsured. CP 2-3.

Allstate paid Keodalah's medical bills under the policy's personal-injury protection (PIP) coverage. CP 3. Keodalah also made a claim under the underinsured motorist (UIM) coverage of his insurance policy and demanded the $25,000 policy limit. CP 3, 6. Allstate initially offered $1,600 to settle the claim based on an assessment that Keodalah was 70% at fault. CP 6. After Keodalah asked Allstate to explain its evaluation, Allstate increased its offer to $5,000. CP 6-7.

Keodalah sued Allstate under his UIM coverage. CP 7. Allstate designated one of its employees, adjuster Tracey Smith, as its CR 30(b)(6) representative. CP 8. Smith testified at deposition that Keodalah had run the stop sign and had been on his cell phone, but later acknowledged that Keodalah in fact had not run the stop sign and had not been on his cell phone. CP 8. Before trial, Allstate offered Keodalah $15,000 to settle.

CP 8. Keodalah refused and again demanded the $25,000 policy limit. CP 9. The case proceeded to a jury trial. CP 9, 11. The jury determined the motorcyclist was 100% at fault and Keodalah sustained $108,868 in damages. CP 11.

Keodalah filed a second lawsuit against Allstate and included claims against Smith. CP 12-16. Against both Smith and Allstate, Keodalah alleged insurance bad faith and violation of the Consumer Protection Act (CPA). CP 12-13. Against Allstate alone, Keodalah also alleged violation of the Insurance Fair Conduct Act (IFCA) and breach of fiduciary duty. CP 12-16. Allstate and Smith moved to dismiss the complaint under CR 12(b)(6). CP 46-67.

The superior court (King County Superior Court, Honorable John P. Erlick) granted Allstate's motion to dismiss as to Plaintiffs' claims against Smith but certified multiple issues for discretionary review under RAP 2.3(b)(4), including whether an individual adjuster is subject to liability for bad faith or violation of the CPA. CP 149. The Court of Appeals accepted review of that issue.[1] *Slip Op.* at 4.

The Court of Appeals reversed the superior court and reinstated Plaintiffs' bad faith and CPA claims against Smith. The court held that RCW 48.01.030 imposes a duty of good faith upon adjusters individually and that the duty is actionable in tort and under the CPA. *Slip Op.* at 4-13.

[1] The Court of Appeals also accepted review of whether IFCA creates a private cause of action for violation of specified insurance regulations. Before the court decided the case, this Court decided *Perez-Cristantos v. State Farm Fire & Casualty Insurance Co.*, 187 Wn.2d 669, 389 P.3d 476 (2017), which foreclosed Keodalah's IFCA claim. *See Slip Op.* at 4 (citing *Perez-Cristantos*, 187 Wn.2d at 672).

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. Summary of Argument.

An insurer's agent is subject to liability to an insured in tort only if the agent personally owes the insured a duty. *See Annechino v. Worthy*, 175 Wn.2d 630, 638, 290 P.3d 126 (2012) ("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.") (quoting RESTATEMENT (THIRD) OF AGENCY § 7.02 (2006)). Similarly, personal liability under the CPA for bad faith would require the existence of an independent duty under RCW 48.01.030.

The duty of good faith in the insurance context exists because of the quasi-fiduciary relationship between an insurer and its insured, and this Court has thus limited the duty to the context of that relationship. No such relationship exists between an insured and an adjuster investigating a claim on behalf of an insurer. Although an insurer is subject to liability for bad faith acts taken by agents acting on its behalf, the Court of Appeals' decision here that an employee adjuster *personally* owes a duty of good faith to an insured is contrary to this Court's precedents, including *Tank v. State Farm Fire & Casualty Co.*, 105 Wn.2d 381, 715 P.2d 1133 (1986), and presents an issue of substantial public importance that this Court should decide. Review by this Court is thus warranted under RAP 13.4(b)(1) and (4).

B. This Court has consistently held that the duty of good faith exists because of the special relationship between an insurer and its insured.

For over 75 years, this Court has held that insurers owe a duty of good faith to their insureds under Washington common law. *See, e.g., St. Paul Fire & Marine Ins. Co v. Onvia, Inc.*, 165 Wn.2d 122, 129, 196 P.3d 664 (2008); *Tank*, 105 Wn.2d at 385-86; *Burnham v. Commercial Cas. Ins. Co. of Newark, N.J.*, 10 Wn.2d 624, 639-40, 117 P.2d 644 (1941). This Court has made clear that the duty exists because of the special relationship between insurer and insured. *Tank*, 105 Wn.2d at 385-86; *Murray v. Mossman*, 56 Wn.2d 909, 912, 355 P.2d 985 (1960). In *Tank*, this Court characterized that relationship as a fiduciary relationship. 105 Wn.2d at 385 (citing *Tyler v. Grange Ins. Ass'n*, 3 Wn. App. 167, 173, 473 P.2d 193 (1970) (op. per Utter, J.)). This Court observed that "[s]uch a relationship exists not only because of the contract between insurer and insured, but because of the high stakes involved for both parties and the elevated level of trust underlying insureds' dependence on their insurers." *Id*.

Subsequent to *Tank*, this Court has clarified that the insurer-insured relationship is not a true fiduciary relationship, which would be unworkable because it would require the insurer to place the insured's interests above its own. *Safeco Ins. Co. of Am. v. Butler*, 118 Wn.2d 383, 389, 823 P.2d 499 (1992). Rather, under *Tank*, an insurer must give "equal consideration" to the insured's interests. 105 Wn.2d at 387. This Court has sometimes referred to the relationship as "quasi-fiduciary." *St. Paul Fire & Marine*, 165 Wn.2d at 130 n.3.

Just six years after this Court first recognized the common-law duty of good faith in 1941, the legislature enacted the insurance code, including the declaration of public interest in RCW 48.01.030, which codifies the duty of good faith:

> ***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.

The primary import of the insurance code was to establish a comprehensive code to govern the insurance industry. *Kueckelhan v. Fed. Old Line Ins. Co. (Mut.)*, 69 Wn.2d 392, 402, 418 P.2d 443, 451 (1966). The code itself created no private rights of action.[2]

Even after the good-faith duty was codified in RCW 48.03.010, this Court generally has continued citing the common law as the source of the good-faith duty for purposes of tort liability. *See, e.g., Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 484, 78 P.3d 1274 (2003); *Murray*, 56 Wn.2d at 911; *Evans v. Continental Cas. Co.*, 40 Wn.2d 614, 628, 245 P.3d 470 (1952); *but see Ellwein v. Hartford Accident & Indem. Co.*, 142 Wn.2d 766, 780, 15 P.3d 640 (2001), *overruled on other grounds by Smith*, 150 Wn.2d 478 ("RCW 48.01.030 imposes a duty to act in good faith upon insurers, and

[2] As the Court of Appeals observed in refusing to recognize a negligence cause of action based on RCW 48.01.030, the purpose of the insurance code generally is "only…to create a mechanism for regulating the insurance industry" and "not…to provide protection or remedies for individual interests." *Pain Diagnostics & Rehab. Assocs., P.S. v. Brockman*, 97 Wn. App. 691, 697, 988 P.2d 972 (1999). The subsequent adoption of IFCA created limited remedies for first-party claimants against insurers for specific unfair conduct. *See* RCW 48.30.015; *Perez-Cristantos*, 187 Wn.2d at 676-84.

violation of that duty may give rise to a tort action for bad faith"). Meanwhile, the statutory duty is enforced by the insurance commissioner and a violation is deemed a per se unfair trade practice for purposes of liability under the CPA. *Ledcor Indus. (USA), Inc. v. Mut. of Enumclaw Ins. Co.*, 150 Wn. App. 1, 12, 206 P.3d 1255 (2009).

Although generally applied for different purposes, this Court has not distinguished between the common-law and statutory good-faith duties in terms of their nature or scope. *See, e.g., Indus. Ins. Co. of the Nw., Inc. v. Kallevig*, 114 Wn.2d 907, 916-17, 792 P.2d 520 (1990) (stating that RCW 48.01.030 codifies a "fiduciary duty to act in good faith"); *Tank*, 105 Wn.2d at 385-86. Significantly, this Court has never held that the statute imposes a broader good-faith duty than the common law.

C. Consistent with the good-faith duty's origin, this Court has limited its application to the insurer-insured relationship.

Because the good-faith duty arises from the special relationship between insurer and insured, this Court has refused to extend the duty beyond the scope of that relationship. For instance, in *Murray*, this Court held that an insurer owes no actionable duty to third-party claimants (*i.e.*, third parties who claim to have been injured by the insured's acts or omissions) because "the duty of the insurance company to use good faith in the handling of a claim against the insured springs from a fiduciary relationship that is entirely lacking between the person injured and the insurance company." 56 Wn.2d at 912. And in *Tank*, this Court held

similarly that third-party claimants have no right of action based on the statutory good-faith duty. 105 Wn.2d at 395.

The rule in the special context of UIM coverage further demonstrates that whether a duty is owed depends on the existence of an insurer-insured relationship. A claim under UIM insurance coverage (which this case involves) puts the insured in a position similar to a third-party claimant. UIM insurance provides a layer of excess insurance coverage that "floats" on top of the injured party's recovery from other sources. *Fisher v. Allstate Ins. Co.*, 136 Wn.2d 240, 244, 961 P.2d 350 (1998). A UIM insurer "stands in the shoes" of the tortfeasor and is allowed to assert liability defenses available to the tortfeasor. *Ellwein*, 142 Wn.2d at 780. The relationship between a UIM insurer and its insured is thus "by nature adversarial and at arm's length." *Id.* (quoting *Fisher*, 136 Wn.2d at 249). Yet because a UIM claim nonetheless arises in the context of the insurer-insured relationship, the insured "still has the reasonable expectation that he will be dealt with fairly and in good faith by his insurer," and a good-faith duty thus survives. *Ellwein*, 142 Wn.2d at 780-81 (citations and internal quotation marks omitted).[3]

[3] The duty of a UIM insurer is, however, less demanding: a UIM insurer need not give equal consideration to the insured's interests, but still must "deal in good faith and fairly as to the terms of the policy and not overreach the insured." *Ellwein*, 142 Wn.2d at 781 (quoting *Hendren v. Allstate Ins. Co.*, 100 N.M. 506, 672 P.2d 1137, 1140-41 (Ct. App. 1983)).

D. An insurer-retained adjuster works "on behalf solely of…the insurer" and has no direct legal relationship with an insured.

An insurer-retained adjuster has no contractual, quasi-fiduciary, or other relationship with the insured. A claims adjuster is not a dual agent. By statutory definition, an adjuster is a person or entity who "investigates or reports to the adjuster's principal relative to claims arising under insurance contracts, *on behalf solely of either the insurer or insured*." RCW 48.17.010(1) (emphasis added).[4]

An insurer-retained adjuster is a stranger to the insurance contract whose only pertinent legal relationship is an agency relationship with his principal, the insurer, to which the adjuster owes absolute loyalty. *See Cogan v. Kidder, Mathews & Segner, Inc.*, 97 Wn.2d 658, 663, 648 P.2d 875 (1982). Unlike an insurer, an adjuster ordinarily owes the insured no obligation under the insurance policy, receives no premiums, and bears none of the financial risk of loss on the claim—the potentially "high stakes" involved for the insurer and insured. *Tank*, 105 Wn.2d at 385. Although an adjuster generally has the insurer's actual or apparent authority to act on its behalf, *see Buchanan v. Switzerland Gen. Ins. Co.*, 76 Wn.2d 100, 108-09, 455 P.2d 344 (1969), the insurer controls its adjuster's responsibilities and retains the ultimate authority under the insurance policy to accept or deny coverage and the obligation to pay claims.

[4] An "independent" adjuster is one hired by an insurer to represent its interests, while a "public" adjuster is one hired by the insured to represent its interests. RCW 48.17.010(1)(a), (b).

E. The Court of Appeals' holding that an employee adjuster owes a duty of good faith to insureds conflicts with decades of precedent from this Court.

In 2017, Division Three of the Court of Appeals held that corporate adjusters owe an actionable duty of good faith under RCW 48.10.030. *Merriman v. Am. Guar. & Liability Ins. Co.*, 198 Wn. App. 594, 611-12, 396 P.3d 351 (2017), *review denied*, 413 P.3d 565 (2017). Here, Division One of the Court of Appeals adopted Division Three's analysis and extended it to individual adjusters employed by insurers. *Slip Op.* at 4-10. Washington is now the only United States jurisdiction where corporate or employee adjusters owe an actionable, independent duty to act in good faith toward an insured.[5] 198 Wn. App. at 611-13. All twenty states other than Washington that have considered whether an adjuster owes such a duty have

[5] The United States District Court for the Western District of Washington had previously held that a corporate adjuster owed an actionable duty of good faith under RCW 48.01.030, *e.g.*, *Lease Crutcher Lewis WA, LLC v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 2009 WL 3444762 (W.D. Wash. 2009) (Lasnik J.), but that an employee adjuster did not, *e.g.*, *Garoutte v. American Family Mut. Ins. Co.*, 2013 WL 231104 (W.D. Wash. 2013) (Pechman, J).

declined to recognize one.[6] Although courts in three states have held that an adjuster owes some duty of care to an insured, even those states have declined to recognize a duty of good faith.[7]

In finding an actionable duty, both Divisions One and Three emphasized the broad, inclusive language used in RCW 48.01.030, which applies to "all persons," including insurers and their "representatives." *Slip Op*. at 4-7; *Merriman*, 198 Wn. App. at 611-12. But this analysis glosses over a critical issue: whether the duty imposed on insurers' representatives is owed independently or *strictly in their representative capacity*. The courts' analysis presumes the former, but nothing in the statute mandates such a reading. Moreover, such a reading is foreclosed by this Court's precedents holding that the good-faith duty arises from the quasi-fiduciary relationship between insurer and insured and steadfastly refusing to extend

[6] The state courts of Alabama, Arizona, California, Connecticut, Florida, Louisiana, Missouri, New York, North Carolina, Oklahoma, South Carolina, Texas, and Vermont have held that an adjuster owes no duty of care to the insured. *See Lodholtz v. York Risk Servs. Group*, 778 F.3d 635, 641 n.11 (7th Cir 2015), and cases cited. Federal courts applying the laws of Indiana and Rhode Island have reached the same conclusion. *Id.* at 640, 641 n.11. In addition, Pennsylvania has held that an adjuster is not liable for bad faith, and Colorado has held that a third-party claims administrator is not liable for bad faith unless it (1) performs the functions of an insurer and (2) has a financial incentive to limit claims. *Id.* (citing *Bleday v. OUM Group*, 435 Pa. Super. 395, 645 A.2d 1358, 1363 (1994); *Riccatone v. Colorado Choice Health Plans*, 315 P.3d 203, 207 (Colo. Ct. App. 2013)). Alaska and New Hampshire have held that adjusters are not liable for bad faith but may be liable for negligence. *Continental Ins. Co. v. Bayless & Roberts, Inc.*, 608 P.2d 281, 287-88 (Alaska 1980); *Morvay v. Hanover Ins. Cos.*, 127 N.H. 723, 506 A.2d 333, 334-35 (1986) (imposing a duty to conduct a "fair and reasonable investigation"). Under West Virginia law, adjusters are not liable for bad faith but may be liable under West Virginia's Unfair Trade Practices Act, *Grubbs v. Westfield Ins. Co.*, 430 F. Supp. 2d 563, 569 (N.D. W. Va. 2006).

[7] *See* note 6, *supra*.

it beyond that relationship, which does not exist between an adjuster and an insured.

To be sure, adjusters are not free to act in bad faith toward insureds. The insurer must ensure that its agents, including adjusters, act consistent with its duty of good faith. Because an insurer's duty to its insured is nondelegable, the insurer is subject to liability for its agents' failure to satisfy the duty when acting on its behalf. *See Carabba v. Anacortes Sch. Dist. No. 103*, 72 Wn.2d 939, 957, 435 P.2d 936 (1967) (citing RESTATEMENT (SECOND) OF AGENCY § 214 (1957)).[8] In addition, the insurance commissioner licenses and regulates adjusters and has authority to discipline them for any violation of the insurance code.[9] *See* RCW 48.17.060(2), .530-.560.

The duty of good faith is not universal amongst all involved with insurance claims. For sound reasons, this Court has refused to extend the duty beyond the context of the insurer-insured relationship. *See Tank*, 105 Wn.2d at 395; *Murray*, 56 Wn.2d at 912. Absent an independent, actionable duty to insureds, an adjuster cannot be held personally liable to them either in tort or under the CPA. *See Annechino*, 175 Wn.2d at 638. The Court of Appeals' holding that such a duty exists conflicts with this Court's precedents. Review is thus warranted under RAP 13.4(b)(1).

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[8] More generally, a principal who retains control over the agent's performance of work is liable for the agent's acts and omissions within the scope of the employment. *Greene v. St. Paul-Mercury Indem. Co.*, 51 Wn.2d 569, 573, 320 P.2d 311 (1958). This rule is abundantly reasonable in the insurance context, where insurers necessarily are corporate entities that can operate only through their employees.

[9] The disciplinary measures imposed by the commissioner may include fines, restitution, and license suspension or revocation. RCW 48.17.530-.560.

F. Whether an employee adjuster owes a duty of good faith to insureds is an issue of substantial public interest that this Court should decide.

If Washington is to become the only jurisdiction to impose an independent, actionable duty of good faith upon adjusters, including employees of insurers, our state's highest court should make that decision.

Personal liability of adjusters is an issue of substantial public importance because of the increased costs it will inevitably generate. Personal liability needlessly increases litigation and its attendant costs by involving additional defendants—costs that will ultimately be passed on to policyholders in the form of increased premiums but without generating any benefit to policyholders, who can recover no greater damages than those already recoverable from insurers. Personal liability also creates potential personal financial consequences for the thousands of individual adjusters licensed in Washington.

At minimum, this case presents a need for this Court to provide guidance on the nature and scope of an adjuster's independent duties, if any. For instance, the "equal consideration" standard that generally applies to insurers cannot logically apply to an adjuster, who has no direct financial stake in the handling of any particular claim.

Review is thus warranted under RAP 13.4(b)(4).

VI. CONCLUSION

This Court should grant review to address whether employee adjusters, and insurer-retained adjusters generally, owe an independent, actionable duty of good faith to insureds. Although this Court denied

review in *Merriman*, that case involved corporate, not employee adjusters, whose circumstances and interests differ. Moreover, the petition for review in *Merriman* did not focus on this Court's precedents regarding the source and scope of the duty of good faith or comprehensively set forth the law in other jurisdictions, both of which provide compelling reasons to grant review here.

Respectfully submitted this 21st day of May, 2018.

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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:

☒ Email, to the following:

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DATED this 21st day of May, 2018.

Patti Saiden

Patti Saiden, Legal Assistant

APPENDIX A

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

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 adjustor 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]

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[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.

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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,

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[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

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[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

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[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

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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]

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[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. Worthy[26] 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

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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

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[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.

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[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.

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[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:

Spearman, J.

Cox, J.

CARNEY BADLEY SPELLMAN

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