

No. 70413-3

DIVISION 1, COURT OF APPEALS  
OF THE STATE OF WASHINGTON

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ADAN ROSALES-GUZMAN,

Plaintiff/Respondent,

v.

SPRUCE HILLS, LLC, a Washington limited liability company  
Defendant,

And

Lloyd's Syndicate 2112,

Intervenor/Appellant.

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**BRIEF OF RESPONDENT**

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## I. INTRODUCTION

Syndicate 2112 is appealing the denial of two motions it made to the trial court: (1) a motion to intervene and (2) a motion to vacate a judgment. The motion to vacate and the timeliness of the motion to intervene were addressed to the sound discretion of the trial court. Syndicate 2112 has not met its high burden of demonstrating how the trial court abused its discretion in denying both of these motions.

Regarding the motion to vacate, Syndicate 2112 never addresses how it had standing, as a non-party, to file the motion. It certainly was not an abuse of discretion to deny a non-party's attempt to make any type of motion, including a motion to vacate. Just the opposite: it would have been improper for a trial court to allow a non-party to file a motion in a lawsuit.

Regarding the motion to intervene, Syndicate 2112 was attempting to intervene 11 months after final judgment. The motion was not timely made. It was well within the trial court's discretion to deny the motion to intervene for that reason alone.

Moreover, Syndicate 2112 failed to serve Spruce Hills LLC with its motion to intervene. CR 24(c) requires that all parties be served. It would have been error for the trial court to consider a motion to intervene when the movant had not served all the parties.

In addition to the above, Syndicate 2112 simply did not meet the requirements to intervene post-judgment. Nor did it meet the requirements to seek to have a judgment vacated. The record is undisputed that Spruce Hills itself attempted to vacate the judgment raising all but one of the arguments advanced by Syndicate 2112. The trial court denied the motion. Syndicate 2112, untimely and improperly, then made a second attempt to vacate the judgment. A court commissioner rejected the argument. Syndicate 2112 then sought a revision by the superior court. The superior court rejected the motion. There was no abuse of discretion of the prior judges who have rejected Syndicate 2112's arguments.

Syndicate 2112's appeal should be denied and the trial court's rulings should stand.

## II. RESPONSE TO ASSIGNMENTS OF ERROR

1. Could Syndicate 2112 file a motion to vacate a judgment in a lawsuit where it was not a party?
2. Does CR 24(c) require that when an entity moves to intervene in an action it must serve all the parties to the action?
3. Does CR 24(c) require that when an entity moves to intervene in an action it must attach a pleading?
4. Has Syndicate 2112 met its burden of demonstrating to this Court how the trial court erred in applying the law to

the facts that were pleaded (none since Syndicate 2112 never pled any facts) or established when it denied Syndicate 2112's motion to intervene?

5. Has Syndicate 2112 demonstrated that the trial court abused its discretion in denying its motion to intervene because it was not timely, i.e., after final judgment had been entered?
6. One requirement under CR 24(a) is that the movant has an interest relating to the subject of the action. Can Syndicate 2112 claim that it has an interest in this lawsuit when it is simultaneously claiming that it has no duty to defend or indemnify Spruce Hills?
7. Has Syndicate 2112 met its high burden of demonstrating that the trial court abused its discretion in denying Syndicate 2112 request for permissive intervention?
8. Even if Syndicate 2112 were a party, has it demonstrated that the trial court abused its discretion by denying its motion to vacate?
9. Does Syndicate 2112 have standing to bring a motion to vacate (assuming it had been a party at the time of filing the motion) where it is taking the position that it does not have a duty to defend or indemnify Spruce Hills?

### III. Statement of the Case

The following is first the procedural history of this lawsuit, then the findings of fact made by the trial court that are now verities on appeal, and then the factual history of this action.

**A. Procedural Background.**

On May 17, 2012, Spruce Hills moved to vacate the judgment.<sup>1</sup> The motion was heard by Judge Okrent of the Snohomish County Superior Court. At that time Spruce Hills argued that the trial court should vacate the judgment claiming that (1) Guzman was not really an employee of Meridian Drywall, the subcontractor, (2) the evidence did not support the damage award, (3) default judgments are disfavored, and (4) it should be allowed to conduct discovery. Judge Okrent denied the motion.<sup>2</sup> Spruce Hills' insurer, Syndicate 2112, made the decision not to seek an appeal of this ruling.

On February 8, 2013, Syndicate 2112 filed both a motion to intervene and a motion to vacate the judgment.<sup>3</sup> Commissioner Brudvik heard the motions. Syndicate 2112 failed to serve Spruce Hills with its motion to intervene and its motion to vacate. Syndicate 2112 raised the same arguments that were raised by Spruce Hills in its prior motion to vacate. In addition, Syndicate 2112 claimed that somehow a letter it had never received altered the way it acted. Commissioner Brudvik rejected these arguments and denied both motions. Instead of serving Spruce Hills and then re-noting its

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<sup>1</sup> CP 1447-70.

<sup>2</sup> CP 1217-19.

<sup>3</sup> CP 1182-1202.

motions, Syndicate 2112 sought to have Commissioner Brudvik's ruling revised by a judge of the superior court bench.

On March 28, 2013, Judge Okrent heard Syndicate 2112's motion to revise. Syndicate 2112 served Spruce Hills with its motion to revise the Commissioner's ruling. Because this was a motion to revise, Judge Okrent was limited to the record before the Commissioner and the record demonstrated that Spruce Hills had not been served. Judge Okrent denied Syndicate 2112's motion to revise.<sup>4</sup>

**B. Factual findings that are now verities on this appeal.**

Syndicate 2112 has not challenged the findings of fact that the trial court entered on February 9, 2012. Accordingly, they are verities in this appeal. The following are some of the findings of fact:

4. On August 22, 2008, Plaintiff was injured when he fell from a scaffold at a construction site.

5. Defendant Spruce Hills, LLC was the general contractor for the construction site where Mr. Rosales-Guzman was injured.

6. As a result of his fall, Plaintiff Rosales-Guzman sustained serious injuries.

7. Medical bills arising from Plaintiff's injury total \$140,514.90 as of January 9, 2012.

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<sup>4</sup> CP 13-16.

8. Due to his August 22, 2008 injury, Plaintiff does not have any practical future-wage earning capacity.

9. Plaintiff has suffered permanent loss over his work life because of this injury.

10. Plaintiff has suffered \$49,500 in past wage loss because of this injury.

11. Plaintiff will suffer \$354,000 in future wage loss at present value over his expected work life because of this injury.

12. Plaintiff has suffered general damages in an amount of \$2,500,000 because of this injury.<sup>5</sup>

**C. The factual history of this case: Guzman sues and obtains a judgment against Spruce Hills.**

Guzman served Spruce Hills' principal, Mike Walker, with the summons and complaint on May 22, 2011.<sup>6</sup> Spruce Hills appeared through counsel, Kevin Hanchett, on June 29, 2011.<sup>7</sup> Hanchett tendered the claim to Spruce Hills' insurer, Syndicate 2112. Syndicate 2112 received a copy of the complaint, together with initial discovery and requests for admissions that Guzman had propounded.<sup>8</sup>

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<sup>5</sup> CP 1765-66.

<sup>6</sup> CP 1306, 1570. The documents were personally served upon Walker. CP 1471. The complaint was accompanied by Plaintiff's Request for Admissions and other discovery materials.

<sup>7</sup> CP 1308-09, 1571-72.

<sup>8</sup> 1109-10, 1330-87.

On August 22, 2011, Guzman filed and served a motion for default judgment that, alternatively, sought summary judgment on liability.<sup>9</sup> Spruce Hills did not file a response or appear at the September 23, 2011 hearing. The court found Spruce Hills in default.<sup>10</sup> The court also granted summary judgment, finding liability.<sup>11</sup>

On January 26, 2012, Guzman filed for entry of a judgment against Spruce Hills noted for February 2, 2012.<sup>12</sup> Guzman served Spruce Hills.<sup>13</sup> Spruce Hills did not respond.

At the February 2<sup>nd</sup> hearing the trial court informed Guzman that it required additional information regarding Guzman's damages.<sup>14</sup> It continued the hearing for one week. In response, Guzman supplemented the record with the declarations of Dr. Brzusek<sup>15</sup> and vocational rehabilitation counselor Cloie Johnson.<sup>16</sup> The evidence showed that Guzman fell from a height of 20 feet, sustaining a concussion and fractures to his foot, shoulder, ribs, and spine.<sup>17</sup> Guzman's injuries were permanent.<sup>18</sup> Ms. Johnson concluded that –

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<sup>9</sup> CP 1312-15, 1915-28.

<sup>10</sup> CP 1892-98.

<sup>11</sup> *Id.*

<sup>12</sup> CP 1882-85.

<sup>13</sup> CP 1317-23.

<sup>14</sup> CP 1694.

<sup>15</sup> CP 1696-1708.

<sup>16</sup> CP 1717-36.

<sup>17</sup> CP 1617-76.

<sup>18</sup> CP 1717-36.

considering his education, experience, and injuries – Guzman would be unable to be employed for his remaining work life.<sup>19</sup> The trial court found that the evidence supported an award of damages in the amount of \$3,044,014.<sup>20</sup>

**D. Guzman offers to settle for policy limits.**

By a letter dated April 13, 2012, to Syndicate 2112, Guzman offered to accept the insurance policy limits of \$1,000,000 in full satisfaction of the \$3,000,000 judgment. Instead of accepting Guzman's offer, Syndicate 2112 retained a defense attorney, Steve Todd, to represent Spruce Hills and attempt to vacate the judgment.

**E. Syndicate 2112 takes over the defense of Spruce Hills.**

When Syndicate 2112 assumed the defense of Spruce Hills on April 21, 2012, it did so unconditionally without reserving any rights it may have had regarding coverage defenses.<sup>21</sup> Syndicate 2112 directed defense counsel, made strategy decisions, decided to move to

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<sup>19</sup> CP 1735-36.

<sup>20</sup> CP 1765-76.

<sup>21</sup> See CP 162-63 (Stephania Denton letter informing Hanchett that Syndicate 2112 was taking over the defense of Spruce Hills). Under Washington law, "[i]n order to preserve its coverage defenses, an insurer should specifically set forth: (1) the applicable policy language upon which the reservation is based, (2) the general conceptual nature of the reservation, and (3) any known facts supporting the reservation. An insurer should expressly state that it is reserving its rights, and identify whether it is reserving its right(s) to deny its duty to defend and/or its duty to pay." Thomas V. Harris, *Washington Insurance Law* § 17.03 (2010). See also *Weber v. Biddle*, 4 Wn. App. 519, 525, 483 P.2d 155 (1971) (requiring specific reservation of rights letter). There is no "reservation of rights" language in the Denton letter. Syndicate 2112 can point to no evidence showing that it took over the defense under a reservation of rights.

vacate the judgment, failed to attempt to settle the claim, and then decided not to appeal the denial of the motion to vacate the judgment.

In a letter dated April 27, 2012, Todd wrote to Sirianni and Hanchett:

Thank you for contacting us regarding this matter. It is our understanding that we have been retained on behalf of Spruce Hills LLC against which an order of default and a default judgment have been entered. We have been attempting to contact our client but have not made contact or obtained his approval to proceed yet. At this early juncture we believe:

Overturing the order of default will be very difficult. . . .

Overturing the default judgment may be possible, but will still be difficult. . . .

We believe negotiations following plaintiff's policy limits demand may be the best option for resolving this claim.

Recommendation #5: gathering information and make an offer of settlement.<sup>22</sup>

Syndicate 2112 disregarded Todd's advice and never reconsidered its long-shot attempt at having the judgment vacated. In addition, Syndicate 2112 never attempted to settle this dispute.

On May 9, 2012, Todd's associate Sommer Clement met with Walker. In her notes, she recorded that Walker was surprised that Syndicate 2112 had not been involved earlier. Clement noted that Walker told her that Spruce Hills could not afford to defend itself:

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<sup>22</sup> CP 127-135.

He is surprised the insurance company didn't get involved earlier. He is not sure where the communication error occurred. He assumed the insurance company was fighting it. He could not afford the battle himself.<sup>23</sup>

Both Sirianni and Dave Schoegg, Syndicate 2112's coverage counsel, were acutely involved with directing Todd and Clement how to proceed – directing them to take actions that could only aid Syndicate 2112 in any coverage dispute.

In a May 9, 2012 progress note, Sirianni noted how Clement was going to talk with Walker about what directions he had given Hanchett:

Summer is going to find out to what extent he [Walker] directed Kevin Hanchett's actions.<sup>24</sup>

This information would not serve Spruce Hills' interest. If Walker had directed Hanchett not to take any action, that information would not have aided Spruce Hills' argument that the judgment should be vacated. Conversely, if Spruce Hills had directed Hanchett to take action<sup>25</sup> and Hanchett had not followed those directions, then that information would still not support having the judgment vacated. Instead, this information would only be of use to Syndicate 2112 if it

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<sup>23</sup> CP 170-74.

<sup>24</sup> CP 137.

<sup>25</sup> Syndicate 2112 already knew this was not the case because it knew that Spruce Hills had no funds to pay for a defense

later, in a coverage dispute, wanted to blame Hanchett – a scenario that has now come to fruition.<sup>26</sup>

On May 15, 2012, after Todd received a declaration of Kevin Hanchett, coverage counsel SchoeggI advised against using the Hanchett declaration because Syndicate 2112 may want to put the blame on Hanchett later:

My only comment on the rest is that you may not want to include Hanchett's declaration. I don't think it helps us and if we want to blame everything on him may undercut our position.<sup>27</sup>

Hanchett's declaration was not used and Syndicate 2112 is now attempting to blame Hanchett for Syndicate 2112's failure to defend its insured.<sup>28</sup>

On May 11, 2012, Todd's billing records document that he had a telephone conference with SchoeggI about the motion to vacate, the arguments that would be raised, the question of whether the coverage issue should be raised, and strategy.<sup>29</sup> During this time Todd was drafting a declaration for SchoeggI.<sup>30</sup>

On May 15, 2012, SchoeggI emailed Todd telling Todd that filing the motion to vacate would have to wait another day because

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<sup>26</sup> Appellant's Opening Br. at 4-7, 25; CP 186-88.

<sup>27</sup> CP 138-39.

<sup>28</sup> Appellant's Opening Br. at 4-5.

<sup>29</sup> CP 141.

<sup>30</sup> CP 176.

Sirianni was busy that day and Bryce Larrabee, an associate general counsel, was just getting involved. SchoeggI also told Todd that Larrabee would be signing the declaration drafted for SchoeggI.<sup>31</sup> Todd responded in an email that memorialized that Syndicate 2112's coverage position was an important consideration in how the motion to vacate was being approached:

It would be nice to know if everyone's comfortable with discussing Lloyds' position as we've done.<sup>32</sup>

On May 16, 2012, Todd and SchoeggI had another telephone conference discussing the issue of Guzman's employment status and changes to the motion to vacate the judgment.<sup>33</sup>

SchoeggI also acknowledged the fact that even after the motion was finalized, everyone realized that it was a long-shot:

[Question posed by Todd to SchoeggI]: "We filed the motion to vacate yesterday. Did Mike send you a copy? Do you want one?"

[SchoeggI's response:] "No, and yes, please. It's the kind of case where you can only be a hero!"<sup>34</sup>

Belatedly, on May 23, 2012, Syndicate 2112 finally made the decision to split the file so that coverage issues would not play a factor in how the claim was being handled on behalf of its insured:

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<sup>31</sup> CP 178.

<sup>32</sup> *Id.*

<sup>33</sup> CP 143.

<sup>34</sup> CP 182.

Steven – just to let you know that we split the file. The potential coverage action is being handled by Bryce Larrabee of this office and he is dealing with Dave SchoeggI whereas you will continue to report to me directly. Because we split the file, I will have no input into the coverage side of the case.<sup>35</sup>

Despite the decision to split the file, Todd continued to deal with SchoeggI on the motion to vacate. Todd sent SchoeggI a copy of Guzman’s opposition and SchoeggI provided his comments to Todd.<sup>36</sup>

On June 6, 2012, the trial court heard Spruce Hills’ motion to vacate and denied the motion at the hearing. Todd wrote a letter summarizing the Court’s decision to Sirianni and Hanchett and also sent a copy to SchoeggI.<sup>37</sup>

On June 18, 2012, Todd wrote an email to Sirianni saying that because he had not heard from Sirianni, he was concluding that he was to do nothing on behalf of Spruce Hills.<sup>38</sup> Sirianni responded:

That is correct given our chances of prevailing on the options you presented. I believe the coverage action with Dave S. is moving forward. I’ll let you know what develops as I need to meet with management on our plan going forward.<sup>39</sup>

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<sup>35</sup> CP 145-46.

<sup>36</sup> CP 182.

<sup>37</sup> CP 148-50, 184.

<sup>38</sup> CP 152.

<sup>39</sup> *Id.*

Apparently Syndicate 2112 believed that its chances of disputing coverage provided it a better avenue to protect its financial interests than trying to do anything further on behalf of Spruce Hills.

Thus, the record shows that as of April 21, 2012, Syndicate 2112 took over the defense and directed every aspect of it. Syndicate 2112 directed the defense attorneys and had its coverage counsel involved in all aspects of the motion to vacate. Yet, Syndicate 2112 is claiming that it was not involved in Spruce Hills' motion to vacate.

In addition to controlling the prior defense, Syndicate 2112 is raising the same arguments that were raised, or could have been raised, in the first attempt to vacate the judgment.

Sirianni submitted a declaration in support of Syndicate 2112's motions to intervene and vacate where he made the following allegation regarding Hanchett:

I advised Mr. Hanchett that the policy had a \$25,000 self-insured retention ("SIR") that Spruce Hills was required to pay or exhaust before Syndicate 2112 had any duty to defend or indemnify, and that Spruce Hills would be responsible for defending itself until the \$25,000 SIR was satisfied. Mr. Hanchett indicated that he understood, and either stated to me or implied to me that he would be defending Spruce Hills in the *Guzman* lawsuit prior to exhaustion of the SIR.<sup>40</sup>

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<sup>40</sup> CP 1009-10.

Sirianni's declaration was not based upon any new information but instead was based upon information that was available to Syndicate 2112 during the prior motion to vacate. Sirianni submitted a declaration in the prior motion to vacate. In that declaration, Sirianni never alleged that Hanchett ever told him, or implied to him, that Hanchett would be defending the lawsuit. Indeed, Sirianni's June 16, 2012 progress note contradicted his testimony:

The NI is no longer in business and essentially closed down his business. . . .

I let Kevin [Hanchett] know that the dec page is showing a 25k SIR which must be paid or exhausted by covered expenses. He understood. He plans on contacting Mike Walker, who is the principal, to see how he wants to proceed.<sup>41</sup>

The fact that Hanchett never told Sirianni that he, Hanchett, was going to defend Spruce Hills was borne out by Sirianni's conduct. Sirianni sent letters dated June 13, June 20, July 24, October 14, and November 30, 2011. All were sent solely to Spruce Hills except for the June 20 letter where the letter was addressed to Spruce Hills with a copy going to Hanchett. If Sirianni believed that Hanchett was acting as the defense counsel for Spruce Hills, he would have directed all of his letters to Hanchett.

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<sup>41</sup> CP 154.

In addition, Hanchett filed a declaration responding to Sirianni's allegations. Hanchett testified:

5. On or about June 16, 2011, Michael Sirianni of RiverStone Claims Management called me and advised me by telephone that the Lloyd's policy had a \$25,000 self-insured retention that must be paid by Spruce Hills, LLC before the policy provided any coverage. I informed Mr. Sirianni that Spruce Hills, LLC had ceased doing business and had no assets. . . .

6. Later, I received a carbon copy of a June 20, 2011 letter from Sirianni to Spruce Hills. The letter simply identified Mr. Sirianni as the assigned adjuster on the claim, and said that he was investigating the case "subject to a complete reservation of rights." The letter was not addressed to me, nor did it ask me to do anything regarding the case. That was the only letter I ever received from Mr. Sirianni.

. . .

9. On January 5, 2012 I received a voice mail from Mr. Sirianni inquiring about the status of the case. I called Mr. Sirianni back on January 12, 2012 and informed him that I had filed a notice of appearance but reiterated that my client did not have \$25,000 to spend on the self-insured retention and that we would not be defending the case. . . .

10. During our conversation on January 12, 2012, Mr. Sirianni said that, given that Spruce Hills would not be paying the \$25,000 self-insured retention, Lloyds had no duty to defend either. He never suggested that I had an obligation to take any action to protect Lloyd's, as opposed to my clients' interests. I never told Mr. Sirianni that I had filed an answer in the case and would have no reason to have made such a statement to him. . . . I never told Mr. Sirianni that the case was "dormant;" I told him we were not defending the action. Mr. Sirianni repeated again that

Lloyds was not going to defend the action because Spruce Hills had not paid its \$25,000 self-insured retention.<sup>42</sup>

Moreover, Sirianni's statements submitted in support of Syndicate 2112's motions are contradicted by his and Syndicate 2112's actions. In Sirianni's January 12, 2012 claims log entry, he wrote:

Policy contains 25k SIR which will likely never be paid or exhausted. The NI is a defunct company which may be filing for Chapter 7.<sup>43</sup>

Thus, Sirianni knew that Spruce Hills was defunct and would never be able to pay the \$25,000 self-insured retention amount. In other words, Spruce Hills was not defending this lawsuit. Yet instead of immediately contacting his management with that knowledge, Sirianni instead, the very next day, wrote a letter to Spruce Hills once again reiterating Syndicate 2112's position that until Spruce Hills paid the \$25,000 SIR, Syndicate 2112 was not going to provide a defense.<sup>44</sup>

Syndicate 2112, argued at the trial court level, and repeats the argument here, that Guzman's attorneys took steps to actively mislead it. This allegation is false. Syndicate 2112 is referring to a letter dated October 4, 2011, by James Beck to Patricia Lubey at Lloyds America, Inc. The letter's "regards" line read:

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<sup>42</sup> CP 234-39.

<sup>43</sup> CP 156.

<sup>44</sup> CP 158-60.

RE: Rosales – Guzman v. Spruce Hills, LLC  
Snohomish County Cause No. 11-2-04773-1  
Lloyd's of London Policy Nos. BLL000115200 and  
00039208

In the letter, Beck wrote:

As you are aware, our firm represents Adan Rosales-Guzman in a case for personal injuries against your insured, Spruce Hills, LLC. A copy of the previously filed complaint is attached.

Due to the significant injuries in this case, we are hopeful that you will consider early mediation of this matter so that this dispute can be resolved without additional litigation. Please contact me at your first opportunity so that we can discuss resolution.<sup>45</sup>

Beck copied Hanchett on the letter.

Beck received two responses from Lloyd's America – neither of which were helpful. The first was an email dated October 4, 2011, from Lubey where she wrote:

Please be advised that Lloyd's America, Inc. is a subsidiary of Lloyd's which serves as a communications and legal office. We are not involved in claims or litigation, other than to try to pass on information to Lloyd's. Lloyd's is an insurance market comprised of members which employ managing agents to underwrite insurance through syndicates. These syndicates independently underwrite insurance and are responsible for their own underwriting and claims.

I have copied in Complaints at Lloyd's. However, as you would like to suggest mediation on behalf of your client, it would be best if you could kindly communicate with the

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<sup>45</sup> CP 1106 (emphasis added).

claims counsel assigned by Lloyd's on this matter. Thank you.<sup>46</sup>

Lubey never submitted a declaration stating what actions, if any, she took to try to determine that Syndicate 2112 was the correct entity to contact. All she wrote in the letter was that Beck should communicate with the defense counsel which of course he had already done by copying Hanchett on his letter.

On October 12, 2011, a paralegal, Sue Winger, wrote Beck a letter. Winger wrote:

Your letter of October 4, 2011 addressed to Lloyd's America, purporting to serve as notice in the above referenced matter, has been referred to this office for response. Please note, however, that neither this office Lloyd's Illinois nor Lloyd's America office is authorized as agent for notices on behalf of any Lloyd's underwriters.

Therefore, neither the receipt of your letter by this office nor our New York office constitutes notice upon concerned Lloyd's underwriters, if any.

...You may wish to refer to the concerned policy of insurance, if any, for instructions on effecting notice. Typically, the concerned insurance broker is authorized to accept claims notices. If not so authorized, the broker would know the identity of the concerned claims agent.<sup>47</sup>

In fact, Spruce Hills had tendered the claim to the insurance broker and the claim was tendered to Syndicate 2112. Syndicate 2112 is

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<sup>46</sup> CP 241.

<sup>47</sup> CP 243.

attempting to use the above to accuse Guzman's counsel of misleading it.

First, and most importantly, there was nothing misleading about the letter. Second, there is certainly no evidence that Beck had any information other than the general information as to where to send the letter. Third, contrary to Syndicate 2112's representations to this Court, the letter identified the policy numbers. Fourth, Beck was attempting to get Lloyd's attention regarding this matter. Fifth, in addition to the fact that there was nothing misleading about the letter, by definition, Syndicate 2112 could not have been misled because it never saw the letter.

Guzman has brought an action in King County Superior Court against Syndicate 2112 as assignee of Spruce Hills' claims against its insurer. After Syndicate 2112 failed at its attempt to vacate the judgment instead of paying its policy limits and protecting its insured, Spruce Hills assigned its rights against Syndicate 2112 to Guzman. Contrary to Syndicate 2112's allegation, the King County action, and not this action, involves coverage issues. This action solely concerned Spruce Hills' negligent acts and how its negligence injured Guzman.

## IV. ARGUMENT

### A. Standard of Review

There are two standards of review applicable to this appeal. First, a denial of a motion to vacate a judgment will only be reversed if the appellant demonstrates that the trial court abused its discretion.<sup>48</sup> The “abuse of discretion” standard also applies to a denial of a motion to permissively intervene and to whether a trial court determines that a motion for intervention as of right is timely made.<sup>49</sup> Second, a trial court’s denial of a motion to intervene as of right (except for the question of timeliness) will be reversed only if the appellant demonstrates that the trial court erred in applying the law to the facts of the case as pleaded or established.<sup>50</sup>

### B. Collateral Estoppel

As a threshold matter, Syndicate 2112 is estopped from moving to vacate the judgment against Spruce Hills. Collateral estoppel promotes the policy of ending disputes by preventing the re-litigation of an issue after a party had a full and fair opportunity to make its case.<sup>51</sup> The doctrine applies when four basic requirements are met: (1) the

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<sup>48</sup> *Hwang v. McMahon*, 103 Wn. App. 945, 949, 15 P.3d 172 (2000).

<sup>49</sup> *Ford v. Logan*, 79 Wn.2d 147, 150, 483 P.2d 1247 (1971); *Board of Regents v. Seattle*, 108 Wn.2d 545, 557, 741 P.2d 11 (1987).

<sup>50</sup> *Westerman v. Cary*, 125 Wn.2d 277, 302, 892 P.2d 1067 (1994); *In re Estate of Jones*, 116 Wash. 424, 426, 199 P. 734 (1921).

<sup>51</sup> *McDaniels v. Carlson*, 108 Wn.2d 299, 303, 738 P.2d 254 (1987).

identical issue was decided in the prior action, (2) the first action resulted in a final judgment on the merits, (3) the party against whom preclusion is asserted was a party to, or in privity with, a party to the prior adjudication, and (4) application of the doctrine does not work an injustice.<sup>52</sup>

First, whether the default judgment entered against Spruce Hills should be vacated was the identical issue decided by the trial court on June 6, 2012.<sup>53</sup> All of the issues that Syndicate 2112 raised in its motion to vacate were either raised, or could have been raised, when Syndicate 2112 controlled the defense in Spruce Hills' attempt to vacate the judgment.<sup>54</sup> The trial court denied Syndicate 2112's motion to intervene, in part, because of Syndicate 2112's involvement in the prior motion to vacate.<sup>55</sup>

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<sup>52</sup> *Id.*

<sup>53</sup> CP 1217-20.

<sup>54</sup> Syndicate 2112 claims the Beck letter is "new evidence" that could not have been raised in the prior motion. But Spruce Hills possessed the letter when it moved to vacate the judgment. Beck copied Hanchett on the letter when he sent it to Lloyd's America. CP 1106. And Hanchett provided the legal file to Todd prior to Spruce Hills' moving to vacate. CP 141, 901. In any event, the Beck letter is irrelevant to Syndicate 2112's motion to vacate the judgment. Even if Syndicate 2112 were allowed to re-argue the motion to vacate, the standard is if the defendant, Spruce Hills, could show excusable neglect for not defending the action. Spruce Hills, because it was insolvent, was unable to defend the action. It is irrelevant, as far as a motion to vacate, what the insurance company was doing at the time. However, even if the insurer's actions were a factor (which they are not) Syndicate 2112 had been tendered the claim. Syndicate 2112 made the conscious decision not to provide a defense. To this day Syndicate 2112 has taken the position that it has no duty to defend.

<sup>55</sup> CP 81-82.

Second, the action in Snohomish County trial court resulted in a final judgment on the merits because the trial court granted Guzman's motion for summary judgment on liability.<sup>56</sup> For purposes of collateral estoppel, "[a] grant of summary judgment is a final judgment on the merits with the same preclusive effect as a full trial."<sup>57</sup>

Third, Syndicate 2112 was in privity with its insured, Spruce Hills. Washington courts have held that application of the principles of collateral estoppel against a liability insurer is appropriate when the insurer's interests are in harmony with the insured's interests. "When the insurer has the same interest as the insured in disputing liability and damage issues, it is fair to treat the insurer as a party for collateral estoppel purposes. . . ."<sup>58</sup>

In addition, it is well-established that "where an insurer has notice of an action and is afforded the opportunity to participate in it, the insurance company is bound by the judgment against its insured on the question of liability regardless of whether it participates."<sup>59</sup>

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<sup>56</sup> CP 1982-94.

<sup>57</sup> *In re Estate of Black*, 153 Wn.2d 152, 170, 102 P.3d 796 (2004).

<sup>58</sup> *Wear v. Farmers Ins. Co. of Wash.*, 49 Wn. App. 655, 659-60, 745 P.2d 526 (1987). It is especially fair to treat Syndicate 2112 as a party for collateral estoppel purposes in this case, given Syndicate 2112's direction of the prior motion and its decision not to appeal the trial court's denial of that motion. Courts in other jurisdictions are in accord. See *Cincinnati Insurance Co. v. MacLeod*, 577 S.E.2d 799, 803 (2003) (holding a "party's insurer stands in the shoes of the insured as to identity of parties or privies").

<sup>59</sup> *East v. Fields*, 42 Wn.2d 924, 925-26, 259 P.2d 639 (1953).

A case on point is *Lenzi v. Redland Ins.*<sup>60</sup> There, Lenzi was injured in an automobile accident in which the other driver was 100% at fault. Lenzi had UIM coverage with limits of \$500,000 through a policy with Redland Insurance Company. Lenzi made a demand on Redland for UIM coverage under the policy. Redland's insurance adjuster responded, declining to acknowledge that the other driver was uninsured. Lenzi then sent Redland a letter enclosing the summons and complaint filed against the uninsured driver. Without further notification to Redland regarding the lawsuit, Lenzi served the uninsured driver and obtained a default judgment against the driver totaling \$212,671. The trial court entered findings of fact and conclusions of law to accompany the default judgment.

A month after obtaining the default judgment, Lenzi demanded Redland pay the judgment amount, plus 12% from the date of the judgment. Redland refused to consider itself bound by the default judgment, listing the following reasons:

Redlands [sic] was (1) never given notice that the lawsuit had been perfected by service, (2) not given an opportunity to defend the claim on the merits, and (3) never asked by the insured [Lenzi] to participate in the lawsuit as a defendant. . . . Redlands [sic] will not issue payment based on the default judgments.<sup>61</sup>

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<sup>60</sup> *Lenzi v. Redland Ins.*, 140 Wn.2d 267, 996 P.2d 603 (2000).

<sup>61</sup> *Id.* at 272.

The trial court granted Lenzi declaratory relief, binding Redland to the default judgment and awarding Lenzi attorney's fees.

On appeal, the Washington Supreme Court held that Lenzi had no duty to Redland other than timely notifying Redland of the filings of the summons and complaint: "Receipt of such pleadings is sufficient notice that further proceedings in which it might have an interest may occur, and that in order to protect its interests, the interested party needs to act to assure receipt of subsequent pleadings."<sup>62</sup> The Court further determined that "the letter enclosing the summons and complaint was sent on September 29. The default was not taken until November 23. Redland had ample time to appear, to intervene formally, or to request informally notice of Davis's service or the Lenzis' subsequent steps in the suit."<sup>63</sup> The Court in *Lenzi* ultimately held that Redland had the opportunity to formally intervene and litigate the damage claim and failed to do so. It was therefore bound by the trial court's default judgment.<sup>64</sup>

The record shows Syndicate 2112 had notice of the action against its insured and was afforded the opportunity to participate in the action. Syndicate 2112 could have moved to intervene when it

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<sup>62</sup> *Id.* at 276.

<sup>63</sup> *Id.* at 276 n.3.

<sup>64</sup> *Id.* at 278-80.

learned of the default judgment against its insured. It chose not to do so. Instead, Syndicate 2112 chose to direct that a motion to vacate be filed. When the motion was denied, Syndicate 2112 chose not to appeal the denial and chose to contest coverage instead.

“All four requirements [of collateral estoppel] center on whether the party that is being estopped has had a full and fair opportunity to present its case.”<sup>65</sup> Syndicate 2112 has had a full and fair opportunity to participate. Under Washington law, it is therefore collaterally estopped from a second attempt to have the judgment vacated.

**C. There is no longer an action in which Syndicate 2112 is able to intervene.**

An additional threshold issue is that there is no longer an action in which Syndicate 2112 is able to intervene. An order granting partial summary judgment on liability was entered on September 23, 2011. Findings of facts and conclusions of law and the final judgment for \$3,000,000 were entered on February 9, 2012. Spruce Hills, the defendant in this action, brought a motion to vacate the judgment on May 17, 2012. On June 6, 2012, the trial court denied Spruce Hills' motion to vacate. Spruce Hills did not seek reconsideration. Spruce Hills did not appeal. This action has been terminated.

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<sup>65</sup> *Wear*, 49 Wn. App. at 659-60.

A case on point is *Black v. Central Motors Lines, Inc.*<sup>66</sup> There, twelve employees sought to intervene in an action almost one year after judgment had been entered. No appeal had been filed from the entry of the judgment. The Fourth Circuit upheld the trial court's denial of the motion to intervene because there was no pending action in which to intervene:

Intervention is ancillary and subordinate to a main cause and whenever an action is terminated, for whatever reason, there no longer remains an action in which there can be intervention. By its very nature intervention presupposes pendency of an action in a court of competent jurisdiction. An existing suit within the court's jurisdiction is a prerequisite of an intervention, which is an ancillary proceeding in an already instituted suit. . . . Since Black's action had been terminated for almost one year and there was no pending litigation in which appellants could intervene, their motion was untimely.<sup>67</sup>

Guzman is unaware of any case holding that a motion to intervene may be granted after judgment has been entered and all time periods for reconsideration have expired and a motion to vacate the judgment has already been denied. Syndicate 2112 cites none. There is no longer an active case in which Syndicate 2112 may intervene. This lawsuit is completed.

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<sup>66</sup> *Black v. Central Motors Lines, Inc.*, 500 F.2d 407 (4<sup>th</sup> Cir. 1974).

<sup>67</sup> *Id.* at 408 (internal citations omitted)(emphasis added).

**D. Intervention**

The above threshold issues notwithstanding, the trial court determined that Syndicate 2112 failed to comply with multiple requirements under CR 24 because “Syndicate 2112 failed to serve Spruce Hills LLC” and “because Syndicate 2112 did not attach a pleading.”<sup>68</sup> This failure was fatal to Syndicate 2112’s attempt to have its motion to intervene heard, and this Court should affirm the trial court on this basis alone.

- 1. Syndicate 2112 failed to comply with CR 24(c)’s requirement that it serve Spruce Hills with its motion.**

Syndicate 2112 argues it served “*everyone* who could possibly require service.”<sup>69</sup> This representation is inaccurate. CR 24(c) requires:

A person desiring to intervene shall serve a motion to intervene upon all the parties as provided in rule 5.

Syndicate 2112 failed to comply with this requirement. CR 5 requires that every motion be served upon “each of the parties.” Generally, such service may be made upon a party’s attorney. However, after final judgment has been entered and the time for filing an appeal has

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<sup>68</sup> CP 13; 81-82.

<sup>69</sup> Appellant’s Opening Br. at 13 (emphasis in original).

expired “[a] party, rather than the party’s attorney, must be served. . . .”<sup>70</sup>

In order to serve Spruce Hills, Syndicate 2112 needed to serve its principal, Mike Walker. Syndicate 2112 did not do that. Instead, Syndicate 2112, after it had filed its motion to intervene, served a copy of the motion on former defense counsel Todd. CR 5 required Syndicate 2112 to serve Spruce Hills, and not its former attorney.

The record shows Syndicate 2112 served Walker with its motion to revise the commissioner’s ruling.<sup>71</sup> However, this did not cure Syndicate 2112’s failure to serve Spruce Hills with its motion to intervene. The Superior Court, in considering the motion to revise, could not consider materials that were not part of the record before the Court Commissioner.

The trial court did not error in applying the law to the facts. The law is clear: a movant must serve all parties in the manner set forth in CR 5. The facts were undisputed: Syndicate 2112 failed to serve Spruce Hills. There is no basis for reversing the trial court’s ruling.<sup>72</sup>

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<sup>70</sup> CR 5(a), (b)(4)-(6).

<sup>71</sup> CP 68, 86.

<sup>72</sup> Syndicate 2112 argues that even if service on Spruce Hills had not been accomplished, this procedural defect is not legally sufficient to deprive Syndicate 2112 of its right to intervene. Appellant’s Opening Br. at 13. The case Syndicate 2112 relies on to make this argument, *Hockley v. Hargitt*, 82 Wn.2d 337, 346, 510 P.2d 1123 (1973), is inapposite. There, the King County prosecuting attorney moved to intervene in a case involving fraud, serving the parties’ attorneys but not all the parties. *Id.* at 339. The Washington Supreme Court held that the rule requiring

2. Syndicate 2112 failed to comply with CR 24(c)'s requirement that the motion be accompanied by a pleading.

CR 24(c) requires that the motion to intervene be accompanied by a pleading setting forth the claim or defense for which the intervention is sought:

Procedurally, the requirements for filing a motion to intervene are unambiguous. Rule 24(c) requires the movant to serve a motion accompanied by a pleading to the parties as provided in Rule 5. Fed.R.Civ.P. 24(c). Some leniency is available under the Rule, but total dereliction of the Rule warrants dismissal of the motion.<sup>73</sup>

Syndicate 2112 failed to comply with the Rule's requirement that it attach a pleading. While some leniency may be allowed, total disregard of the requirement is not.

The purpose of a pleading is to give the opposing party notice of what the claim is and upon what ground it rests.<sup>74</sup> A pleading in this case would have served several essential functions. It would have

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service on parties rather than their counsel if pleadings assert new or additional claims for relief (CR 5(a)) is limited to parties in default for failure to appear. *Id.* Because the parties in *Hockley* were not in default, the court held that service on the parties was not necessary. *Id.* Accordingly, CR 5(b)(4) – which explicitly prohibits service on a party's attorney after final judgment – was not addressed.

<sup>73</sup> *F.T.C. v. Med Resorts Intern., Inc.*, 199 F.R.D. 601, 606 (N.D. Ill. 2001) (applicant never filed a pleading resulting in trial court denying motion to intervene); *see also Gabauer v. Woodcock*, 425 F. Supp. 1, 3 (D. Mo. 1976) (motion to intervene that was only accompanied by a copy of the existing defendant's motion to dismiss does not comply with Rule 24 and thus trial court denied motion to intervene). The pleading required by Rule 24(c) is easily determinable by looking at such references as *Washington Practice*, § 24.11, Vol. 9A (2000) (providing sample form).

<sup>74</sup> *N.W. Line Constructors Chapter of Nat'l Elec. Contractors Ass'n v. Snohomish Cnty Pub. Util. Dist. No. 1*, 104 Wn. App. 842, 848-49, 17 {3d 1251 (2001).

provided Guzman notice of Syndicate 2112's interest in the action as a non-party. It also would have provided Guzman notice of the facts and legal issues that Syndicate 2112 considers common between this lawsuit and the King County insurance lawsuit. Syndicate 2112's motion to intervene did not provide the grounds for intervention as required by CR 24(c) and thus did not substitute for a pleading.

The trial court did not error in applying the law to the facts here. The law was clear: a pleading must be attached. The facts were undisputed: no pleading was attached. There is no basis for reversing the trial court's ruling.

**E. The trial court did not make an error of law in applying the requirements of CR 24(a) to the facts.**

Civil Rule 24(a) provides:

**Intervention of Right.** Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

In a motion to intervene as of right, a trial court must consider the following four factors: (1) timely application for intervention; (2) the applicant claims an interest that is a subject of the action; (3) the applicant is so situated that the disposition will impair or impede the

applicant's ability to protect the interest; and (4) the applicant's interest is not adequately protected by the existing parties.<sup>75</sup> The applicant carries the burden of demonstrating that it meets all four requirements.

1. The trial court did not abuse its discretion in concluding that the motion for intervention as a matter of right was not timely made.

Post-judgment intervention requires a strong showing that intervention is necessary considering all of the circumstances including prior notice, prejudice to the other parties, and reasons for the delay.<sup>76</sup>

Syndicate 2112 made a conscious decision not to defend its insured, Spruce Hills. It had notice of the lawsuit and knew that a complaint had been filed. Even after it learned that the judgment had been entered it did not intervene but instead simply took over the defense for Syndicate 2112. Then, almost a year after the judgment had been entered, it sought to intervene. Its motion was not timely.

A case on point is *Martin v. Pickering*.<sup>77</sup> There, the insurer, Mid-Century, hired defense counsel for its insureds. However, it then believed that the insurance policy had lapsed before the date of the automobile accident that formed the cause of action and had the

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<sup>75</sup> *Spokane Cnty. v. State*, 136 Wn.2d 644, 649, 966 P.2d 305 (1998).

<sup>76</sup> *Kreidler v. Eikenberry*, 111 Wn.2d 828, 832, 766 P.2d 438 (1989) (upheld trial court's denial of motion to intervene because applicants had notice, were aware of the suit, and there were no extraordinary circumstances justifying delay).

<sup>77</sup> *Martin v. Pickering*, 85 Wn.2d 241, 533 P.2d 380 (1975).

attorneys withdraw from representing the insureds. The plaintiff noted the deposition of Mid-Century's agent. The attorney for Mid-Century wrote to Mid-Century stating his opinion that there was "very little likelihood" that Mid-Century could establish no coverage and recommended that Mid-Century re-establish the defense. The two previously-retained defense attorneys wrote to Mid-Century and recommended that they be re-retained under a reservation of rights. Mid-Century refused to follow those recommendations.

A default judgment was then entered against the insureds in the amount of \$500,000. The insurer did not receive notice that the default judgment was going to be entered. The insurer then brought a motion to intervene and a motion to set aside the judgment. The trial court denied the motion to intervene. On appeal, the State Supreme Court upheld the trial court's holding:

Intervention as of right is governed by CR 24(a). A critical requirement is that the motion be *timely*. A strong showing must be made to intervene *after judgment*. In considering the question of timeliness, all the circumstances should be considered, including the matter of prior notice of the lawsuit and the circumstances contributing to the delay in moving to intervene. In the instant case, Mid-Century had *notice of* and indeed *appeared* in the lawsuit, but for reasons known only to itself, Mid-Century chose to withdraw from the case. Mid-Century had more than ample opportunity and time to re-enter the case and to defend under a reservation of rights agreement allowing it to later deny coverage. Indeed, this course of action was strongly urged upon Mid-Century by different counsel on at least two

different occasions. Mid-Century, however, ignored this advice and apparently took a calculated risk that the defendants would procure their own counsel. In short, the timing and tardiness of the motion to intervene was directly attributable to the tactics or game plan of Mid-Century. Under these circumstances, the motion to intervene *after judgment* cannot be considered timely.<sup>78</sup>

The same is true here. Syndicate 2112 had notice of the lawsuit and made a conscious decision to not provide a defense to its insured. Later, it did provide a defense and decided to attempt to vacate the judgment. It failed. The ruling denying the motion to vacate was on June 6, 2012. Syndicate 2112 waited until February of 2013 to bring its motion to intervene. The motion was simply not timely.

Syndicate 2112 attempts to argue that its untimely application to seek intervention should be allowed because Guzman produced a letter in the King County action that was written by Beck. That letter, however, has nothing to do with whether Syndicate 2112 believed it had an interest that needed protecting in this lawsuit that was not adequately done when it directed the prior motion to vacate. If Syndicate 2112 felt its interest was not adequately being protected during the last motion to vacate then it had a duty to intervene at that time when the motion to vacate was still pending.

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<sup>78</sup> *Id.* at 243-44.

2. **Syndicate 2112 failed to demonstrate that disposition of this dispute will impair or impede Syndicate 2112's ability to protect its interest.**

Guzman's position is that because Syndicate 2112 had a duty to defend Spruce Hills and had a duty to indemnify Spruce Hills, it had an interest in this action. However, in contrast, Syndicate 2112 is taking inconsistent positions. For purposes of its attempt to intervene, it is arguing that it has an interest in this action. The only reason it could have an interest in this action is if it has a duty to defend and indemnify. However, it is arguing that it has no duty to defend or indemnify Spruce Hills for this claim. If that were the case, then it would not have an interest in this action. Syndicate 2112 cannot take both positions as they are mutually exclusive.

3. **Syndicate 2112 failed to demonstrate its interest was not adequately protected by Spruce Hills.**

The purpose of allowing a party to intervene is because it has not had the opportunity to be involved in the dispute and its interest is not being protected.<sup>79</sup> Syndicate 2112 took over the defense of this action in April 2012 and not only directed the defense counsel how to proceed, but indeed had its coverage counsel involved with the previous motion to vacate the judgment.

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<sup>79</sup> See *Westerman v. Cary*, 125 Wn.2d 277, 892 P.2d 1067 (1994) (prosecutor's motion to intervene was properly denied when his interest was already being protected).

Assuming Syndicate 2112 has an interest in vacating the judgment (which is inconsistent with its argument that it has never had a duty to defend its insured) Syndicate 2112 has not explained how its insured's interest was any different than its interest when it directed the prior attempt to vacate the judgment. Syndicate 2112 does not explain why its interest was not adequately protected during the prior motion to vacate. The record shows just the opposite: Syndicate 2112 had the same interest as Spruce Hills in seeking to vacate the judgment, and, for this reason, directed the effort to vacate the judgment.

**F. The trial court did not abuse its discretion in determining that Syndicate 2112 did not meet the requirements for permissive intervention.**

Syndicate 2112 also claims that the trial court abused its discretion by denying its motion to intervene under CR 24(b), which permits intervention only under the following circumstances:

When a statute confers a conditional right to intervene; or

When an applicant's claim or defense and the main action have a question of law or fact in common. . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Syndicate 2112 was not entitled to permissive intervention because of the procedural deficiencies noted above, all of which apply to CR 24(b).

In addition, Syndicate 2112 did not identify what it believed were the common questions of fact or law that would provide a basis for permissive intervention.<sup>80</sup> In any event, there are no common questions of fact or of law between the two lawsuits. This lawsuit involved Spruce Hills' liability to Guzman. The King County action between Guzman (as assignee of Spruce Hills' rights) and Syndicate 2112 involves Syndicate 2112's obligations to Spruce Hills. While the two are related, they do not involve the type of common questions of law or fact that allow for permissive intervention.

When Syndicate 2112 belatedly accepted the defense of its insured, Spruce Hills, it did so without reserving any rights it may have had regarding coverage defenses. Accordingly, there are no common issues of law or fact because Syndicate 2112 has no coverage defenses it can raise in the King County action.

Even if Syndicate 2112 had reserved the right to raise coverage defenses (which it did not) there are no common questions of fact or of

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<sup>80</sup> This also relates to Syndicate 2112's failure to attach a pleading to its motion that would have provided the Trial Court and this Court with a basis to determine whether there were common questions of fact or law.

law. The material facts in the King County action involve Syndicate 2112's failure to provide a defense. Those facts were not involved in this action. The legal issue involved in the King County action is Syndicate 2112's duties to its insured, Spruce Hills. That legal issue was not involved in this action; instead, this action involved the duty of a general contractor, Spruce Hills, to the employee of a subcontractor, Guzman.

In addition, both Guzman and Spruce Hills would be prejudiced if Syndicate 2112 were allowed to intervene and seek vacation of the judgment. First, Spruce Hills and Guzman have reached a settlement agreement where Spruce Hills has assigned all of its contractual and extra-contractual claims against Syndicate 2112 to Guzman. The judgment is already a subject of an agreement and for that reason alone, Guzman and Spruce Hills would be prejudiced.<sup>81</sup>

Second, Guzman, upon obtaining the assignment from Spruce Hills, agreed not to seek to pierce the corporate veil to go against Walker and his marital community. Spruce Hills has an interest in protecting its principal.

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<sup>81</sup> See, e.g., *Chrysler Corp. v. Haden Uniking Corp.*, 158 F.R.D. 405 (N.D. Ill. 1994) (applicant insurer was not allowed to intervene where parties were on the verge of settling).

Third, Guzman has filed and served a lawsuit bringing contractual and extra-contractual claims against Syndicate 2112 in King County Superior Court. Guzman has propounded interrogatories, request for production of documents, and requests for admissions upon Syndicate 2112 and has reviewed over 1,000 pages of documents produced by Syndicate 2112. Guzman has responded to Syndicate 2112's first set of interrogatories and request for production of documents. Guzman has filed a motion for partial summary judgment. Syndicate 2112 has filed a motion for partial summary judgment. By the time this Court rules in this case, all briefing will have been completed on the motions.<sup>82</sup>

**G. The trial court did not abuse its discretion in denying Syndicate 2112's motion to vacate.**

As an initial matter, Syndicate 2112 was not a party to this action. At the time it filed its motion to vacate, it was not a party. As a matter of law, a non-party cannot file a motion in a lawsuit, including a motion to vacate.

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<sup>82</sup> In addition, the chances of witnesses no longer being available to testify have increased now that it is more than one year post-judgment.

1. The trial court did not abuse its discretion in concluding that Syndicate 2112 failed to demonstrate the existence of substantial evidence to support a defense.

Syndicate 2112 has the burden of demonstrating to this Court that the trial court abused its discretion in failing to be convinced that Syndicate 2112 had a defense. It is surprising that Syndicate 2112 is trying to make this argument, especially in light of the undisputed fact that the defense attorney Syndicate 2112 had retained, Steve Todd, opined that there was only a 25% chance that a motion to vacate would succeed. In addition to that fundamental impediment, this was a discretionary decision for the trial court and the trial court did not abuse its discretion.

“A party moving to vacate a default judgment must be prepared to show . . . that there is substantial evidence supporting a *prima facie* defense.”<sup>83</sup> Syndicate 2112 argued meritorious defenses exist with regard to liability. It contended the evidence showed that Guzman was not employed by Meridian Drywall (a subcontractor) and that Spruce Hills (the general contractor) was not liable for Guzman’s injuries. The trial court, using its discretion, was not convinced. Indeed, the evidence before the trial court showed just the opposite.

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<sup>83</sup> *Little*, 160 Wn.2d at 703-04 (citing *White v. Holm*, 73 Wn.2d 348, 352, 438 P.2d 581 (1968)).

Guzman was an employee of Meridian at the time of his August 22, 2008 injury. The evidence demonstrates that Meridian considered Guzman an employee as late as July 20, 2009, eleven months after his injury.<sup>84</sup> L&I's documents confirmed that Meridian employed Guzman at the time of the accident.<sup>85</sup>

In any event, whether Guzman was an employee of Meridian is inconsequential to Spruce Hills' liability.<sup>86</sup> "In this state, general

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<sup>84</sup> CP 1558 (July 20, 2009 Letter from Meridian to Plaintiff). For example, in a January 13, 2009 letter from Meridian to Guzman regarding a light duty restriction, Meridian writes:

This is a temporary, transitional position until you are ready to return to your former job duties.

....

You will continue to receive the health and welfare benefits you were receiving at the time of your injury.

....

If you do not contact the above person or show up for work on the start work date, we will consider you [sic] lack of response/no-show as a voluntary quit.

CP 1552 (emphasis added). In a subsequent letter dated January 29, 2009, Meridian writes that because Guzman was unable to perform the light duty work, "you are considered to have voluntarily quit your employment with our company." CP 1554. Meridian sent substantially similar letters confirming Guzman's employment on April 10, 2009, CP 1556, and July 20, 2009, CP 1558.

<sup>85</sup> CP 1392 (L&I December 29, 2010 Payment Order).

<sup>86</sup> Under Washington's Industrial Safety and Health Act, RCW Chapter 49.17 ("WISHA"), the general contractor is an employer of all on the site for purposes of worksite safety. RCW 49.17.020(4) (defining "employer" broadly to include general contractors). Accordingly, the general contractor bears primary responsibility for worksite safety:

Inasmuch as both the general contractor and subcontractor come within the statutory definition of employer, the primary employer, the general contractor, has, as a matter of policy, the duty to comply with or ensure compliance with WISHA and its regulations. A general contractor's supervisory authority places the general in the best position to ensure compliance with safety regulations. For this reason, the prime

contractors have a non-delegable duty to ensure compliance with all WISHA regulations for the protection of all employees on the jobsite, whether its own employees or those of an independent subcontractor.”<sup>87</sup> The duty runs “to all workers lawfully on the premises.”<sup>88</sup>

Here, the facts support the liability finding against Spruce Hills. Spruce Hills was the general contractor. Guzman was lawfully on the premises either as an employee of Meridian, as the facts demonstrate, or as an invitee. The scaffold at issue was in violation of WISHA regulations.<sup>89</sup> Because Spruce Hills bears the ultimate responsibility for these violations, it is liable for Guzman’s injuries. The trial court acted within its discretion in so finding.<sup>90</sup>

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responsibility for safety of all workers should rest on the general contractor.

*Stute v. P.B.M.C., Inc.*, 114 Wn.2d 454, 463, 788 P.2d 545 (1990) (emphasis added).

<sup>87</sup> *Kinney v. Space Needle Corp.*, 121 Wn. App. 242, 248, 85 P.3d 918 (2004).

<sup>88</sup> *Kelley v. Howard S. Wright Constr. Co.*, 90 Wn.2d 323, 333, 582 P.2d 500 (1978).

<sup>89</sup> Neither party denies that the scaffold at issue was in violation of safety regulations.

<sup>90</sup> *Syndicate 2112* cites *Kelley* for the proposition that “[t]he general rule at common law is that one who engages an independent contractor (here, a subcontractor) is not liable for injuries to employees of the independent contractor resulting from their work.” *Kelley*, 90 Wn.2d at 330. But the *Kelley* court did not stop there; it also set out a broader duty for general contractors under statutory law:

A third basis of Wright’s duty to respondent Kelley is created by statute. A statute can create a nondelegable duty to furnish a safe place of work. . . . RCW 49.16.030 [WISHA’s predecessor], applicable at the time of the accident, imposed a duty on all employers to furnish a reasonably safe place of work, with reasonable safety devices, and to comply with state

2. The trial court did not abuse its discretion in finding that Syndicate 2112 failed to demonstrate mistake, surprise, or excusable neglect.

Once again, Syndicate 2112 has the burden of demonstrating that the trial court abused its discretion in failing to be convinced that Syndicate 2112 demonstrated that there was mistake, surprise, or excusable neglect that would justify vacating the judgment.

Syndicate 2112 fails to cite a single Washington case. Guzman is aware of no case holding that a default judgment may be vacated where a defendant had notice of all proceedings against it and had the advice of counsel throughout the process. There is, however, authority from the Washington State Supreme Court holding that a trial court committed reversible error by vacating a judgment where a defendant – and its insurer – had knowledge of the suit but elected not to participate.

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safety regulations. In *Bayne v. Todd Shipyards Corp.*, 88 Wash.2d 917, 568 P.2d 771 (1977), we construed this statute to place a duty on employers to all workers lawfully on the premises. We agree with respondent's contention that the statute created a nondelegable duty on the part of a general contractor to provide a safe place of work for employees of subcontractors on the job site. This duty extends to providing reasonable safety equipment where necessary.

90 Wn.2d at 332-33.

In *Little v. King*,<sup>91</sup> the court rejected St. Paul Insurance Company's attempt to intervene and set aside a judgment after the injured party tried to collect from St. Paul. The court held that "[t]he decision not to participate does not meet the standard" for vacating judgments where the defendant has notice of the proceedings.<sup>92</sup>

*Little* involved a motor vehicle accident. King, a motorist whose liability coverage had lapsed, rear-ended Little's vehicle. Little was protected by uninsured motorist coverage through St. Paul. St. Paul was notified of the suit, received a copy of the summons and complaint, and was informed that Little's injuries were likely permanent and that past and future losses could exceed \$1 million. "St. Paul would have been permitted to intervene in the case if it had moved to do so because it was at risk of liability by virtue of its UIM obligations."<sup>93</sup>

"Little moved for an order of default and default judgment (or, alternatively, for summary judgment) against King."<sup>94</sup> The pleadings were served on King, who appeared at the hearing without counsel. Though the trial court gave King an opportunity to file an answer to

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<sup>91</sup> *Little v. King*, 160 Wn.2d 696, 161 P.3d 345 (2007).

<sup>92</sup> *Id.* at 706.

<sup>93</sup> *Id.* at 701.

<sup>94</sup> *Id.*

avoid a default, King declined. The judge entered a default judgment in favor of Little for \$2,155,835.58.<sup>95</sup>

Thereafter, Little's attorney sent St. Paul the judgment with a request for payment of \$2 million under the UIM policy. Two weeks later, St. Paul moved to intervene and vacate the default judgment. King, now represented by counsel, joined in St. Paul's motion. The trial court granted the motion to vacate.<sup>96</sup>

On appeal, at the outset, the Court quickly dismissed any argument based on St. Paul's lack of notice of the default hearing. In a single sentence, it held: "Since St. Paul had not appeared, it was not entitled to notice of this hearing."<sup>97</sup>

The court further held that "defendants fail to meet their burden under the second primary element of *White*: that the moving party's failure to timely appear in the action was occasioned by mistake, inadvertence, surprise, or excusable neglect."<sup>98</sup> King's deliberate choice not to file an answer to prevent a default judgment did not meet the standard. "Similarly, St. Paul knew about the accident, knew that it was Little's underinsured motorist carrier, and knew that King was uninsured. Again, as surveyed above, St. Paul had

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<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 703.

<sup>98</sup> *Id.* at 705.

ample opportunity to intervene in the case and elected not to. Similarly, its decision not to participate fails to satisfy *White*.<sup>99</sup> Vacation was therefore an abuse of discretion.<sup>100</sup>

The analysis is identical here. Syndicate 2112 was fully aware of this suit from its inception. It is undisputed that Syndicate 2112 could have assumed Spruce Hills' defense at any time, just as it finally did in April 2012.<sup>101</sup> The record shows Syndicate 2112 knew about the suit, should have known that it would be liable under the policy, had ample opportunity to intervene on behalf of an insolvent defendant, and elected not to do so. There was no "mistake" made. Faced with these facts, the trial court denied Syndicate 2112's motion to vacate. This decision was wholly within the court's discretion.

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<sup>99</sup> *Id.* at 706.

<sup>100</sup> *Id.*

<sup>101</sup> Syndicate 2112 attempts to differentiate *Little* on facts, claiming that whereas the insurer in *Little* was fully informed about the underlying proceeding but made a decision not to participate, here, "due to the misleading representations," Syndicate 2112 had no opportunity to make a "decision" whether or not to participate. Appellant's Opening Br. at 25 n.7. But the record shows that Syndicate 2112 was not misled. Spruce Hills' attorney explained to Syndicate 2112 that Spruce Hills did not have \$25,000 to spend on the SIR and that it would not be defending the case. CP 234-39. And, as demonstrated, Syndicate 2112 could not have been misled by Beck's letter to Lloyd's America.

3. The trial court did not abuse its discretion in failing to be convinced that Syndicate 2112's argument that the motion to vacate should be granted because of the amount of the damage award.

As a threshold matter, Syndicate 2112 cannot claim that the amount of the damages was not justified as it did not assign error to the findings of fact that included a damage award. The remainder of Syndicate 2112's argument boils down to mere disagreement over the amount of damages. The law rejects such disputes raised after the fact.

"[A] party who moves to set aside a judgment based upon damages must present evidence of a *prima facie* defense to those damages."<sup>102</sup> "It is not a *prima facie* defense to damages that a defendant is surprised by the amount or that the damages might [have] been less in a contested hearing."<sup>103</sup> "Even viewed in the light most favorable to the parties moving to set aside the default judgment, mere speculation is not substantial evidence of a defense."<sup>104</sup>

Here, Syndicate 2112 provides no competent evidence of lesser damages. Rather, its brief ignores critical facts. The record reflects that Guzman fell from a height of 20 feet, sustaining a concussion and fractures to his foot, shoulder, ribs, and thoracic

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<sup>102</sup> *Little*, 160 Wn.2d at 704.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 705.

spine.<sup>105</sup> He was hospitalized at Harborview Medical Center following the accident.<sup>106</sup> Despite extensive medical treatment, including surgery and speech therapy, Guzman's injuries were deemed permanent.<sup>107</sup> Falling from 20 feet and sustaining life-altering injuries would certainly strike most reasonable people as "painful" and causing "suffering."

In addition, Guzman is over 40-years-old, has the equivalent of only a sixth grade education from Mexico, and speaks only Spanish.<sup>108</sup> Dr. Brzusek testified that it will be difficult for Guzman to do any physical labor.<sup>109</sup> Vocational expert Johnson similarly testified that Guzman "is unable to obtain and perform gainful employment on a reasonably continuous basis when considering his age, education, experience and physical and mental capacities as related to his industrial injury. He retains no practical wage earning capacity and has suffered a permanent loss over his work life."<sup>110</sup>

Judge Okrent reviewed Guzman's medical records and expert testimony before concluding that Guzman suffered significant injuries

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<sup>105</sup> CP 1617-76.

<sup>106</sup> CP 1717-36.

<sup>107</sup> *Id.*

<sup>108</sup> CP 1730, 1765.

<sup>109</sup> CP 1617-76, 1697.

<sup>110</sup> CP 1736.

sufficient to justify “\$49,500 in past wage loss,” “\$354,000 in future wage loss,” and “general damages in the amount of \$2,500,000.”<sup>111</sup>

The trial court's conclusion was grounded in the record, based on substantial evidence, made after careful consideration, and is, most importantly, reasonable. Syndicate 2112 points to no evidence to refute any of the evidence weighed by the trial court. Syndicate 2112 simply cannot meet its burden of showing the trial court's judgment was based on untenable grounds or made for untenable reasons, such that no reasonable person would take the position adopted by the court.

**H. Guzman requests an award of his attorney fees and costs pursuant to RAP 18.1.**

If applicable law grants a party the right to recover reasonable attorney fees or expenses on review before the Court of Appeals, the party must request the fees or expenses as a motion.<sup>112</sup> Guzman is entitled to reasonable attorney fees under *Olympic Steamship Co., Inc. v. Centennial Ins. Co.*<sup>113</sup> because this appeal arises directly out of the bad faith action brought by Guzman as assignee of Spruce Hills against Syndicate 2112 pending in King County. Syndicate 2112 attempted to

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<sup>111</sup> CP 1776.

<sup>112</sup> RAP 18.1.

<sup>113</sup> *Olympic Steamship Co., Inc. v. Centennial Ins. Co.*, 117 Wn.2d 37, 53, 811 P.2d 673 (1991).

intervene after its insured was unable to vacate the judgment because it failed to act in good faith with regard to Spruce Hills and is now attempting to avoid the consequences of its bad faith behavior. Guzman therefore requests the reasonable fees it has been required to expend to respond to this appeal. At the very least, Guzman requests that the Court reserve the issue of fees pending the outcome of the King County action.

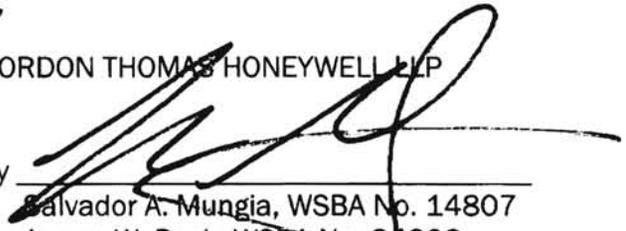
#### V. CONCLUSION

For the reasons set forth above, Guzman requests that this Court affirm the decisions of the Snohomish County Superior Court.

Respectfully submitted,

GORDON THOMAS HONEYWELL LLP

By



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STATE OF WASHINGTON  
SUPERIOR COURT

DECLARATION OF SERVICE

I, Kim Snyder, declare that on this 9 day of October, 2013, I had delivered the Brief of Respondent addressed to the Clerk of the Court, Division 1, Court of Appeals, and served upon the parties indicated below:

Copy to:

Sent via:

David M. Schoegg  
Stephania Camp Denton  
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Seattle, WA 98104-1064

Email and Regular U.S. Mail

I declare under penalty of perjury that the foregoing is true and correct.

Dated this 9 day of October, 2013 at Tacoma, Washington.

  
\_\_\_\_\_  
Kim Snyder, Legal Assistant

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COURT OF APPEALS