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A. CLARIFICATION OF FACTS

Progressive claims that its PIP adjuster and UIM adjuster did not have any contact with each other regarding Ms. Carbaugh's claim, other than the two letters from UIM adjuster Nancy Wicks, informing PIP adjuster Dawn Brewster (now Dawn Ibanez) that UIM would only reimburse PIP for medical expenses that were reasonable, necessary and accident related. See Respondent's Brief at p. 4-5. CP 65; CP 98-99. Progressive further claims that Ms. Ibanez was not involved in Ms. Carbaugh's claims at all after February 2007, because the PIP file had been "deactivated" after Ms. Carbaugh stopped treating. See Respondent's Brief at p. 5-6; CP 65. However, these statements are not accurate.

On January 18, 2008, just two months before Ms. Carbaugh notified Progressive of the filing of her lawsuit against the tortfeasors, Ms. Carbaugh's counsel wrote to UIM adjuster, Ms. Wicks, regarding the inadequacy of Progressive's \$2500 offer to Ms. Carbaugh. CP 120-121. In that letter, Ms. Carbaugh's counsel noted that the last PIP ledger he had received reflected \$6,553.28 in PIP payments. CP 120. However, Ms. Carbaugh's counsel pointed out that his records of Ms. Carbaugh's treatment reflected \$7,196.70 in treatment costs, and asked if Progressive believed that those special damages were not reasonably incurred as a

result of the underlying motor vehicle collision. CP 121.

Six days later, on January 24, 2008, Ms. Wicks responded to Ms. Carbaugh's counsel's letter. CP 122-123. In that letter, the UIM adjuster, Ms. Wicks, wrote as follows:

I cannot comment on any PIP issues addressed in your letter. If you believe there is any further amount owed by PIP, you need to bring that up with the PIP adjuster, Dawn Ibanez. A copy of this letter has been forwarded to her for any response needed on the PIP handling of this claim.

CP 122 (emphasis added). Thus, as Ms. Carbaugh's counsel was informed in January 2009, the PIP adjuster, Ms. Ibanez, was still involved regarding Ms. Carbaugh's claim and may be providing a response regarding the discrepancy between the \$6,553.28 in PIP payments reflected on the last PIP ledger sent to Ms. Carbaugh's counsel and the \$7,196.70 in treatment costs Ms. Carbaugh had incurred. *Id.*

Then, sometime in February 2008, Ms. Ibanez took further action on the PIP claim. She transferred Ms. Carbaugh's PIP file to Progressive's subrogation department. CP 65.

On March 24, 2008, a paralegal in Ms. Carbaugh's counsel's office wrote to Ms. Ibanez, following up on the discrepancy between the prior PIP ledger showing \$6,553.28 in PIP payments and Ms Carbaugh's \$7,196.70 in treatment costs, and notifying Progressive that its PIP

subrogation rights were being protected by the filing of a lawsuit as follows:

At your earliest convenience, please provide my office with an updated PIP ledger regarding the above-referenced claim. In the meantime, please be advised that we have filed a summons and complaint against the tortfeasor in the Pierce County Superior Court.

Thank you for your assistance in this matter. If you have any questions, please feel free to contact my office.

CP 73.

Apparently, Ms. Ibanez did nothing with the letter, other than send Ms. Carbaugh's counsel an updated PIP ledger. CP 66. Progressive failed to acknowledge the existence of Ms. Carbaugh's lawsuit against the tortfeasors or to request to intervene in that lawsuit. CP 170. The reason that Progressive failed to take any action with regard to the notice of Ms. Carbaugh's lawsuit was clearly stated in Ms. Ibanez's declarations that state as follows:

I have not been trained in, and I am not familiar with, the UM/UIM insurance requirements, or its interplay when an insured sues the uninsured or underinsured third-party tortfeasor for injuries arising from an accident. Specifically, I did not know that a UM/UIM insurer could be bound by a judgment entered against a third-party tortfeasor by its insured. CP 64.

. . . I do not have the training or experience in either UM or subrogation and do not know the rules or

procedures for those sections. I do not need to know the rules and procedures for those sections....CP 160. (Emphasis added).

On March 24, 2008, the same day the paralegal from Ms. Carbaugh's counsel's office wrote to PIP adjuster Dawn Ibanez about the PIP ledger and the filing of the lawsuit protecting Progressive's subrogation interest, Ms. Carbaugh's counsel demanded arbitration of Ms. Carbaugh's UIM claims under the terms of her insurance policy. That policy provided for arbitration as follows:

If **we** and the **insured person** cannot agree on:

1. The legal liability of the operator or **owner** of an **underinsured motor vehicle**; or
2. The amount of the damages sustained by the **insured person**;

this will be determined by arbitration if **we** and the **insured person** agree to arbitration prior to the expiration of the bodily injury statute of limitations. . . .¹

CP 168-169, CP 148.

UIM adjuster Ms. Wicks responded to Ms. Carbaugh's demand for UIM arbitration on April 2, 2008. CP 125. In that April 2, 2008, letter, Progressive denied Ms. Carbaugh's demand to arbitrate her UIM claim, stating "Progressive . . . elects to have the matter decided by a court of

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Thus, Ms. Carbaugh and Progressive needed to agree to arbitration by April 17, 2008, three years from the date of the April 17, 2005, collision. CP 130

competent jurisdiction. . . .” CP 125. Progressive’s April 2, 2008, letter then asked Ms. Carbaugh to provide it with a copy of a summons and complaint if she chose to commence a lawsuit against Progressive for UIM coverage. Id. This letter did not request a copy of Ms. Carbaugh’s lawsuit against the tortfeasors. Id.

On April 3, 2008, ten days after being notified that Ms. Carbaugh had commenced a lawsuit against the tortfeasors and protected Progressive’s subrogation rights, Progressive filed its own lawsuit against the uninsured tortfeasors under Pierce County cause number 08-2-06850-7.² CP 170. That lawsuit specifically sought to recover on Progressive’s “subrogation rights and contractual rights arising from said policy of insurance and payments made pursuant thereto for the benefit of Karyn Carbaugh.” (Progressive’s amended complaint, p. 3, li. 1-2). Id. Indeed, Progressive’s lawsuit against the uninsured tortfeasors sought recovery of \$7,230.28 in PIP benefits it paid, plus any UIM money that

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Apparently, Ms. Ibanez, who had transferred Ms. Carbaugh’s PIP file to Progressive’s subrogation department did not inform the subrogation department that Ms. Carbaugh had already commenced a lawsuit against the tortfeasors. Moreover, according to their sworn statements, neither the PIP adjuster, Ms. Ibanez, who had overseen the payout of over \$7000 in benefits, nor the UIM adjuster, Ms. Wicks, who was overseeing the UIM claim, were informed that Progressive was filing its own lawsuit against the tortfeasors to recover PIP benefits previously paid and UIM benefits that might be paid. CP 161; CP 101.

might be paid if and when Ms. Carbaugh's UIM claim is resolved.³ Id.

In the meantime, the Joslins, the uninsured tortfeasors in the case at bar, failed to appear or answer Ms. Carbaugh's complaint. CP 12. Thus, on April 30, 2008, an Order of Default was entered against defendants John Joslin and "Jane Doe" Joslin and Norma Joslin and "John Doe" Joslin. CP 15.

On July 22, 2008, which was four months after this lawsuit had been filed with no response from the Joslins, Ms. Carbaugh sought and obtained a default judgment against defendants Joslin. CP 170. CP 45-49. The default judgment was supported by declarations from two of Ms. Carbaugh's doctors, CP 23-26; CP 27-30, a declaration from Ms. Carbaugh, CP 43-44, jury verdicts from similar cases, CP 31-38, and two legal memoranda regarding the entry of the default judgment. CP 16-17, CP 20-22. Progressive has never argued that the taking of the order of default or the default judgment was in any way improper. CP 74-96.

On September 19, 2008, counsel for Progressive wrote to Ms.

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It is unclear how Progressive felt that it was entitled to pursue its own independent lawsuit to recoup PIP benefits paid to Ms. Carbaugh when, under its own evaluation by its UIM adjuster, Ms. Carbaugh had yet to be made whole when her claim against the tortfeasors exceeded the amount of the PIP payments as reflected by the UIM adjuster's \$2500 offer to Ms. Carbaugh. Compare Respondent's Brief at p. 3; "Progressive has the right to recoup any money paid under PIP from a third-party tortfeasor only if Appellant is made whole."

Carbaugh's counsel, stating the following:

My client recently discovered that you . . . filed a lawsuit against John Joslin, Norma Joslin and their respective spouses for damages arising out of the accident. . . . You never notified Progressive that you were filing the lawsuit against the Joslins. . . .Progressive is therefore not bound by this Default Judgment. CP 56.

On September 26, 2008, Ms. Carbaugh's attorney responded by letter, informing Progressive's counsel that Progressive was timely notified of the filing of Ms. Carbaughs' complaint on March 24, 2008, and providing Progressive's counsel with proof of mailing. CP 59-61. To date, Progressive has never argued that the March 24, 2008, letter to PIP adjuster Dawn Ibanez was in any way inadequate to inform the recipient that a lawsuit had been filed against the tortfeasors. CP 74-96.

Thereafter, after receiving proof that Progressive had been notified of Ms. Carbaugh's lawsuit against the tortfeasors, Progressive dropped the argument that it was not notified of the lawsuit, and began attacking Ms. Carbaugh's counsel, alleging it was the victim of "sharp practices" and "schemes," while ignoring its own inexcusable neglect. CP 90, Respondent's Brief p. 13. In short, Progressive argues that if there is a breakdown of procedure throughout its PIP, UIM and Subrogation departments, it must be the fault of someone else.

B. SUMMARY OF ARGUMENT

The law applied to this case is simple. If an insurer has timely notice of a lawsuit against an uninsured tortfeasor, and has the attendant opportunity to intervene, then the insurer is bound by a judgment against that tortfeasor. Thus, if the Court finds that Progressive had timely notice and the attendant opportunity to intervene in Ms. Carbaugh's lawsuit, when her attorney sent a letter to the adjuster notifying Progressive of the lawsuit the same day it was filed, then Progressive was bound by the judgment against the Joslins, and it was error to vacate said judgment.

If the Court rules that the notice was not timely, it was nonetheless error to vacate the judgment against the Joslins when the Joslins failed to appear or answer the lawsuit, or satisfy any of the requirements of CR 60 for setting aside a judgment. Progressive, as Ms. Carbaugh's insurer, should not deprive Ms. Carbaugh of the right to collect on her judgment against the tortfeasors when the Joslins have never even attempted to satisfy the requirements for setting aside a judgment under CR 60.

C. ARGUMENT

- 1. Notifying the PIP adjuster that a lawsuit had been commenced against the tortfeasors, thereby protecting Progressive's subrogation interest, and demanding UIM arbitration under the express terms of Progressive's policy is not a "scheme" as Progressive now alleges.**

- a. **There is no “scheme” by commencing a lawsuit against third party tortfeasors and pursuing the speedy remedy of UIM arbitration against a UIM insurer at the same time.**

There is nothing improper or devious about commencing a lawsuit against a tortfeasor, while at the same time, seeking to arbitrate or litigate UIM benefits in a separate action. This precise procedural posture occurred in the case of Fisher v. Allstate Ins. Co., 136 Wn.2d 240, 961 P.2d 350 (1998), wherein a UIM insured filed parallel lawsuits against a tortfeasor and against a UIM insurer.

There, Fisher was injured in a motor vehicle collision. Fisher commenced a lawsuit against the tortfeasor in Idaho, and commenced a separate lawsuit against Fisher’s UIM carrier, Allstate, in Washington. Fisher, 136 Wn. 2d at 243. Early on, Allstate was aware of Fisher’s lawsuit against the tortfeasor, but did not move to intervene. Id. Originally, the Fisher’s UIM lawsuit against Allstate was scheduled to proceed to trial before Fisher’s lawsuit against the tortfeasor. Id. at 243. However, Fisher and the tortfeasor later agreed to arbitrate Fisher’s claim before the trial date in the UIM lawsuit against Allstate. Id. Fisher was then awarded \$236,000 in damages in arbitration. Id.

Fisher then presented the arbitration award to Allstate, and

demanded payment of the \$25,000 UIM benefits. Id. When Allstate refused, Fisher moved for summary judgment that Allstate was bound by the arbitration award against the tortfeasor. Id. The trial court ruled that Allstate was bound by the arbitration award Id. On appeal to our Supreme Court, it rejected Allstate's arguments that Allstate did not have timely notice of the arbitration between Fisher and Allstate. Instead, the Court held that Fisher need only provide notice of a lawsuit against the tortfeasors in order to bind Allstate. Id. at 355-356.

In the present case, Ms. Carbaugh sought to pursue the same course of action as the plaintiff in Fisher. She commenced a lawsuit against the tortfeasors within the statute of limitations, thereby protecting Progressive's subrogation interest and preserving her claims above and beyond her \$25,000 UIM coverage. Progressive was timely notified on March 24, 2008, of the filing of the lawsuit against the tortfeasors. She also sought to arbitrate her UIM claim. Because UIM arbitration is a relatively speedy process, under normal circumstances, Ms. Carbaugh's UIM arbitration with Progressive would have occurred long before any trial in her lawsuit against the tortfeasors.

However, in this case, two unforeseen events occurred. First, Progressive would not agree to arbitrate under the terms of its policy. CP

125. Second, the tortfeasors failed to appear in this matter until January 5, 2009, some nine (9) months later, and well after a default judgment was taken.⁴ CP 222-224; CP 45-49. Neither of these events were within the control of Ms. Carbaugh or her counsel. Thus, there was no “scheme” that the defendants would not appear in the present lawsuit so that Ms. Carbaugh could obtain a default judgment, nor was there any “scheme” to have Progressive deny Ms. Carbaugh the speedy remedy of UIM arbitration so that Ms. Carbaugh could later try to bind it to a judgment against the tortfeasors.

b. There was no “scheme” in demanding UIM arbitration when Ms. Carbaugh’s UIM coverage with Progressive provides for the arbitration of UIM disputes.

Progressive incorrectly argues that as of March 24, 2008, Ms. Carbaugh’s “only apparent recourse” was to litigate her claim for UIM benefits “unless she could bind Progressive to a judgment. . . .” See Respondent’s Brief at p. 13. Progressive further argues that Ms. Carbaugh’s counsel sent his March 24, 2008, letter to UIM adjuster Ms.

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Progressive argues that because the Joslins were uninsured, that they were unlikely to appear or defend any lawsuit against them. See Respondent’s brief at p. 13-14. However, as Progressive is aware, when Progressive filed its own lawsuit against the Joslins on April 3, 2008, under Pierce County Cause No. 08-2-06850-7, CP 170, just ten days after the filing of Ms. Carbaugh’s lawsuit, the Joslins appeared through counsel and defended that lawsuit. The Joslins attorney then belatedly appeared in the case at bar in January 2009. CP 222-224.

Wicks “demanding arbitration of the UIM claim, even though the policy did not require it,” thereby implying that Ms. Carbaugh was requesting something improper. See Respondent’s Brief at p. 14. Progressive even goes so far as to baldly state that by demanding the remedy of UIM arbitration as set forth in Ms. Carbaugh’s policy, Ms. Carbaugh’s counsel “deliberately tried to deceive Ms. Wicks about the filing of the third party lawsuit by demanding arbitration when arbitration was not required under the policy.” Respondent’s Brief, p. 33 (emphasis added).

However, Progressive’s own policy specifically provided arbitration as a remedy. CP 185. However, Progressive elected to deny Ms. Carbaugh the speedy and inexpensive remedy of UIM arbitration.

As stated above, Progressive began asserting the existence of “schemes” and “sharp practices” only after it realized that it had received timely notice of Ms. Carbaugh’s lawsuit against the tortfeasors. The Court should reject Progressive’s arguments.

2. The trial court improperly adopted dicta from the Lenzi v. Redland Ins. Co. case, allowed Progressive to intervene, and vacated the default judgment against the tortfeasors when the PIP adjuster, as opposed to the UIM adjuster, was advised of Ms. Carbaugh’s lawsuit against the tortfeasors.

At the trial court level, Progressive urged the court to follow dicta from the case of Lenzi v. Redland Ins. Co. and allow it to intervene and

vacate Ms. Carbaugh's default judgment which had properly been obtained against non-responsive tortfeasors. Progressive further urged the court to adopt a new rule, that, in order to bind an insurer to any judgment against a third party tortfeasor, the insured must give notice specifically to the correct UIM adjuster. See November 17, 2008, Verbatim Report, RP 9; See also December 12, 2008 Verbatim Report, RP 11.

- a. **There is no need to allow post judgment intervention as stated in the dicta from Lenzi v. Redland Ins. Co. when an insurer with notice of a lawsuit and an opportunity to intervene is bound by the results of that lawsuit.**

In Lenzi v. Redland Ins. Co., 140 Wn.2d 267, 996 P.2d 603 (2000), after ruling that only timely notice of a lawsuit against a third party and an opportunity to intervene was required under the Finney-Fisher rule in order to bind the UIM insurer to a judgment against the third party, our Supreme Court went on to state, in a footnote, as follows:

Had [the insurer] filed a motion to intervene and a motion to vacate the default judgment after learning of it, it seems possible if not likely the trial court might have granted both motions under the unusual circumstances of the case.

Lenzi, 140 Wn.2d 267, 278, n.8, 996 P.2d 603 (2000). There can be little doubt that this statement was dicta, as our Supreme Court had already found that the insurer in that case was bound by the judgment entered against the tortfeasors.

- b. There is no need to allow post judgment intervention as stated in the dicta from Lenzi v. Redland Ins. Co. when an insurer that does not receive notice of a lawsuit and has no opportunity to intervene is not bound by the results of that lawsuit.**

Under the holding of the Division Two case of Beck v. Farmers Ins. Co., 113 Wn. App. 217, 53 P.3d 74 (2002), review denied, 149 Wn.2d 1005 (2003), a UIM insurer that has not received notice of a lawsuit and has not had an opportunity to intervene, is not bound by the results of the lawsuit. Under those circumstances, the insurer has no interest in the lawsuit as its interests will not be affected by the outcome of the lawsuit. Thus, there is no need for an insurer under those circumstances to intervene, post judgment, in its insured's lawsuit when its interests are not effected by that lawsuit. This Court should decline to adopt the procedure outlined in the dicta from Lenzi, supra. Otherwise, uninsured tortfeasors will receive the benefit of having their judgment vacated entirely through the efforts of a disinterested insurer. Uninsured tortfeasors who refuse to respond to a properly served summons and complaint, and who cannot satisfy any of the requirements of CR 60 for vacating a default judgment, should not receive the windfall of having a default judgment vacated by a disinterested insurer who has no reason to intervene.

- c. Progressive's argument that notice of a lawsuit must be**

given specifically to a UIM adjuster is unworkable and is not supported by any case law or insurance policy provisions.

Progressive does not cite to a single case that requires that notice must be given to a specific UIM adjuster within an insurance company of a lawsuit in order to find the insurer bound by a later judgment. Progressive does not cite to any of its policy language that requires such targeted notice to a single adjuster within the insurance company. Moreover, at the trial court level and now on appeal, Progressive has never claimed that the notice that was given to Progressive on March 24, 2008, was in any way inadequate to notify the recipient adjuster that Ms. Carbaugh had commenced a lawsuit in Pierce County against the tortfeasors.

Progressive's argument for the creation of a new rule is neither workable nor well taken for a number of reasons. First, the "Finney-Fisher" rule only requires timely notice to the insurer. Lenzi, 140 Wn.2d at 278. ("[t]he Finney-Fisher rule requires only timely notice by the insured to an insurer of the insured's action against an uninsured tortfeasor and an opportunity for the insurer to intervene, not notice of all pleadings filed."). The rule does not state that a particular adjuster within an insurance company must receive notice. Second, Progressive's argument that notice must be given to the UIM adjuster presumes that a UIM

adjuster has been assigned to a claim. However, there are many instances where a UIM adjuster may not be assigned to a claim at the time a lawsuit against the tortfeasors is commenced. For example, a claimant may not know if a tortfeasor is truly uninsured or not, or whether a tortfeasor is underinsured by maintaining low policy limits, until a lawsuit is commenced against the tortfeasor, and the tortfeasor's insurance status is uncovered during discovery. Thus, under those circumstances, it is often the case that the only adjuster assigned to the claimant's claim, and the only adjuster a claimant would know to advise of a lawsuit against the third party tortfeasors, may be a PIP adjuster.⁵ Third, notifying a PIP adjuster that a lawsuit has been filed against the tortfeasors is certainly reasonable when the insured is protecting the insurer's right of subrogation before the expiration of the statute of limitations.⁶ Finally, if

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It is also possible for a claimant under similar circumstances to have waived PIP coverage, and elected to purchase only UIM coverage. In that instance, the claimant wishing to notify the insurer of a lawsuit against third party tortfeasors may not have any adjuster assigned to her claim. Presumably, the insured would mail notice to a general claims post office box or provide notice to the insurer's agent. See e.g. WAC 284-30-360(1)(c)(Notification given to an agent of the insurer is notification to the insurer).

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One would think that having recently transferred Ms. Carbaugh's PIP file to Progressive's subrogation unit in February 2008, after receiving notice in March 2008 that Ms. Carbaugh had commenced a lawsuit against the tortfeasors, PIP adjuster, Dawn Ibanez, would have forwarded Ms. Carbaugh's notice of the lawsuit to the subrogation department that was preparing to commence a lawsuit against the same tortfeasors.

Progressive wishes to require that specific, targeted notice of a third party lawsuit must be give to a single adjuster within the insurance company, it would be a simple matter for Progressive to include in its policy specific language of how an insured must give it notice of a lawsuit against third party tortfeasors.

3. The issue of whether Progressive was bound by the default judgment against the tortfeasors was raised before the trial court.

In its respondent's brief, Progressive ignores Ms. Carbaugh's arguments in her Appellant's Brief that Progressive was bound by the judgment against the tortfeasors, claiming that the issue was not raised at the trial court level, and should not be raised on appeal. Nothing could be further from the truth. Ms. Carbaugh's initial trial court brief, responding to Progressive's motion to intervene and set aside the default judgment, spent over five pages discussing the Lenzi v. Redland Ins. Co., case, and how an insurance company, which has received notice of a lawsuit against the tortfeasors, is bound by a judgment entered against the tortfeasors when it fails to intervene in the lawsuit. CP 134-139. At the close of Ms. Carbaugh's argument in that section, Ms. Carbaugh's counsel clearly articulates that "[a]n insurer that is notified of a lawsuit against an uninsured tortfeasor is bound by the result of that lawsuit." CP 139.

These arguments were again raised in Ms. Carbaugh's motion for revision.
CP 171-176.

Thus, Ms. Carbaugh's arguments that Progressive was bound by the judgment against the tortfeasors was properly raised before the trial court and should be considered on appeal. Again, if the Court finds that Progressive had timely notice of Ms. Carbaugh's lawsuit and is therefore bound by the judgment against the tortfeasors, then the trial court erred in granting Progressive's motion to intervene and vacate Ms. Carbaugh's judgment.

4. Progressive failed to make the strong showing necessary to intervene, post judgment, and set aside a properly entered default judgment.

As stated in the Appellant's Brief, a trial court should only allow intervention post judgment "upon a strong showing after considering all circumstances, including prior notice, prejudice to the other parties, and reasons for and length of the delay." Kreidler v. Eikenberry, 111 Wn.2d 828, 832-333, 766 P.2d 438 (1989).

Progressive's only excuse for failing to seek intervention sooner is that Ms. Carbaugh's notice of the lawsuit was sent to the PIP adjuster instead of the UIM adjuster, see Respondent's Brief at p. 20, and that the PIP adjuster "did not know that a UM/UIM insurer could be bound by a

judgment entered against a third-party tortfeasor by its insured” CP 64, and “[did] not need to know the rules or procedures for those [UM and subrogation] sections.” CP 160.

Progressive should be aware that its insurance policy does not require that notice of a third party lawsuit be given only to a UIM adjuster. Thus, Progressive’s lack of training of its staff regarding what to do upon receiving notice of a third party lawsuit does not constitute a “strong showing” sufficient to intervene in Ms. Carbaugh’s lawsuit after the judgment was entered.

5. Progressive has no standing to set aside the default judgment.

CR 60 only allows a “party or his legal representative” to obtain relief from a final judgment. CR 60(b). Progressive was not a party to Ms. Carbaugh’s lawsuit when she filed it or when she concluded it by obtaining a default judgment against the uninsured tortfeasors. Indeed, Progressive was not a party to the judgment itself. Progressive is not the uninsured tortfeasor’s legal representative and has actually sued the uninsured tortfeasors in a separate lawsuit seeking many of the same damages at issue in Ms. Carbaugh’s lawsuit against the same tortfeasors.

Given that Ms. Carbaugh had the right to collect on her judgment, Progressive should not have been permitted to impair that right, to the

prejudice of its own insured, and to the benefit of the uninsured, recalcitrant tortfeasors, by seeking an order to set aside her properly obtained default judgment against the defendants. Instead, if Progressive truly believed that it had insufficient notice of the filing of Ms. Carbaugh's lawsuit against the tortfeasors, it should have sought a declaration at the trial court level that it was not bound by the default judgment under the holding of Division Two's decision in Beck v. Farmers Ins. Co., 113 Wn. App. 217, 53 P.3d 74 (2002), review denied, 149 Wn.2d 1005 (2003)(holding that a UIM insurer which had not received actual notice that a lawsuit had been filed was not bound by a later arbitration award). In that way, Ms. Carbaugh could still pursue recovery on her judgment independent of her prosecution of her UIM claim with Progressive.

6. Ms. Carbaugh raised Progressive's lack of a prima facie defense at the trial court level, preserving the issue for appeal.

Progressive argues that Ms. Carbaugh did not raise the issue of its lack of a prima facie defense to damages at the trial court level, thereby waiving the issue on appeal. See Respondent's Brief at p. 24-26.

However, this issue was raised at the trial court. During the December 12, 2008, hearing before Judge Tollefson, Ms. Carbaugh's counsel argued as

follows:

Your Honor, with regard to the prima facie defense, there is no defense to liability here. This was a rear-end motor vehicle crash. My client was a passenger in the car that got rear-ended. The only defense that Progressive has raised is that, well, maybe her damages are too high. Again, I submitted to the commissioner, who entered the default judgment, settlement summaries and jury verdicts supporting this award, so that's not a defense just to say we think it is too much money.

December 12, 2008, verbatim report at RP 25, line 20 to RP 26, line 4.

Thus, the issue of whether adjuster Nancy Wick's opinion that Ms.

Carbaugh's case was worth less than the judgment constitutes substantial

evidence of a prima facie defense is properly before this Court on appeal.

a. Adjuster Nancy Wick's opinion regarding the value of Ms. Carbaugh's claim does not constitute substantial evidence of a prima facie defense.

As stated in Ms. Carbaugh's Appellant's Brief, our Supreme Court recently reiterated the requirements for setting aside a default judgment in the case of Little v. King, 160 Wn.2d 696, 703-704, 161 P.3d 345 (2007).

There, the Court noted that the moving party must come forward with "substantial evidence" of a prima facie defense. Id.

The case of Little v. King, is similar to the case at bar. There, an uninsured motorist carrier moved to vacate a default judgment against the

uninsured driver.⁷ Like the case at bar, in Little v. King, there was no dispute regarding liability. Little, 160 Wn.2d at 704. Like the case at bar, the insurer raised two arguments in an attempt to establish a prima facie defense as to damages. As its defense to damages in Little, the insurer argued that (1) the damages awarded were unreasonable and (2) that preexisting conditions may have contributed to the plaintiff's injuries. Little, 160 Wn.2d at 704. In the case at bar, Progressive argues that (1) Ms. Carbaugh's damages were too high and that (2) she had several gaps in treatment, making only some of the treatment reasonable. CP 100-101. In both Little and the case at bar, the "evidence" of a prima facie defense came in the form of a declaration from an insurance adjuster. Id.

In rejecting the insurance adjuster's declaration as substantial evidence of a prima facie defense, our Supreme Court stated that it is not a prima facie defense to damages that a defendant is surprised by the amount of damages or that the damages might have been less in a contested hearing. Id. Moreover, the Little Court noted that the insurance adjuster's opinion that the plaintiff's damages may have been caused by preexisting

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Unlike the case at bar, where the tortfeasors have done nothing other than appear nine months late, in Little v. King, the tortfeasor actually joined in the motion to vacate the default judgment.

conditions was not competent evidence of causation. Id. at 705. Likewise, in the case at bar, adjuster Nancy Wick's opinion that Ms. Carbaugh's treatment past the first four months was not reasonable is not competent evidence sufficient to set aside a judgment.

Thus, because Progressive failed to establish a prima facie defense as to damages, the trial court erred in vacating the default judgment against the tortfeasors.

7. Progressive does not address its inexcusable neglect in failing to act upon timely notice that a lawsuit had been filed against the tortfeasors, which is fatal to a motion to vacate either a default order or a default judgment.

Although the requirements for setting aside an order of default are not entirely the same as those for setting aside a default judgment, two factors to be considered are the same, excusable neglect and due diligence.

Seek Systems, Inc. v. Lincoln Moving/Global Van Lines, Inc., 63 Wn. App. 266, 271, 818 P.2d 618 (1991); In re Estate of Stevens, 94 Wn. App. 20, 30-31, 971 P.2d 58 (1999). Without excusable neglect, "neither an order of default nor a default judgment can be vacated." In re Estate of Stevens, 94 Wn. App. at 30-31 (citing Seek Systems, Inc. v. Lincoln Moving/ Global Van Lines, 63 Wn. App. 266, 271, 818 P.2d 618 (1991)).

In Prest v. American Bankers Life Assur. Co., 79 Wn. App. 93,

100, 900 P.2d 595, rev. denied, 129 Wn.2d 1007, 917 P.2d 129 (1996), .
Division Two of the Court of Appeals, “[i]t is an important part of the
business of an insurance company to respond to legal process. . .” and the
failure to take action in the face of a lawsuit that later results in a default
judgment that binds the insurance company “is inexcusable.”

In a more recent case, the Court of Appeals, Division Two,
affirmed a trial court’s decision to deny the motion to set aside a default
judgment. Rosander v. Nightrunners Transport, Ltd., 147 Wn. App. 392,
196 P.3d 711(2008). In response to the insurer’s argument that its claims
adjuster’s medical condition caused the insurer’s failure to appear at a
default hearing, thereby excusing its conduct, the Court of Appeals stated
as follows:

Further, ‘[j]udicial decisions have repeatedly held that, if a
company’s failure to respond to a properly served summons
and complaint was due to a break-down of internal office
procedure, the failure was not excusable.’ TMT Bear
Creek Shopping Ctr., Inc. v. Petco Animal Supplies, Inc.,
140 Wn. App. 191, 212, 165 P.3d 1271 (2007). **This rule
applies with equal force to a company’s receipt of
properly sent notice.**

Rosander v. Nightrunners Transport, Ltd., 147 Wn. App at 407.(emphasis
added).

In the case at bar, Progressive does not address how its failure to
take any action once its adjuster was notified of Ms. Carbaugh’s lawsuit

against the tortfeasors was in any way excusable. See Respondent's Brief at p. 31. Its only excuse for failing to act is that the UIM adjuster, Nancy Wicks, did not receive notice of the lawsuit. Id. Progressive claims that the PIP adjuster "understandably" did nothing. See Respondent's Brief at p. 10. Under both Prest and Rosander, the PIP adjuster's failure to take any action after being notified of Ms. Carbaugh's lawsuit is inexcusable.

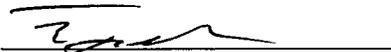
Case law is clear. Without excusable neglect, neither an order of default nor a default judgment can be vacated. Thus, the trial court erred in vacating the default judgment.

D. CONCLUSION

Ms. Carbaugh requests that the court reverse the trial court, reinstate the default judgment against defendants Joslin, find that Progressive is bound by that judgment, and award Ms. Carbaugh her attorneys fees and costs.

DATED this 31st day of October, 2009.

**THE LAW OFFICES OF
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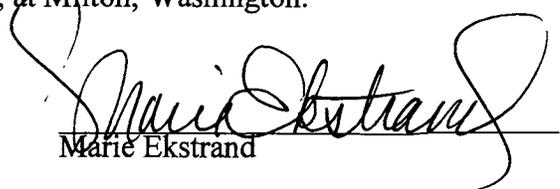
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I hereby declare under the penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

DATED this 2 day of October, 2009, at Milton, Washington.


Marie Ekstrand