

COURT OF APPEALS
DIVISION II

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STATE DEPARTMENT
BY  DEPUTY

NO. 38837-5 II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

KARYN CARBAUGH,

Appellant,

vs.

JOHN N. JOSLIN, et ux., et al.

Respondents.

RESPONDENTS' BRIEF

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I. INTRODUCTION

Both the Court Commissioner and the trial court independently granted Progressive's Motion to Intervene and Set Aside the Default Judgment under the facts presented. The issue before this Court is whether the trial court abused its discretion in granting these two motions. For the reasons set forth below, there was no abuse of discretion, and the trial court's ruling should be upheld.

II. COUNTER-STATEMENT OF THE FACTS

A. AUTOMOBILE ACCIDENT.

On April 17, 2005, Appellant was a passenger in a pickup truck which was rear-ended by a vehicle driven by John Joslin and owned by his mother, Norma Joslin. Neither Mr. Joslin nor Ms. Joslin had automobile liability insurance.

Appellant claims that she sustained soft tissue neck and back injuries from this accident. She began treating with a chiropractor on

May 3, 2005, who referred her to massage therapy.¹ On June 6, 2005, after four treatments, the chiropractor reported:²

Karyn was involved in a motor vehicle accident and she is doing a lot better. She states her low back pain is more intermittent now, still having some. She is mainly having some soreness through the mid-back. She does pretty much anything she wants, but this causes her some extra pain when lifting or doing various activities. Her pain scale is mainly through the thoracic area, 2-3 on level 1-10. Cervical spine is within normal limits. She feels really good in the cervical spine at this time. She is sleeping a lot better. She has some sleeping problems here and there, but pretty minor at this time.

Appellant treated until August 22, 2005, and then stopped treatment for two months.³ She resumed treatment on October 22, 2005 and continued until March 15, 2006.⁴ She again discontinued treatment for six months until September 20, 2006, when she saw a medical doctor who referred her to physical therapy.⁵ Her physical

¹ CP 29.

² CP 77.

³ CP 29, 77.

⁴ CP 29.

⁵ CP 25.

therapy lasted from October 24, 2006 through January 21, 2007.⁶

Appellant received no additional treatment.

B. INSURANCE.

Appellant had automobile insurance with Progressive, which provided two separate, distinct, and unrelated coverages. The first was personal injury protection (PIP) which provides money to pay for both medical expenses and lost income. **These payments are provided regardless of fault.** Progressive has the right to recoup any money paid under PIP from a third-party tortfeasor only if Appellant is made whole.

Progressive also provided uninsured/underinsured motorist (UM/UIM) coverage. This insurance provides protection to an insured if he/she is injured in an accident with either an uninsured or an underinsured driver. The UM/UIM insurer steps into the shoes of the third-party tortfeasor and the **relationship between the insured and UM/UIM insurer is adversarial.**

Following Appellant's accident with Mr. Joslin, Progressive opened a PIP claim file for Appellant and assigned it to Dawn

⁶ CP 25.

Ibanez.⁷ Ms. Ibanez thereafter paid Appellant's accident related medical bills.

1. Appellant's Attorney, Mark Watson, Demanded that Progressive Split the PIP and UM Files, and the Adjusters not Communicate with Each Other.

Appellant retained Mark Watson to represent her for claims arising from this accident. On February 21, 2006, Mr. Watson sent a letter to Progressive notifying it of his representation.⁸ In this letter, he informed Progressive that Appellant was making a UM/UIM⁹ claim. Mr. Watson demanded that Progressive segregate the PIP and UM files, and that a separate adjuster be assigned to each file. **He further demanded that these two claims representatives not share information or have *ex parte* contact on the case.** His letter states in pertinent part:

Please also be aware that our client intends on making a UM/UIM claim against the insurance policy with your company once all third-party liability and applicable insurance coverages are determined. **Demand is hereby made that two separate claim representatives be assigned to**

⁷ At the time this PIP file was assigned in 2005, Ms. Ibanez' last name was "Brewster." After Ms. Ibanez married, she changed her name.

⁸ CP 104-105.

⁹ Since the Joslins were uninsured, Respondent has hereinafter referred to it as the "UM" claim.

handle my client's respective PIP and UIM claims. There is to be no sharing of information or *ex parte* contact between these two representatives regarding this claim. (Emphasis in original).

Progressive complied with these demands. Nancy Wicks, an experienced claims representative, was assigned the UM file.¹⁰ The PIP and UM files were kept separate, and the two claims representatives did not share information or have *ex parte* contact about this claim.¹¹ Indeed, Ms. Wicks on two occasions sent a letter to Ms. Ibanez informing her that Progressive would pay only those medical bills which were reasonable and necessary as a result of the accident.¹²

2. *From February 2007 Forward, Mr. Watson Dealt Only with Ms. Wicks Because the PIP File was Deactivated.*

Appellant stopped treating in January 2007.¹³ In February of 2007, Ms. Ibanez deactivated Appellant's PIP file because Appellant's treatment had ended.¹⁴ Thereafter, Ms. Ibanez had no

¹⁰ CP 97-98.

¹¹ CP 64-65, 98.

¹² CP 98-99, 107-108.

¹³ CP 29.

¹⁴ CP 65.

contact with Mr. Watson's office until late March 2008, over 13 months later.¹⁵

After February of 2007, Mr. Watson dealt only with Ms. Wicks regarding Appellant's UM claim. On July 10, 2007, Mr. Watson sent Ms. Wicks a letter demanding that Progressive pay its \$25,000 UM policy limits, as well as waive its PIP subrogation claim.¹⁶ Ms. Wicks responded in a letter dated August 17, 2007 offering \$2,500 in addition to the PIP payments as settlement.¹⁷ Ms. Wicks sets forth the following explanation for her offer:

Please be advised that I have completed my review of your client's claim. It is understood by the records, that your client had sustained soft tissue injuries to her neck, back and left shoulder. She had consistent treatment for a four month time period. She then had large gaps in treatment and then only had sporadic treatment thereafter. Please be advised that we are evaluating this case for general damages for the four months after the loss. We point to her chiropractic report of June 6, 2005 where she gives an account of only having intermittent pain in her back and her neck felt really good. This is not consistent with her claim over a year later of not getting any better. At that time, she

¹⁵ CP 66.

¹⁶ CP 115-116.

¹⁷ CP 118.

had no objective findings, her ROM was full and only subjective complaints were given.

Mr. Watson did not respond until five months later when on January 18, 2008, he sent another letter again demanding policy limits.¹⁸ Ms. Wicks responded in a January 24, 2008 letter where she again reviewed Appellant's sporadic medical treatment, but increased her offer to \$3,655 in an attempt to settle the claim.¹⁹

C. APPELLANT INTENTIONALLY DID NOT NOTIFY MS. WICKS, THE UM ADJUSTER, THAT THE APPELLANT WAS FILING A THIRD PARTY LAWSUIT AGAINST THE JOSLINS.

On March 24, 2008, Mr. Watson had a lawsuit filed on Appellant's behalf against the Joslins in Pierce County.²⁰ On the very same day, he sent a letter to Ms. Wicks formally demanding UM Arbitration "... under the provisions of Progressive's policy."²¹ Mr. Watson deliberately did not tell Ms. Wicks that he had filed a lawsuit against the Joslins. Indeed, Mr. Watson never informed Ms. Wicks

¹⁸ CP 120-121.

¹⁹ CP 122-123.

²⁰ CP 1, 3.

²¹ Mr. Watson made this demand even though Progressive's policy required that both Progressive and Appellant agree to arbitration. Mr. Watson's further stated in his letter that Progressive was required to serve a Notice of Motion to Stay Arbitration within 20 days or it could not contest arbitration. This is an incorrect statement of the law. *Fincher v. MOE*, 100 Wash. App. 649, 998 P.2d 332 (2000).

about this lawsuit against the third-party tortfeasor at any time before the Default Judgment was entered three months later.

Ms. Wicks promptly responded to Mr. Watson's letter. In her April 2, 2008 letter, she objected to having the matter decided by arbitration, and informed Mr. Watson that Progressive wanted the issue decided in a court of law. Her letter concluded:

If you have any comments or questions, please feel free to contact me. After you have instituted court proceedings and have provided me with a copy of the summons and complaint, I will refer this claim to counsel for a defense.

Mr. Watson therefore knew in early April that Progressive would not agree to arbitrate Appellant's UM claim. Despite knowing this, Mr. Watson never informed Ms. Wicks of the third party lawsuit or provided her with a copy of the Summons and Complaint as she requested.

Mr. Watson did not respond to Ms. Wicks' April 2, 2008 letter, so she sent another letter dated June 11, 2008 where she states, in pertinent part:

I am writing in regards to the above captioned matter. In your last correspondence with us, you had advised Ms. Carbaugh would be filing

a lawsuit on this matter as you had not agreed on our position on value. To date we have not yet received any further correspondence, nor have we received service of process on this matter.

If Ms. Carbaugh will be pursuing her claim through litigation, we ask that you forward us a copy of any summons and complaint she has filed on this matter, so that we can handle it accordingly.

Mr. Watson did not respond to this letter, and did not provide Ms. Wicks' with a copy of the Summons and Complaint filed against the Joslins.

D. THE ONLY "NOTICE" APPELLANT GAVE OF THE THIRD PARTY LAWSUIT WAS TO MS. IBANEZ, THE PIP ADJUSTER.

As noted, Mr. Watson purposely did not notify Ms. Wicks, the UM claim representative, that he filed a lawsuit against the Joslins. On March 24, 2008, the same date he filed the third-party lawsuit and sent the letter to Ms. Wicks demanding arbitration, he had his legal assistant send a letter to Ms. Ibanez, the PIP claim representative, which provided:

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Dear Ms. Ibanez:

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 Pierce County Superior Court.

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

Mr. Watson took extraordinary measures to document that this letter to Ms. Ibanez was mailed. On March 24, 2008, his legal assistant prepared a Declaration of Mailing.²² His office also obtained a post office receipt showing that the letter was mailed.²³

When Ms. Ibanez received this letter, the PIP file had been inactive for over a year and, in fact, had already been forwarded to Progressive's Subrogation Department.²⁴ She provided Mr. Watson with a copy of the PIP ledger as requested.²⁵ She understandably did not do anything else. While she had 15 years experience as a PIP

²² CP 61.

²³ CP 62.

²⁴ CP 65.

²⁵ CP 66.

adjuster, she had never worked as a UM adjuster²⁶ and did not know the potential impact to Progressive's UM insurance by Appellant filing a lawsuit against the Joslins.²⁷ Moreover, she did not know that Mr. Watson had intentionally failed to notify Ms. Wicks of the third party claim.²⁸ In any event, she was prohibited from having *ex parte* communications with Ms. Wicks.²⁹

The Joslins did not respond to the lawsuit and Plaintiff obtained an Order of Default on April 30, 2008,³⁰ and a Default Judgment on July 22, 2008 for \$150,000.³¹

In February of 2008, the PIP file was sent to Progressive's Subrogation Department in Ohio.³² The Subrogation Department, unaware of Appellant's lawsuit against the Joslins, filed its own lawsuit against them in April of 2008.³³

²⁶ CP 64.

²⁷ CP 66.

²⁸ CP 66.

²⁹ CP 66, 67.

³⁰ CP 15.

³¹ CP 47-49.

³² CP 65.

³³ CP 101.

E. PROGRESSIVE'S MOTION TO INTERVENE AND SET ASIDE THE DEFAULT JUDGMENT.

Once Ms. Wicks learned that Appellant had obtained a Default Judgment, she immediately retained counsel, who sent a letter to Mr. Watson asking him to acknowledge that Progressive would not be bound by the Default Judgment.³⁴ Mr. Watson responded by taking the position that Progressive was bound.³⁵

Progressive moved to intervene in the Joslin lawsuit and moved to set aside the Default Judgment. The Court Commissioner granted both motions.³⁶ Appellant filed a Motion for Revision, a de novo review by the trial court. The trial court independently reviewed Progressive's Motions and granted them.^{37 38}

III. ISSUES

- 1. Did the trial court abuse its discretion in granting Progressive's Motion to Intervene?**
- 2. Did the trial court abuse its discretion in setting aside the Default Judgment?**

³⁴ CP 56, 57.

³⁵ CP 59.

³⁶ CP 220-221.

³⁷ CP 225-6.

³⁸ The only change the court made in the Motion for Revision was to allow Appellant to recover attorney's fees for obtaining the Order of Default.

IV. ARGUMENT

A. APPELLANT'S ACTIONS ON MARCH 24, 2008 WAS A SCHEME TO TRY TO BIND PROGRESSIVE TO A DEFAULT JUDGMENT OBTAINED AGAINST THE JOSLINS.

Appellant's actions on March 24, 2008, can only be explained in light of the Supreme Court's decision in *Lenzi v. Redlands*, 140 Wn.2d 267, 996 P.2d 903 (2000). In *Lenzi*, the Supreme Court held that a UM insurer who is given timely notice that its insured has sued the third party tortfeasor must intervene in that lawsuit. Otherwise, the insurer is bound by the amount of the judgment against the third party tortfeasor, even a default judgment.

On March 24, 2008, Appellant knew that Progressive disagreed with her as to the value of her claim and would not pay policy limits. Her only apparent recourse was to litigate with Progressive unless she could bind Progressive to a judgment she obtained against the Joslins. Appellant, through her attorney, Mark Watson, devised a scheme to try to bind Progressive. Appellant knew that the Joslins were uninsured and therefore unlikely to appear or

defend any lawsuit filed against them. On March 24, 2008, Appellant filed a lawsuit against them in Pierce County.

On the very same day, Mr. Watson sent a letter to Ms. Wicks demanding arbitration of the UIM claim, even though the policy did not require it. He deliberately did not inform her that he was filing the lawsuit against the Joslins because he knew that Ms. Wicks, involved with UM claims, would know that Progressive would be bound by a judgment in the third party lawsuit, and it therefore would intervene.

Instead of telling Ms. Wicks of the third party lawsuit, Mr. Watson had his legal assistant send a letter to Ms. Ibanez, the PIP adjuster. **This letter was also sent on March 24, 2008.** This letter, in an off-hand manner, told Ms. Ibanez that a lawsuit had been filed against the Joslins while requesting a copy of the PIP ledger. At this time, the PIP file had been deactivated for over one year and Ms. Ibanez was not involved at all with the claim.

Mr. Watson gambled that Ms. Ibanez would not understand the potential impact to Progressive by the filing of the third party lawsuit. While Ms. Ibanez was an experienced PIP adjuster, she did

not have any experience in UM claims. Even if she had such knowledge, Ms. Ibanez had no way of knowing that Mr. Watson deliberately did not tell Ms. Wicks of the Joslin lawsuit. Further, she was forbidden to have any *ex parte* contact with Ms. Wicks.

B. PROGRESSIVE BROUGHT THE MOTION TO INTERVENE AND TO SET ASIDE THE DEFAULT JUDGMENT BASED UPON THE SUPREME COURT'S RECOMMENDATION IN LENZI v. REDLANDS.

In *Lenzi v. Redlands, supra*, our Supreme Court held that an UM insurer is bound by the Default Judgment which its insured obtained against a third party tortfeasor so long as the insurer received timely and adequate notice of the lawsuit.³⁹

Justice Talmage, writing the majority opinion, strongly suggested that Redlands, the insurer, should have moved to intervene in the third-party lawsuit and moved to set aside the Default Judgment. He writes on page 608:

Redland could have formally intervened upon notice of the filing of the lawsuit and possibly even after entry of the default judgment. [FN 8]

³⁹ In *Lenzi*, the insurer was provided a copy of the summons and complaint against the third party tortfeasor. Presumably, the UM/UIM claim representative received the notice of the lawsuit, as this was not a disputed issue.

In Footnote 8, the court noted that Default Judgments are precarious and not favored because, “it is the policy of the law that controversies be determined on the merits rather than by default.”

The court goes on to state:

Had Redland 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. CR 55(c)(1) sets forth a rather lenient rule for setting aside default:

For good cause shown and upon such terms as the court deems just, the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b). Redland did not even try to cure its problem in the trial court.

Id. at p. 609.

Progressive strongly believes that it is not bound by the Default Judgment because it did not receive adequate, timely notice of the Joslin lawsuit. Despite this strong belief, Progressive took the Supreme Court’s recommendation and brought the Motions to Intervene and to Set Aside the Default Judgment.

C. THE ISSUE OF WHETHER PROGRESSIVE IS BOUND BY THE DEFAULT JUDGMENT IS NOT BEFORE THIS COURT.

Appellant devotes nine pages in her brief arguing that Progressive is bound by the Default Judgment obtained against the Joslins.⁴⁰ This issue was not before the trial court, and the trial court did not rule on it. The long-standing rule is that the Appellate Court will not review theories other than those which were presented to the trial court. *Matthias v. Lehn and Fink Products Corp.*, 70 Wn.2d 541, 424 P.2d 284 (1967); *Patnode v. Edward N. Geto & Associates*, 26 Wash. App. 463, 613 P.2d 804 (1980).

Since this issue was not before the trial court, it should not be considered on appeal. The only issues are whether the trial court abused its discretion in granting the Motion to Intervene and to Set Aside the Default Judgment.

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D. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN GRANTING PROGRESSIVE'S MOTION TO INTERVENE.

1. The Standard of Review is Abuse of Discretion.

This court applies the “abuse of discretion” standard in deciding whether the trial court erred in granting Progressive’s Motion to Intervene. *In Re Recall Charges Against Seattle School District No. 1*, 162 Wn.2d 501, 173 P.3d 265 (2007). An abuse of discretion occurs:

... [i]f there is a clear showing that the exercise of discretion was manifestly unreasonable, based on untenable grounds, or based on untenable reasons.⁴¹

2. The Trial Court did not Abuse its Discretion.

Civil Rule 24(a)(2) allows one to intervene in an ongoing lawsuit as a matter of right. It provides in pertinent part:

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: ... (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

⁴⁰ Appellant’s Brief, pp. 16-24.

⁴¹ *Morman v. Butcher*, 126 Wn.2d 36, 40, 891 P.2d 725 (1995).

the applicants interest is adequately represented by existing parties.

This rule allows intervention as a matter of right if the following requirements are satisfied:

(1) The applicant has an interest relating to the transaction which is the subject of the action, and the disposition of the action may as a practical matter impair his ability to protect his interest, and

(2) The applicant's interest is not adequately represented by the existing party, and

(3) The application for intervention is timely.

Appellant does not contend that the first two requirements are not satisfied in this case. She does contend that Progressive failed to timely intervene.

A Motion to Intervene can be timely, even after a judgment has been entered. *Olver v. Fowler*, 131 Wash. App. 135, 126 P.3d 69 (2006); *Kreidler v. Eikenberry*, 111 Wn.2d 828, 766 P.2d 438 (1989):

Under CR 24(a) an intervener must make 'timely application.' After a judgment is entered, intervention requires a strong showing considering all circumstances, including prior notice, prejudice to the other parties, and the length of and reasons for delay. **The rule,**

however, is liberally construed to favor intervention. (Emphasis added).

Olver v. Fowler, supra at p. 139.

These factors support the trial court's decision to allow Progressive to intervene. Progressive did not receive adequate prior notice of the Joslin lawsuit. As explained in detail above, Appellant deliberately did not notify Ms. Wicks that a third party lawsuit had been filed. This lack of notice to Ms. Wicks is the reason why Progressive did not intervene prior to the entry of the Default Judgment. Once Progressive learned of the third party lawsuit, it took immediate steps to intervene and set aside the Default Judgment which had been entered.

The remaining factor is the prejudice, if any, to Appellant if Progressive was allowed to intervene. The "prejudice" refers only to the difficulties caused to Appellant in presenting her case solely because of the delay, and not the additional work resulting from having to deal with Progressive intervening. *Columbia Gorge Audubon Society v. Klickitat County*, 98 Wash. App. 618, 989 P.2d 1260 (1999). In the present case, Appellant will not be prejudiced in

presenting her case on damages by allowing Progressive to intervene.
This factor also favors intervention.

Since the factors for intervention were satisfied, this court cannot say that the trial court's decision in allowing Progressive to intervene was manifestively unreasonable, or based upon untenable grounds, or on untenable reasons. The trial court's decision should be upheld.

E. PROGRESSIVE HAS STANDING TO SET ASIDE THE DEFAULT JUDGMENT ONCE THE COURT GRANTED ITS MOTION TO INTERVENE.

An entity has standing if it has

... some protectable interest that has been invaded or is about to be invaded

Orion Corp. v. State, 103 Wn.2d 441, 693 P.2d 1369 (1985).

Progressive has standing in this case to move to set aside the Default Judgment because it could be potentially bound by the amount of that Default Judgment in Appellant's UM claim.

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**F. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION
IN SETTING ASIDE THE DEFAULT JUDGMENT.**

1. The Abuse of Discretion Standard Applies.

This court uses the “abuse of discretion” standard in determining whether the trial court erred in ruling on a motion to set aside a Default Judgment. *Duryea v. Wilson*, 135 Wash. App. 233, 144 P.3d 318 (2006). However, the reviewing court is more likely to find an abuse of discretion when the trial court **refuses** to vacate a Default Judgment. As stated by Division II in *Duryea v. Wilson*, *supra* at 237-8:

As we have previously held ‘[d]efault judgments are generally disfavored in Washington based on an overriding policy which prefers that parties resolve disputes on the merits.’ While we review the denial of the motion to vacate for abuse of discretion, ‘[o]ur primary concern’ is to ensure that the trial court’s decision was ‘just and equitable.’ We are more likely to find an abuse of discretion and to reverse a trial court decision refusing to vacate a default judgment than one that sets aside such a judgment. (Citations omitted).

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2. **Four Factors are Considered in Deciding Whether to Set Aside a Default Judgment.**

In *White v. Holmes*, 73 Wn.2d 348, 352, 438 P.2d 591 (1968), the Supreme Court set forth in the following factors to be considered in deciding a Motion to Set Aside a Default Judgment:

The discretion which the trial court is called upon to exercise in passing upon an appropriate application to set aside a default judgment concerns itself with and revolves about two primary and two secondary factors which must be shown by the moving party. The factors are: (1) That there is substantial evidence extant to support, at least prima facie, a defense to the claim asserted by the opposing party; (2) that the moving party's failure to timely appear in the action, and answer the opponent's claim, was occasioned by mistake, inadvertence, surprise or excusable neglect; (3) that the moving party acted with due diligence after notice of entry of the default judgment; and (4) that no substantial hardship will result to the opposing party. *Hull v. Vining, supra; Chehalis Coal Company v. Laisure*, 97 Wash. 422, 166 P. 1158 (1917); *Yeck v. Dept. of Labor & Industries, supra; Hinz v. Northland Milk and Ice Cream Co.*, 237 Minn. 28, 53 N.W.2d 454 (1952); *Whitledge v. Anderson Air Activities*, 276 S.W.2d 114 MO (1955).

In *White, supra*, there was a misunderstanding between the Defendant and his insurance company as to whether the insurance company would provide an attorney to represent him. Because of

this misunderstanding, no timely appearance or answer was filed and a Default Judgment was entered. The Defendant moved to set aside the Default and the trial court denied the motion. The Washington Supreme Court reversed the order and remanded the cause for trial on the merits. The court began its analysis by expressing the principle that resolution of cases on the merits, rather than by default, is favored in the law:

[1] At the outset, we pause to note that a proceeding to vacate or set aside a default judgment, although not a suit in equity, is equitable in its character, and the relief sought or afforded is to be determined in accordance with equitable principles and terms. *Roth v. Nash*, 19 Wn.2d 731, 144 P.2d 271 (1943). Thus, we early took occasion to endorse the proposition that in such proceedings, the court, in passing upon an application which is not manifestly insufficient or groundless, should exercise its authority liberally, as well as equitably, to the end that substantial rights be preserved and justice between the parties be fairly and judicially done. *Hull v. Vinging*, 17 Wash. 352, 49 P. 537 (1897).

White v. Holm, supra at 351.

3. ***Appellant has Waived the First Primary Factor, Lack of a Prima Facie Defense by not Raising it Before the Trial Court.***

The uniform rule is that issues and arguments not raised in a summary judgment hearing at the trial court level cannot be

considered for the first time on appeal. *Save-Way Drug, Inc. v. Standard Investment Company*, 5 Wash. App. 726, 727, 490 P.2d 1342 (1971); *Herberg v. Schwartz*, 89 Wn.2d 916, 925, 578 P.2d 17 (1978); *Smith v. Shannon*, 100 Wn.2d 26, 666 P.2d 351 (1983). This rule is succinctly stated in *Ashcroft v. Wallingford*, 17 Wash. App. 853, 860, 565 P.2d 1224 (1977):

However, at no time did plaintiff present to the trial court its contention that comparative negligence was applicable. A party has the obligation to assert its claims, legal position, and arguments to the trial court to preserve the alleged error on appeal. Issues not raised in the summary judgment cannot be considered for the first time on appeal.

Similarly, in *Deacy v. College Life Insurance Company*, 25 Wash. App. 419, 425, 607 P.2d 1239 (1980), the court states:

The *Deacy*'s argue the payment by David of the \$10 constituted substantial performance warranting imposition of liability on *College Life*. This theory was not presented to the trial court. Issues not raised in the hearing for summary judgment cannot be considered for the first time on appeal. We, therefore, do not consider this issue. (Citations omitted).

The rationale for this rule is:

The reason for this rule is to afford the trial court an opportunity to correct any error, thereby avoiding any unnecessary appeals and retrials.

Smith v. Shannon, supra at p. 37.

In the present case, Appellant never raised at the trial court, in either her brief, or orally argued, that Progressive's Motion should be denied because it did not have a meritorious defense to Appellant's claim. Indeed, Progressive, in its Reply Brief in Support of its Motion to Intervene and to Set Aside the Default Judgment, specifically noted this wherein it states:⁴²

1. Plaintiff does not dispute the existence of a prima facie defense.

The first primary factor is whether a prima facie defense exists to plaintiff's claim. The purpose of this requirement is to avoid a useless trial, which would occur if defendant could not produce facts sufficient to produce a different result. *Griggs v. Averbach Realty*, 922 Wn.2d 576, 583, 589 P.2d 1289 (1979).

Plaintiff, in her response, does not dispute the existence of Progressive's defense to her claim of damages which is set forth in Ms. Wick's

⁴² CP 155-156.

Declaration. This factor favors setting aside the Default Judgment.

Appellant has raised this issue for the first time on appeal. It is untimely and should not be considered.

4. *A Prima Facia Defense Exists on Damages.*

Even if the court considers this factor, a prima facia defense exists to Appellant's damage claim. This requirement is not strictly applied when the case is new and discovery has not yet commenced. *Calhoun v. Merit*, 46 Wash. App. 616, 731 P.2d 1094 (1986). In *Calhoun*, the Defendant rear-ended the Plaintiff's vehicle in June of 1984 and the Plaintiff subsequently filed a lawsuit for bodily injury allegedly sustained in the accident. The Plaintiff obtained a default judgment on August 6, 1985 for approximately \$55,000 in damages after the Defendant failed to appear or answer. On August 23, 1985, the Defendant's attorney entered a Notice of Appearance and on September 25, 1985, moved to set aside the Default Judgment. In support of the Defendant's motion, the Defendant's insurance adjuster submitted an affidavit stating as follows:

During the course of my investigation of this claim during 1984 and the first part of 1985, I

received facts which would indicate to me that this claim has a value far less than the judgment entered in excess of Fifty-Five Thousand Dollars (\$55,000). As to the issue of damages, it is my personal belief that the defendant has a meritorious defense to the amount entered and that a jury or arbitrator would award far less than this amount.

Calhoun v. Merit, supra at p. 618.

The trial court refused to set aside the Default Judgment and Defendant appealed. The Court of Appeals overturned holding that the trial court abused its discretion in failing to set aside the Default Judgment. It found that despite the conclusory nature of the insurance adjuster's affidavit, the Defendant had a meritorious defense on the issue of damages. The court recognized both the subjective nature of general damages in a bodily injury action and that the Defendant was entitled to develop its defense through discovery, stating on page 620:

The factors set out in *White*, including whether the defendant has presented a prima facie defense to the claim, must be applied in the context of the general rules cited above. That is, default judgments are not favored, motions to vacate default judgment are essentially equitable proceedings, and the overriding concern of the court is to do justice. *Griggs*, at 582. In this

context, we note that development of a defense to the damages would require the examination of Mr. Calhoun by a defense expert. Here, the default was entered before any such discovery could take place. Moreover, presenting a defense to damages for pain and suffering is always complicated by the subjective as opposed to the objective nature of such damages. Given these circumstances, it would be inequitable and unjust to deny the motion to vacate the damage portion of the judgment on the grounds that Mr. Merit did not present a prima facie defense.

In the present case, Progressive has had no opportunity to conduct formal discovery or develop any defenses on the issue of damages. It had no opportunity to obtain all of Appellant's medical records (including pre-accident records), depose Appellant, or have her undergo an independent medical exam.

Progressive did have Appellant's medical records provided by her attorney. These revealed that Appellant's chiropractor noted after four visits that Appellant had improved and only had intermittent, minor symptoms.⁴³ Appellant then had two significant gaps in treatment of two and six months.⁴⁴ Ms. Wicks carefully reviewed

⁴³ CP 77.

⁴⁴ CP 29, 77.

these records and formed her opinion that Appellant's claim was worth significantly less than \$25,000.⁴⁵

Based on the above facts, the trial court did not abuse its discretion in finding that a valid defense to damages exists.

a. Little v. King is Distinguishable.

Appellant cites *Little v. King*, 160 Wn.2d 696, 161 P.3d 345 (2007) as authority that Progressive has not established a prima facie case defense. This case is factually distinguishable. In *Little*, the Defendants presented only a declaration from an insurance adjuster that he had reviewed Plaintiff's medical records and found reports of pre-existing conditions. The Supreme Court held that this was insufficient to create a prima facie defense on damages because there was no evidence that the pre-existing conditions were causing Plaintiff's current symptoms.

This is factually distinguishable from the present case where Appellant's treatment records following the accident show minor symptoms after only a short period of time following the accident, and then gaps in treatment. Moreover, Ms. Wicks offered her

⁴⁵ CP 101.

opinion as to the value of Appellant's claim which was not present in *Little*.

5. **The Trial Court did not Abuse its Discretion in Finding that Progressive's Failure to Answer the Complaint was Due to Excusable Neglect.**

The second primary factor to consider is whether Progressive's failure to intervene and answer the Complaint was a result of mistake, inadvertence, or excusable neglect. This is also mandated by CR 60(b)(1) and (9) which provides for setting aside a judgment for many reason, including any of the following: "mistakes, inadvertence, surprise, excusable neglect ... unavoidable casualty or misfortune."

As noted above, Progressive did not intervene and file an Answer to the Complaint because Appellant failed to give it timely adequate notice of the lawsuit. Mr. Watson purposely did not notify Ms. Wicks, Progressive's UM claims representative, of the third-party lawsuit. Instead, he informed Ms. Ibanez, who was not actively involved in the case, and who, at Appellant's demand, could not communicate with Ms. Wicks, the UM adjuster. The trial court did not abuse its discretion in finding this requirement satisfied.

6. *The Trial Court did not Abuse its Discretion in Finding that Progressive's failure to Answer the Complaint was Due to Mr. Watson's Sharp Practices.*

CR 60(b)(4) provides that a judgment can be set aside because of fraud, misrepresentation or other misconduct. This rule states:

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

...

(4) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

...

In *Morin v. Burriss*, 160 Wn.2d 745, 161 P.3d 956 (2007) our Supreme Court recently held that a Default Judgment can be set aside under this rule where there has been fraud, misrepresentation, or other misconduct by Plaintiff's counsel.

RCW 48.01.030 provides:

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

providers and their representatives rests the duty of preserve inviolate the integrity of insurance.

Mr. Watson, as Appellant's representative, was required to practice honesty and abstain from deception. He violated this standard by his actions on March 24, 2008 and thereafter. He deliberately attempted to deceive Ms. Wicks about the filing of the third party lawsuit by demanding arbitration when arbitration was not required under the policy. Instead of informing Ms. Wicks of the third party lawsuit, he sent notice to Ms. Ibanez, who was not actively involved in the case, and who had been forbidden to communicate with Ms. Wicks. He further did not respond to Ms. Wicks' request for copies of any filed Summons and Complaint.

These sharp practices violate RCW 48.01.030 and constitute misconduct under CR 60(b)(4). The Default Judgment should be set aside on this basis.

V. CONCLUSION

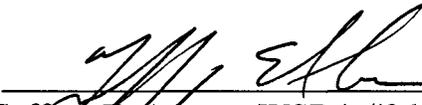
Both the Court Commissioner and the trial court independently determined that Progressive's Motion to Intervene and Set Aside the Default Judgment should be granted. No abuse of

discretion occurred because tenable grounds exist for this decision.

The Trial Court's decision should be upheld.

Respectfully submitted, this 13 day of August, 2009.

MURRAY, DUNHAM & MURRAY

By: 

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of Attorneys for Respondent

CERTIFICATE OF SERVICE

I, Dorothy Brooks, hereby declare under the penalty of perjury, under the laws of the State of Washington, that the following is true and correct.

I certify that on the 14th day of August, 2009, I caused the original of Respondent's Brief to be filed with the Clerk of the Court, Court of Appeals by legal messenger. I also caused copies to be served on all counsel as follows:

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