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COURT OF APPEALS DIVISION NO. 2
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON

BY  DEPUTY

ADRIAN TEPEI, ANGELICA TELESCU (nee TEPEI), BENJAMIN
TEPEI, CAMELIA COLCER (nee TEPEI), DAN TEPEI and
DINA TEPEI,

Appellants,

v.

THE INSURANCE CORPORATION OF BRITISH COLUMBIA,

Respondent.

BRIEF OF APPELLANTS

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INTRODUCTION

For over 30 years, the Washington courts have repeatedly affirmed the rule that underinsurers who have both notice and an opportunity to intervene in third-party tort litigation involving their insureds will be bound by the determinations of liability and damages made in those tort proceedings. Often referred to as the *Finney/Fisher* rule, the underlying principle implicates both public and private interests in furtherance of the notion that no litigant seeking relief should be compelled to prove his case twice.

The six Tepei appellants (“Tepeis”) were injured in a single vehicle rollover accident in Lewis County in 1996. Respondent Insurance Corporation of British Columbia (“ICBC”) denied the liability of the vehicle’s driver, Petru Tepei, despite its awareness of significant evidence to the contrary. ICBC’s third-party liability denial foreclosed consensual resolution of any injury claims in British Columbia and compelled the Tepeis to file suit in the courts of Lewis County as a precondition to receiving underinsurance benefits. Seven years of litigation ensued, during which ICBC both provided a defense to Petru Tepei and directed a host of litigation activities targeted towards limiting ICBC’s exposure to both third-party and first-party claims.

The Lewis County action concluded with a jury verdict in April 2004 that held Petru Tepei solely responsible for the collision, and awarded the Tepeis over \$9,100,000 in damages. Nearly six years later, underinsurance benefits under the Tepeis’ first-party coverage with ICBC have yet to be paid. Despite a quantum of involvement in the Lewis County tort litigation far exceeding that required to satisfy the *Finney/Fisher* rule, ICBC has refused to abide by the 2004 verdict in subsequent underinsurance arbitration proceedings.

The Lewis County court has concluded that it lacks personal jurisdiction over ICBC to remedy its refusal to comply with *Finney/Fisher*. The Tepeis seek review of that decision.

ASSIGNMENTS OF ERROR

- 1. Did the trial court err in concluding that it lacked personal jurisdiction over ICBC sufficient to grant the Tepeis *any* measure of substantive or declaratory relief arising from ICBC’s refusal to honor determinations of liability and quantum made in a Lewis County tort action in which ICBC was actively involved as third-party and first-party insurer?

- 2. Should the trial court’s April 20, 2009 order of judgment awarding ICBC attorney’s fees and costs pursuant to RCW 4.28.185(5) be vacated, owing to the error committed by the trial court with respect to issue #1, above?

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STATEMENT OF THE CASE

A. Factual Background¹

1. The 1996 Accident and Applicable Insurance Coverage

On October 27, 1996, the Tepeis were involved in a single-vehicle rollover accident while traveling in the northbound lanes of Interstate 5 near Onalaska, Lewis County, Washington. Petru Tepei was driving the family's 1991 Toyota minivan in the vicinity of milepost 68 when he heard a loud noise followed by vibrations coming from the rear of the vehicle. Petru Tepei continued driving for approximately 15 seconds at highway speed before losing control of the vehicle. The vehicle flipped and rolled multiple times before coming to rest against the median barrier separating the lanes of Interstate 5. The Tepeis collectively sustained a variety of personal injuries arising from the accident. CP at 836-37.

As residents of British Columbia, both Petru Tepei and the Tepei family were insured by ICBC, British Columbia's statutorily-created provincial auto insurer. Petru Tepei carried third-party liability insurance coverage written by ICBC in the amount of CDN\$200,000 per occurrence. The Tepeis were also covered by first-party underinsurance coverage ("UMP") written by ICBC which provided maximum benefit limits of CDN\$1,000,000 per person. CP at 837.

The Tepeis obtained counsel in British Columbia to assist them in pursuing claims for their injuries under applicable ICBC insurance policies. ICBC was notified that the Tepeis would be pursuing claims under both third-party and first-party coverages. ICBC appointed a

¹ Many of the facts expressed herein have been admitted by the parties. The factual matrix of the events leading up to this litigation were extensively outlined in the Tepeis' initial complaint for declaratory relief. CP at 1437-47. ICBC admitted many of these pre-2006 "procedural" facts in its answer. CP at 1261-66. Subsequently, the trial court granted leave to the Tepeis to amend their answer. RP (10/24/08). The amended complaint, which was reviewed by the trial court prior to granting leave, repeated many of the same admitted facts from the original complaint/answer exchange between the parties. CP at 835-47. As the Tepeis contend this court must treat the factual assertions contained in the amended complaint as true for the purposes of review, this brief's internal citations refer to that document.

single adjuster, Dan Burnett (“Burnett”), to evaluate and adjust all claims arising from the accident under both coverages. CP at 838.

2. *Initial Investigation and ICBC’s Denial of Insured’s Liability*

Initial scene investigation disclosed that the right rear tire on the Tepei minivan had failed. CP at 837. ICBC retained a tire investigator to determine the cause of the tire failure. Although the cause of the accident was unclear pending professional analysis, internal memos reflected that as early as February 14, 1997, ICBC recognized that the damages sustained by the Tepeis would exhaust Petru Tepei’s third-party liability coverage of CDN\$200,000, and thus expose ICBC to first-party claims under UMP coverage. CP at 355.

In April of 1997, ICBC was informed by its investigator that evidence of *both* tire underinflation and the presence of a “foreign substance” were found in the subject tire. CP at 357. Despite receiving expert opinion that a factor within Petru Tepei’s control (underinflation) was present in the tire, Burnett informed the Tepeis and their counsel that ICBC would be denying Petru Tepei’s liability for the accident on the basis of a manufacturing defect. CP at 838.

ICBC’s April 1997 denial of Petru Tepei’s liability largely dictated the process the Tepeis were required to follow to obtain compensation for their injuries. Under relevant British Columbia law, a first party UMP claim cannot be advanced by a claimant prior to the resolution of all outstanding third party liability claims, to the satisfaction of ICBC. To be eligible for UMP benefits, claimants must establish that their injuries were occasioned by an “underinsured motorist”. The process of “proving up” the UMP claim, commonly referred to as “perfection”, requires either (1) trial to judgment in the underlying action, or (2) agreement from ICBC that the claimants’ damages were caused by an “underinsured

motorist”. CP at 837-38. ICBC’s denial of Petru Tepei’s liability foreclosed the second option, thus compelling the Tepeis to initiate litigation to prove whether they been injured by an “underinsured motorist”. CP at 838.

3. *Pre-litigation Activities in Washington – The Advance Loan Agreement*

The Tepeis retained Washington counsel capable of representing them in anticipated litigation in Lewis County Superior Court (“the Tort Action”). Prior to filing the Tort Action, ICBC and the Tepeis engaged in over a year’s worth of negotiations, both in Washington and British Columbia, to explore whether it would be possible for ICBC to “loan” the Tepeis a portion of Petru Tepei’s third party liability insurance proceeds in advance of judgment. CP at 839-40. Burnett corresponded with Seattle attorney Mark P. Scheer (“Scheer”) as early as April 30, 1998 to set up a meeting in Seattle to discuss options related to settlement of Petru Tepei’s third party tort liability. CP at 336. At least one subsequent meeting related to discussions surrounding the ALA was held in Bellingham, with Burnett, Scheer and the Tepeis’ counsel in attendance. CP at 381. In June of 1998, Scheer advised the Tepeis’ counsel that ICBC was open to a cooperative effort aimed at having liability for the accident assigned to the tire manufacturer(s). CP at 839. The possibility of a loan agreement and covenant not to execute (commonly referred to as a “Mary Carter” agreement) was one of the options discussed between the parties.

On October 28, 1998, Scheer sent Burnett a copy of a draft “advance loan agreement” (“ALA”) proposal for ICBC’s review. CP at 320-26. The attached cover letter indicates that the draft ALA was Scheer’s work product, which he was forwarding to Burnett/ICBC for review “[p]rior to sending the agreement to [the Tepeis’ counsel]”. CP at 320.

Counsel for the Tepeis eventually received the draft ALA, reviewed it, and returned it to Scheer with suggested changes. On December 7, 1998, Scheer wrote Burnett commenting on the effect of the Tepeis' proposed changes. CP at 338-353. Scheer concluded that "*the agreement as modified by the plaintiffs does not serve, in our opinion, the interests of Mr. Tepei, although it is not contrary to Mr. Tepei's interests either.*" CP at 338. Scheer urged Burnett to reject the Tepeis' request to convert the ALA into a simple loan by removing the covenant not to execute, stating:

"The language as originally drafted accomplished two different functions.....[t]he second function of the language as we drafted it is that it essentially removed any UMP claim against ICBC by preventing the plaintiffs from pursuing ICBC for any moneys in excess of the \$200,000 policy limits. [Counsel for the Tepeis] recognized this effect and strongly objected at the start of our telephone conference with him about this agreement. From his statements, we believe he will be unwilling to give up his clients' UMP claims unless he gets some money in excess of Mr. Tepei's \$200,000 policy limits."

CP at 339.

Noting that "*[t]he plaintiffs...are likely to insist on maintaining their UMP rights against ICBC*", Scheer suggested a "solution" which would include language in the ALA "*limiting ICBC's liability on an UMP claim to a sum certain (ex: \$100,000). Plaintiffs would have to accept this condition in exchange for getting any money at all.....*" CP at 339.

While the ostensible purpose of Scheer's involvement in drafting the ALA was to protect Petru Tepei from the perils of a Washington tort judgment in excess of his CDN\$200,000 insurance limits, correspondence from Scheer to Petru Tepei informing him of the ALA and enclosing a copy for his review was not sent until January 13, 1999, several

months after negotiations on the ALA had begun and some ten weeks after Burnett had first received the ALA for review and comment. CP at 328-334.

In July of 1999, the parties reached agreement on the terms of the ALA. Relevant provisions included:

- A payment of CDN \$150,000 from ICBC to the Tepeis;
- A denial of liability by Petru Tepei;
- A covenant not to execute any judgment entered against Petru Tepei in excess of his CDN\$200,000 third party liability insurance limits;
- A clause requiring the Tepeis to repay ICBC the lesser of (a) 10% of any tort judgment or (b) the full cost of Petru Tepei's defense in the event that "entities other than Petru Tepei" were found at fault for the Tepeis' damages.

CP at 362-372

The ALA was subject to the approval of Lewis County Superior Court. The agreement also required approval from the three Washington guardians ad litem who had been appointed by the Lewis County Superior Court to safeguard the interests of the three minor and/or incapacitated plaintiffs. CP at 366.

ICBC was expressly identified as a "party" to the ALA in its recitals. CP at 362 ("THE PARTIES TO THIS AGREEMENT ARE:.....Petru Tepei and his insurance carrier, the Insurance Corporation of British Columbia, hereinafter collectively referred to as the "loaners"). The recitals included an admission that "[a]ll parties have been represented by counsel throughout the negotiation of this agreement...." CP at 363 (¶ 8).

Petru Tepei signed the ALA. CP at 366. Scheer signed the ALA in his capacity as “attorney for Petru Tepei”. CP at 368. ICBC, through its “Head Office B[odily I[njury] Manager” Patrick Adams, signed the ALA in its own independent capacity. CP at 367.

4. ICBC’s Involvement in the Tort Action

The Tort Action was filed in Lewis County Superior Court in August of 1999, naming Petru Tepei, Michelin North America (“MNA”) and Uniroyal as defendants and alleging claims under negligence and product liability theories. CP at 840.

In late 2000, MNA filed a motion to dismiss the Tort Action to British Columbia under the doctrine of *forum non conveniens*. The Tepeis and Petru Tepei opposed MNA’s motion. In or about May of 2001, MNA’s motion to dismiss was denied by the Lewis County Superior Court. CP at 840-41.

In June 2003, MNA filed a motion to apply British Columbia law to issues of (1) product liability, (2) seatbelt nonuse by the parties, and (3) assessment of non-economic damages. The Tepeis and Petru Tepei opposed MNA’s motion. In or about September of 2003, MNA’s motion on choice of law was denied by the Lewis County Superior Court. CP at 841.

In the summer of 2003, discovery depositions in the Tort Action began in earnest. Despite the fact that Petru Tepei was not contesting the damages sustained by the Tepeis in the accident, Scheer and his firm attended and/or participated in over twenty-five damages related discovery depositions leading up to the trial of the Tort Action. CP at 841. In collateral proceedings under oath in British Columbia, Burnett has acknowledged that he instructed Scheer to attend these depositions and “collect information with respect to damages” on ICBC’s behalf. CP at 404.

In February of 2004, ICBC directed Scheer to file a motion on Petru Tepei's behalf seeking to bifurcate the determinations of liability and damages in the Tort Action. CP at 841. The motion was filed despite the fact that Petru Tepei had been fully shielded from liability in excess of CDN\$200,000 by virtue of the terms contained in the ALA. CP at 365.

At all times from the filing of the Tort Action in 1999 through the 2004 trial, ICBC had notice and knowledge of all relevant litigation events, as it was actively involved in directing Scheer's defense of Petru Tepei. CP at 842.

At no time did ICBC move the Lewis County Superior Court for permission to intervene in the Tort Action in its capacity as first party underinsurer for the Tepeis. CP at 842.

5. Judgement in the Tort Action and Subsequent Conduct by ICBC

The Tort Action commenced in Lewis County Superior Court on March 1, 2004. MNA contested both liability and damages; consistent with the recitals contained in the ALA, Petru Tepei contested liability alone. On April 23, 2004, the jury in the Tort Action found Petru Tepei 100% liable for the accident, and dismissed the product defect claims against MNA and Uniroyal. The jury awarded the Tepeis over US\$9.1 million in compensatory damages, in the following amounts:

-- Adrian Tepei:	\$1,129,271
-- Angelica Telescu (nee Tepei):	\$1,497,266
-- Benjamin Tepei:	\$1,553,921
-- Camelia Colcer (nee Tepei):	\$136,798
-- Dan Tepei:	\$3,605,832
-- Dina Tepei:	\$1,179,991

Judgment against Petru Tepei was entered on August 25, 2004. CP at 842-43.

In August of 2004, the Tepeis presented ICBC with a settlement proposal for their outstanding first party UMP claims. The proposal calculated the benefits owing under the UMP contract using the determinations of liability and damages made in the Tort Action as the “starting point” from which first party contractual benefits were to be calculated. ICBC rejected that proposal. CP at 843.

Relevant British Columbia law required the Tepeis to submit disputes related to UMP entitlement to arbitration. In the arbitration process, ICBC has consistently asserted that as a condition of receiving UMP benefits, the Tepeis must call evidence to prove both causation of their injuries and the amount of their damages to the UMP arbitrator, notwithstanding the fact that these issues were addressed in the Tort Action at a cost to the Tepeis of over US\$350,000. CP at 843. The arbitration process in British Columbia continues to this day.

B. Relevant Procedural Details of the Present Action

The present action was filed in May of 2007. The Tepeis’ initial complaint sought declaratory and injunctive relief related to ICBC’s ongoing attempts to relitigate issues of liability and damages determined in the Tort Action, as well as unspecified substantive relief collateral to any refusal by ICBC to follow such orders of the trial court. CP at 1437-47.

ICBC filed a motion for summary judgment on July 3, 2008. CP at 1312-43. At that time, discovery responses to the Tepeis were outstanding, and the trial court denied ICBC’s motion to enlarge their time for response to discovery until after the summary judgment motion. CP at 1249-50; RP (8/11/08) at 9-10.

On September 12, 2008, the trial court denied the Tepei’s motion to compel more complete discovery from ICBC, granted a protective order to ICBC with respect to

discovery, set over the summary judgment motion of ICBC and granted the Tepeis 30 days to file a motion seeking leave to amend their complaint. RP(9/12/08) at 19; CP at 862-63.

The Tepeis filed a motion seeking leave to amend their complaint on October 10, 2008. CP at 828-30. The proposed language of the amended complaint was submitted to the trial court for its review. CP at 835-847. The trial court granted leave to amend on October 24, 2008. RP(10/24/08).

On November 3, 2008, ICBC filed a motion to dismiss for lack of personal jurisdiction pursuant to CR 12(b)(2). CP at 686-703. The Tepeis responded in opposition to the motion to dismiss on December 1, 2008. CP at 273-303. The Tepeis filed two declarations with significant supporting documentation in support of their responsive motion. *Koehler Dec.*, CP at 304-357; *Samuels Dec.*, CP at 358-493. ICBC filed a reply in support of dismissal on December 8, 2008. CP at 232-272.

On January 20, 2009, the trial court granted ICBC's motion to dismiss for want of personal jurisdiction. CP at 228-29, RP (1/20/09) at 42-47.

Subsequent to the entry of the dismissal order, the trial court allowed for argument on the issue of ICBC's entitlement to attorney's fees and costs pursuant to RCW 4.28.185(5). RP (2/26/09). Judgment was ultimately granted to ICBC for an attorney's fees and costs award in the amount of \$35,659.05, by order dated April 20, 2009. CP at 5-7. This appeal followed.

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ARGUMENT

A. *The trial court erred in concluding that it lacked personal jurisdiction over ICBC sufficient to grant the Tepeis any measure of substantive or declaratory relief.*

The sole issue presented by this appeal is whether the trial court committed reversible error in its January 20, 2009 ruling dismissing the Tepei's action for lack of personal jurisdiction over ICBC. CP at 228-29(order).

1. *Applicable Standards of Review*

In evaluating a motion to dismiss for lack of jurisdiction, the court must review the facts in a light most favorable to the party opposing dismissal. *Access Rd. Bldrs. v. Christenson Elec. Contracting Eng'g Co.*, 19 Wn. App. 477, 481, 576 P.2d 71 (1978). Motions to dismiss under CR 12(b)(2) are treated in the same manner as motions for failure to state a claim under CR 12(b)(6) to the extent that matters outside the pleadings may be presented. If such matters are not excluded by the court, the motion is treated as one for summary judgment under CR 56, thereby permitting dismissal of the party only if no genuine issue of material fact is presented. *Puget Sound Bulb Exch. v. Metal Bldgs. Insulation, Inc.*, 9 Wn. App. 284, 289, 513 P.2d 102 (1973).

If the trial court's inquiry is based on affidavits and discovery "only a prima facie showing of jurisdiction is required" to defeat the motion. *Precision Lab Plastics, Inc. v. Micro Test, Inc.*, 96 Wn. App. 721, 725, 981 P.2d 454 (1999)(quoting *MBM Fisheries, Inc. v. Bollinger Machine Shop & Shipyard, Inc.*, 60 Wn. App. 414, 418, 804 P.2d 627 (1991)). The rationale is that "[a]ny greater burden such as proof by a preponderance of the evidence would permit a defendant to obtain a dismissal simply by controverting the facts established by a plaintiff through his own affidavits and supporting materials." *Data Disc, Inc. v. Sys.*

Tech. Assoc., 557 F.2d 1280, 1285 (9th Cir. 1977). Finally, the assertions contained in the plaintiff's complaint are considered substantiated for the purpose of review. *MBM Fisheries*, 60 Wn. App. at 418.

With respect to evaluating the due process concerns inherent in any exercise of personal jurisdiction over ICBC, the appropriate test is defined by the Washington Supreme Court's decision in *Shute v. Carnival Cruise Lines*, 113 Wn. 2d 763, 783 P.2d 78 (1989). In *Shute*, the court held that due process concerns are satisfied provided that:

- (1) The non-resident defendant or foreign corporation must purposefully do some act or consummate some transaction in the forum state;
- (2) The cause of action must arise from, or be connected with, such act or transaction; and
- (3) The assumption of jurisdiction by the forum state must not offend traditional notions of fair play and substantial justice, consideration being given to the quality, nature and extent of the activity in the forum state, the relative convenience of the parties, the benefits and protections of the laws of the forum state afforded the respective parties, and the basic equities of the situation.

Shute at 771.

2. *The evidence below established that ICBC "purposefully availed" itself of the Lewis County forum through its conduct related to the Tort Action.*

In the proceedings below, ICBC asserted that any conduct it may have engaged in related to the Tort Action represented only "random, fortuitous or attenuated" contacts with Washington state, arising solely from its "passive fulfillment of a B.C. contractual obligation" to defend its third party insured, Petru Tepei. CP at 691.

The trial court accepted ICBC's interpretation of its level of participation in the Tort Action, concluding that ICBC's directions to Scheer arose solely from its third party defense obligations:

"[a]s I understand the situation, once the decision was made to file a lawsuit in the State of Washington by the....Tepei plaintiffs, ICBC was contractually obligated to

defend Mr. Tepei in this forum state. They hired Mr. Scheer to do that. The mere fact that Mr. Scheer was working for Mr. Tepei, but he's also, in essence, working with ICBC, number one, is not at all, in my mind, unusual.

Secondly, I don't think that that necessarily amounted to a purposeful insertion of ICBC into the courts of the State of Washington. They're obligated to defend. They're an insurance corporation....the name of the game here [is that] they're going to pay out the least amount of money possible; they're going to defend to the maximum extent that they think is necessary to result in the least amount of payout necessary, and they're going to look out for their insured, and they're going to look out for their own bottom line, and that, to my mind, is what was going on here."

RP (1/20/09) at 44-45

The Tepeis respectfully contend that there was ample evidence in the record below illustrating that ICBC's strategy and conduct in defending the Tort Action was substantially driven by its desire to protect itself from exposure to *first party* claims under the Tepei's UMP coverage, a concern unique to ICBC and wholly beyond its *third party* contractual obligations to provide Petru Tepei with a legal defense.

One of the unique features of this single-vehicle accident is that ICBC functioned as both third party insurer for the driver, Petru Tepei, and first party underinsurer for the injured Tepei claimants. ICBC's financial exposure for this accident on the third party claims was limited to CDN\$200,000, the extent of Petru Tepei's liability insurance. In contrast, ICBC's potential exposure under the Tepeis' first party UMP coverage was CDN\$1,000,000 per injured claimant, for a total of CDN\$6,000,000. CP at 837.

ICBC has asserted, and the trial court appeared to accept, that ICBC's activities and involvement in the Tort Action were insufficient to constitute purposeful avilment of the Washington courts because they were done solely to protect the interests of Petru Tepei, an insured driver sued in Washington State. This assertion overlooks the evaluation of ICBC's adjuster Burnett, who had concluded as early as February of 1997 that Petru Tepei's third

party insurance limits would be exhausted by his family's claims against him, and that ICBC faced an indeterminate amount of exposure to first party UMP claims. CP at 355 (#3); see also CP at 357 (4/23/97 Burnett e-mail: "*At this stage, there is no question that our policy limits of 200,000 are gone.*").

This admission is critical to the purposeful avilment inquiry. The trial court's assertion that for ICBC "the name of the game here....[is to] pay out the least amount of money possible" is unquestionably correct. But the "game" at issue only involved Petru Tepei for the first CDN\$200,000 of claims exposure. Litigation strategy and conduct directed by ICBC in the Tort Action which aimed to evaluate, influence or reduce ICBC's first party claims exposure provided no benefit to Petru Tepei and was not required as a part of his third party contract of insurance. Numerous such actions were taken at the direction of ICBC, and were taken for the furtherance of its interests alone.

The trial court noted that the circumstances surrounding the ALA were "unusual". RP (1/20/09) at 45. ICBC was unquestionably obligated to defend Petru Tepei in the event he was sued in Washington State. To the extent that the ALA included a covenant not to execute against Petru Tepei for an award in excess of his CDN\$200,000 policy limits, the agreement served the interests of both insured and insurer.

However, nothing in the "passive fulfillment" of ICBC's contractual obligations to Petru Tepei required ICBC to negotiate for and obtain terms in the ALA which benefitted interests exclusive to itself. The first draft of the ALA, written by Scheer and reviewed by Burnett before being provided to either the Tepeis' counsel or Scheer's own client²,

² In the third party insurance defense context, Washington follows the "single client" rule. Appointed defense counsel are obligated to represent the interests of the insured, not the insurer. *Tank v. State Farm Ins. Co.*, 105 Wn. 2d 381, 388, 715 P.2d 1133 (1986).

conditioned the receipt of loan funds on the Tepeis' agreement to waive their first party UMP claims:

"In consideration for the agreement to remain a party in the future suit and for the payment/loan....[i]n no event or under any circumstances will either Petru Tepei or the Insurance Corporation of British Columbia pay the claimants or any entity more than a total of \$200,000 (Cdn.) for the claimant's damages resulting from the October 27, 1996 motor vehicle accident...."

CP at 325 (Clause F)

Scheer acknowledged in subsequent correspondence that the purpose of the above language was to induce the Tepeis to waive their first party claims against ICBC. As the Tepeis' counsel had noticed and objected to this language, Scheer proposed a "solution" for Burnett which would compel the Tepeis to *"limit ICBC's liability on an UMP claim to a sum certain (ex: \$100,000)....in exchange for getting any money at all"*. CP at 339. The Tepeis contend it is self-evident that the conditions included in drafts of the ALA which sought to limit or extinguish ICBC's UMP exposure provided no benefit to Petru Tepei's defense, and were pursued for the benefit of ICBC alone.

While provisions limiting ICBC's UMP exposure were removed from the final draft of the ALA, the agreement ultimately approved in the summer of 1999 did include a provision requiring the Tepeis to repay "the loaners" their defense fees and costs in the event the tire manufacturers were found liable for the Tepei's injuries. CP at 366 (Clause F). Again, this provision provided no benefit to Petru Tepei. It was executed for the sole objective of recouping for ICBC sums spent by Scheer on the defense of Petru Tepei – a defense ICBC was contractually obligated to provide. Thus, had the Tepeis prevailed against MNA and/or Uniroyal in the Tort Action, they would have been compelled to reimburse ICBC for legal expenses incurred by Scheer in advising "his client" Petru Tepei how ICBC

might extinguish exposure for his family's first party insurance claims. This perverse contradiction clearly illustrates the fallacy behind ICBC's contentions below that its conduct in the Tort Action was limited to "passive fulfillment" of obligations to its third party insured.

In argument below, counsel asserted that "*ICBC, while they did have certain obligation under this contract [the ALA], they were not – I don't think you would call them a party to the contract.*" RP (1/20/09) at 12, l. 7-9. Yet ICBC is defined in the recitals to the ALA as one of the parties to the agreement. A representative of ICBC signed the agreement in his capacity as a corporate agent – independently of Scheer, who signed as "attorney for Petru Tepei". Thus, ICBC is a signatory in its own capacity to an agreement which loans insurance funds potentially owing from ICBC as a result of a Washington accident, and which purports to divide the proceeds of an anticipated Washington lawsuit between itself and third parties. The ALA was subject to approval by the Lewis County Superior Court, and was signed by five Washington counsel, including three guardians ad litem appointed by the trial court to represent the interests of three of the Tepei claimants.³

In analyzing whether a contractual obligation is sufficient to establish the consummation of a transaction in the state of Washington, the court must consider "the entire business transaction, including prior negotiations, contemplated future consequences, the terms of the contract and the parties' actual course of dealing." *MBM Fisheries, supra*, 60 Wn. App. 414. The negotiations surrounding the ALA and the effect of the terms contained

³ Benjamin Tepei and Adrian Tepei were minors at the time of the 1996 accident. Dan Tepei was over the age of 18, but suffering from incapacity issues which the Tepeis asserted were caused by his injuries in the 1996 accident. The details surrounding the appointments of the GAL's were not a part of the record in the present 2006 action against ICBC – though their signatures are included on the copy of the ALA presently before this court. CP at 370-72.

in the final contract itself provide sufficient evidence of purposeful availment by ICBC to justify reversal of the trial court's dismissal order.

In signing the ALA, ICBC also acknowledged that "*all parties have been represented by counsel throughout the negotiation of this Agreement*". CP at 363 (§ 8). The Washington Supreme Court has previously held that retaining a lawyer to represent one's interests in a Washington legal matter constitutes the "transaction of business" for the purpose of Washington's long-arm statute, RCW 4.28.185. *Tolouse v. Swanson*, 73 Wn. 2d 331, 333, 438 P.2d 578 (1968)(court suggests even *general* jurisdiction might lie under RCW 4.28.180 when a party "availed himself of the benefits of our judicial machinery to protect his interests"). The due process inquiry implicit in the "transacting business" prong of the long-arm statute is coextensive with the inquiry conducted to assess "purposeful availment". *Stairmaster Sports/Medical Prods. v. Pacific Fitness Corp.*, 916 F. Supp. 1049, 1052 (W.D. Wash. 1994), citing *Amoco Egypt Oil Co. v. Leonis Navigation Co.*, 1 F.3d 848, 850-51 (9th Circ. 1993).

Finally, ICBC's purposeful furtherance of its own interests through its control of the Tort Action was not limited solely to circumstances surrounding the ALA. Despite the fact that Petru Tepei was not contesting the Tepeis' damages claims in the Tort Action, lawyers from Scheer's firm attended and/or actively participated in some twenty-five damages related depositions conducted in 2003 and 2004. CP at 841. In collateral proceedings under oath in British Columbia, Burnett acknowledged that he instructed Scheer to attend these depositions for the purpose of collecting information for ICBC with respect to the Tepeis' damage claims. CP at 404.

The Tepeis believe the record reflects ample evidence of conduct in the Tort Action directed by ICBC in furtherance of its interests as first party underinsurer of the Tepeis to bring ICBC within the personal jurisdiction of the Washington courts. The evidence presented belies ICBC's position, which was accepted by the trial court, that its involvement in the Tort Action was limited to passive obligations to defend its third party insured. As such, this court has jurisdiction to evaluate the key issues presented in this litigation – whether the *Finney/Fisher* rule should be applied to ICBC, and what remedies this court should extend to the Tepeis for ICBC's ongoing refusal to comply with that doctrine.

3. *The trial court's failure to follow Civil Rule 44.1 led it to make incomplete and/or erroneous conclusions about ICBC's role in compelling the Tepeis to file the Tort Action.*

At the outset, it should be noted that the Tepeis have *never* alleged the application of British Columbia law to their action, either in the original or amended complaint. CP at 1437-47; CP at 835-47. It is the Tepeis' view that the central question posed by this litigation is whether the *Finney/Fisher* rule should apply to ICBC, based on a constellation of forum-centered conduct committed in the Tort Action which significantly transcended the minimal requirements of "notice plus opportunity to intervene" typically found sufficient to compel application of the general rule.

Nonetheless, British Columbia law is relevant to one issue which sheds light on why ICBC's conduct in the Tort Action amounted to the consummation of a transaction directed at Washington state, and not merely the passive role of a third party insurer defending its insured. Central to the trial court's conclusion that ICBC's role in the Tort Action was passive and fortuitous was its acceptance of evidence presented by ICBC that the Tort Action was a mandatory step the Tepeis were required to take as a condition of establishing

entitlement to UMP benefits under British Columbia law. This assertion was contradicted by admissions made by ICBC in its answer and evidence contained in the record below. More troubling, the trial court accepted counsel's unbriefed oral argument on "how the UMP process works" without the benefit of reviewing the case law relied upon, and without providing the Tepeis with a meaningful opportunity to rebut ICBC's evidence. The trial court's failure to comply with the modest requirements of Civil Rule 44.1 regarding proof of foreign law led to incomplete and erroneous conclusions detrimental to the Tepeis' interests.

In argument on the motion to dismiss, the trial court was clearly concerned about whether British Columbia law required the Tepeis to complete a third party tort action before asserting a claim for UMP benefits. Presumably, the trial court felt that if judgment in the Tort Action was a mandatory prerequisite to UMP, then conduct by ICBC taken in defense of Petru Tepei was consistent with a passive, third party insurance defense role and not with ICBC's purposeful availment of the Washington forum in its own interests.

The trial court specifically asked counsel for ICBC *"do I understand the [UMP] regulations to be that you can't – you don't even get to the UMP unless or until you start a lawsuit and unless or until you get a jury verdict?"* RP(1/20/09) at 15. Counsel for ICBC responded, *"[t]he answer to your question is, yes, there has to be a judgment in order for them to establish that there is an UMP claim. The entitlement to UMP is predicated upon a tort judgment, because only then do you know whether or not this person is underinsured."* RP (1/20/09) at 16.

This interpretation of "how UMP works" is inconsistent with the one acknowledged by the parties in the original complaint and answer. In their complaint, the Tepeis asserted that:

“To be eligible for UMP benefits, a claimant must establish that their damages were occasioned by an “underinsured” motorist. The process of establishing such a claim, commonly referred to as “perfection”, requires either (1) trial to judgment in the underlying action against the third party tortfeasor, or (2) the consent of ICBC that the claimants’ damages were caused by an underinsured driver such that the UMP claim may proceed in lieu of any underlying trial against the tortfeasor.”

CP at 1439 (emphasis added).

In its answer, ICBC admitted the truth of this paragraph without qualification. CP at 1262.

The above statement was repeated nearly verbatim in the Tepeis’ amended complaint. CP at 837-38 (phrase “proving up” substituted for the word “establishing”; otherwise verbatim).

This distinction is critical to evaluating ICBC’s conduct in the context of a personal jurisdiction challenge. Contrary to ICBC’s assertion at the hearing to dismiss, the Tepeis were not required to try the Tort Action to judgment to establish a right to underinsurance benefits. They did, however, have to establish to ICBC’s satisfaction that their damages had been occasioned by an “underinsured motorist”. As both third party and first party insurer for this accident, ICBC possessed the ability to allow the Tepeis to proceed consensually to UMP at any time, if only ICBC would agree that Petru Tepei was an “underinsured motorist” with respect to the Tepeis’ claims. Indeed, for its own internal adjusting purposes, ICBC had acknowledged that Petru Tepei was an “underinsured motorist” as early as February of 1997, when Burnett admitted that Mr. Tepei’s third party limits were “used up”. CP at 355; see also CP at 357 (4/23/97 Burnett e-mail: “*our policy limits of 200,000 are gone*”). Instead of admitting to the Tepeis’ counsel what it knew itself – namely that the subject tire on the Tepei vehicle had been underinflated and that Petru Tepei’s liability exceeded his third party insurance limits – ICBC instead denied Petru Tepei’s liability for the accident.

By foreclosing the “consensual” option to proving Petru Tepei was an “underinsured motorist”, the Tepeis were left with no alternative but to file the Tort Action. But the

decision to foreclose this option and compel the Tepeis to litigate in Washington was not mandated by British Columbia law. It was a direct consequence of ICBC's decision to deny liability for its insured in the face of evidence to the contrary which ICBC accepted for its own internal adjusting purposes. CP at 357 (tire underinflation reported by expert). Viewed in the light most favorable to the non-movant, the evidentiary record strongly suggests that ICBC denied Petru Tepei's liability for the accident to avoid exposure to significant underinsurance liabilities. Denial of liability foreclosed UMP arbitration in British Columbia "by consent", and forced the Tepeis to sue Petru Tepei and the tire manufacturers in the Tort Action. Thus, ICBC not only directed conduct in the Tort Action to further its own first party interests, it in fact triggered the conditions which compelled the Tepeis to file the Tort Action in the first place. The Tepeis contend this fact enhances the strength of the assertion of personal jurisdiction over ICBC by the Washington courts with respect to its conduct arising from the Tort Action. This fact was overlooked by the trial court, which accepted ICBC's assertion that the Tepeis had to sue Petru Tepei to obtain UMP benefits, and thus that ICBC was a passive third party insurer just along for the ride. RP(1/20/09) at 44.

The Tepeis contend that that admissions contained in the complaint/answer process should have resolved this issue. Nonetheless, the trial court conducted its own inquiry into "how the UMP process worked" during oral argument on the motion to dismiss. The trial court accepted ICBC's interpretation of a tort judgment being a prerequisite to an UMP claim, and then challenged the Tepeis' counsel to rebut that assertion on three separate occasions. RP(1/20/09) at 28, l. 17-20; at 31, l.18-22, and at 33, l. 17 thru 34, l. 11. Counsel was constrained from doing so by the fact that (a) she is not a lawyer in British Columbia

familiar with its laws and regulations, and (b) this issue was not briefed by the parties in respect to the motions to dismiss.

In rebuttal argument, counsel for ICBC stated that he could “respond to the points...that you’d raised about the precondition of the tort judgment”. RP (1/20/09) at 39. Counsel repeated his previous assertions, contrary to ICBC’s answer, that *only* a tort judgment could satisfy entitlement to UMP. In doing so, he cited to British Columbia statutes and case law which were neither included in the materials before the court in the motions process, or provided to the court at the time of the hearing. RP(1/20/09) at 41-43. The Tepeis’ counsel had no meaningful opportunity to review or reply to these materials, which appeared to buttress the trial court’s ultimate conclusion that “*I still think I have a pretty good understanding of exactly how this situation works with respect to Canada.*” RP(1/20/09) at 43.

Civil Rule 44.1 grants a trial court broad discretion in the taking of evidence with respect to determinations of foreign law. The court “may consider any relevant written material or other source, including testimony, having due regard for their trustworthiness”. *CR 44.1(c)*. No reported cases in Washington have attempted to define the “trustworthiness” requirement, and that language is absent from the analogous federal rule. See *FRCP 44.1*. However, the Ninth Circuit has noted that an appellate court reviewing a determination of foreign law must, at a minimum, satisfy itself that the trial court relied upon a correct interpretation of the relevant law. *Trans Contained Services (BASEL) A.G. v. Security Forwarders, Inc.*, 752 F.2d 483, 486 (1985).

The Tepeis believe that the admissions about the workings of the UMP process obtained through the complaint/answer exchange should have been preferred by the trial

court as inherently more “trustworthy” than oral argument and unsupported reference to British Columbia case citations and statutes not before the court or opposing counsel. To the extent this error led the trial court to conclude ICBC was merely a passive participant in inevitable events leading up to the filing of the Tort Action, it provides additional justification in support of the relief the Tepeis seek.

4. *The trial court’s failure to consider the applicability of the Finney/Fisher rule to ICBC’s conduct compels reversal of the order to dismiss.*

In granting the motion to dismiss, the trial court stated that it would be “fundamentally unfair” for it to bind ICBC, a British Columbia corporation, to abide by the determinations of liability and damages established in the 2004 Tort Action. RP(1/20/09) at 46. In arriving at this conclusion, the trial court overlooked some thirty years of Washington case law which has consistently reaffirmed the presumptive rule that an underinsurer who has notice and opportunity to intervene in a third party tort action is estopped from challenging findings of liability and damages made in such an action.

The purpose and policy objectives underlying the *Finney/Fisher* principle were extensively analyzed by the Washington Supreme Court in the second case which lent its name to the rule, *Fisher v. Allstate Insurance Co.*, 136 Wn.2d 240, 961 P.2d 350 (1998). The Court affirmed the central holding of *Finney v. Farmers Insurance Co.*, 21 Wn. App. 601, 586 P.2d 519 (1978), *aff’d* 92 Wn.2d 748, 600 P.2d 1272 (1979), stating that it found “no reason to depart” from *Finney’s* conclusion that “an insurer will be bound by the ‘findings, conclusions and judgment’ entered in the action against the tortfeasor when it has notice and an opportunity to intervene” in that action. *Fisher*, 136 Wn.2d at 246. The Court noted that this holding “articulates the rule applied in a majority of jurisdictions in both the UM and

UIM contexts.” *Id.* at 246-47(citations omitted); see also fn. 2 (extensive citations to out-of-state authorities). *Fisher* expressly identified a host of rationales for its holding which offered *private* advantages to the litigants involved, including “[c]onsideration of fairness and the avoidance of redundant litigation”, “the possibility of anomalous results”, and “preventing insurers from picking and choosing their judgments”. *Id.* at 248. The Court also noted that

“[r]elitigation provides an unwarranted benefit to insurance companies as well. A UIM carrier could deny a claim, wait until litigation between the insured and tortfeasor was complete, and then assert its insured collaterally estopped if the damage award was low, but avoid the damage award by relitigating if considered too high.”

Id. at 249.

Nothing in *Fisher*, or in subsequent cases applying the *Finney/Fisher* rule, suggests that the above interests are to be categorically ignored in the context of the non-resident claimant. See, e.g., *Lenzi v. Redlands Ins. Co.*, 140 Wn. 2d 267, 996 P.2d 603 (2000)(underinsurer bound to findings and conclusions contained in default judgment against tortfeasor); see also *Mutual of Enumclaw Ins. Co. v. T & G Const. Inc.*, 165 Wn. 2d 255, 199 P.3d 376 (2008)(affirming general rule).

The Tepeis further contend that the *Finney/Fisher* rule is grounded in concerns which extend beyond the mere private interests of the litigants. Washington has a broad interest in preventing insurers from engaging in unfair or deceptive practices whose effects are manifested within Washington. See *RCW 48.01.030*. The good faith and fair dealing requirements of Title 48 of the Revised Code of Washington are remedial in nature, and should thus be construed liberally to accomplish their intended purposes. See generally *Gesa Fed. Credit Union v. Mut. Life Ins. Co.*, 105 Wn. 2d 248, 255, 713 P.2d 728 (1986)(internal

citations omitted)(definition of “remedial statute” and approval of liberal construction rule). All “insurance transactions” committed in Washington are to be governed by Title 48. *RCW 48.01.020*. “Insurance transactions” have been defined to include “transactions of matters subsequent to the execution of the [insurance] contract and arising out of it”. *RCW 48.01.060(4)*. In the context of underinsurance benefits, Washington has likewise interpreted the purpose of its UIM statute liberally. See *RCW 48.22.030*; see also *Mencel v. Farmers Ins. Co.*, 86 Wn. App. 480, 484 937 P.2d 627 (1997)(purpose of *RCW 48.22.030* to provide “full compensation to those injured in automobile accidents”). Taken in tandem, Washington law would appear to favor the application of the *Finney/Fisher* rule to the fullest extent permitted by due process.

The fact that three of the Tepeis were represented by Washington guardians ad litem for purposes surrounding the execution of the ALA provides further evidence of Washington’s interest in ensuring that *Finney/Fisher* is followed in this case. In the context of the Tort Action, the trial court rightly concluded that *RCW 4.08.050* and *SPR 98.16W* allow for no exception for non-resident minor plaintiffs appearing before the Washington courts. Having given judicial approval to the ALA, a settlement-type agreement to which ICBC and the Tepeis were parties, Washington maintains an interest in ensuring vulnerable parties under the protection of the court are afforded the benefits provided by application of the *Finney/Fisher* rule.

Finally, Washington has a strong state interest in ensuring that the findings, conclusions and judgment rendered in the Tort Action by a Washington jury are given proper deference and effect in subsequent proceedings elsewhere. Despite a quantum of involvement in the Tort Action far exceeding that typically required to trigger application of

the *Finney/Fisher* rule, ICBC continues to assert its right to ignore the judgment in the Tort Action and compel the Tepeis to relitigate issues of causation and damages in underinsurance benefit proceedings in British Columbia. CP at 470 (*Tepei v. ICBC*, 2007 BCSC 1694 at ¶¶ 12-13). While the precise calculation of sums owing under the British Columbia contract of first party insurance are a matter for a Canadian tribunal, *Finney/Fisher* suggests that matters of liability and damages determined in the Tort Action may not be revisited in the context of such proceedings. ICBC's ongoing efforts to relitigate these issues are tantamount to vesting a British Columbia underinsurance arbitrator with jurisdiction to invade the province of a Washington jury and disturb its underlying verdict – a power even this court does not possess absent extraordinary circumstances. *Herriman v. May*, 142 Wn. App. 226, 232, 174 P.3d 156 (2007)(court has no discretion to disturb a verdict within the range of evidence; inconsistencies in evidence are matters affecting credibility and weight and are exclusive province of the jury).

All the above issues were extensively briefed by the Tepeis in opposition to ICBC's motion to dismiss. CP at 291-94. Indeed, *Fisher v. Allstate Insurance Co.* and *Lenzi v. Redlands Ins. Co.*, supra, were referenced by name in the plea for relief made by the Tepeis in their original complaint. CP at 1447. Their plea for declaratory relief grounded in *Finney/Fisher* was renewed in the amended complaint which was approved by the trial court. CP at 845-46. Yet in dismissing this action, the trial court was silent as to effect of the *Finney/Fisher* rule on the issues before it, instead focusing solely on whether the ALA was sufficient to constitute ICBC's purposeful availment of the Washington forum.

The Tepeis did not argue below, and are not arguing to this court, that the *Finney/Fisher* rule can create personal jurisdiction over a non-resident underinsurer where it

would not otherwise exist. Indeed, it may well be “fundamentally unfair” to categorically extend the *Finney/Fisher* rule to *all* foreign underinsurers who have notice and opportunity to intervene in a Washington tort action against their insured. Unique circumstances could undoubtedly arise in the “foreign” insurer context – such as where “notice” was insufficient, or the “opportunity to intervene” was not meaningful given the proximity of the insurer’s domicile to the Washington tort forum.

The record on review suggests such “unique circumstances” are not present here. The self-evident fact that British Columbia is a “foreign” yet English speaking jurisdiction adjacent to Washington was argued below. CP at 287-89. ICBC had a dual interest in the Tort Action as both third party and first party insurer. CP at 837. As the payor for Petru Tepei’s defense, ICBC had notice of all relevant details of litigation events in the Tort Action. CP at 1443(assertion); CP at 1264(admission). These events included motions addressing issues of *forum non conveniens* and choice of law matters where the trial court concluded Washington had an interest in holding the trial here and applying Washington law to the issues presented. CP at 1442-3(assertions); CP at 1263 (admissions). ICBC’s conduct in denying Petru Tepei’s status as an “underinsured motorist” was the triggering event leading to the filing of the Tort Action, as it foreclosed the ability of the Tepeis to seek UMP benefits through arbitration without first engaging in an expensive foreign trial. See section A(3), *supra*. ICBC engaged in months of pre-litigation negotiations culminating in the ALA, a document which purported to confer financial benefit on ICBC in the event a Washington jury verdict was entered against entities other than its third party insured. CP at 362-72. The evidence provided by ICBC to date regarding its conduct surrounding the ALA, and its involvement in the Tort Action generally, is suggestive of an intent to use the defense of its

third party insured Petru Tepei as a “Trojan horse” to pursue objectives unique to its own interests in minimizing first party insurance liabilities under the Tepeis’ UMP coverage. See section A(2), *supra*. Given this precise constellation of facts, the Tepeis contend that personal jurisdiction sufficient for this court to invoke and enforce ICBC’s adherence to the *Finney/Fisher* rule is found here.

The trial court’s analysis in granting ICBC’s motion to dismiss turned the third prong of the due process test in *Shute*, *supra*, on its head. Not only did the court fail to consider the effect of the *Finney/Fisher* rule in the context of fair play and substantial justice concerns, it focused its inquiry on whether it was fundamentally unfair to the Tepeis to require them to pursue relief in Canada, “where they’re most familiar with the Canadian regulations relative to insurance.” RP (1/20/09) at 47. With respect, the Tepeis believe that the focus should properly rest on ICBC and its quantum of conduct and behavior in Washington – especially in light of the fact that the applicability of *Finney/Fisher* is a matter of Washington law, not Canadian law.

B. As dismissal on personal jurisdiction grounds constituted reversible error, the trial court’s April 20, 2009 order awarding ICBC prevailing party attorney’s fees under RCW 4.28.185(5) should be vacated.

A party is entitled to obtain review of a trial court decision on attorney’s fees, costs and litigation expenses in the same review proceeding as that challenging the judgment without need to file a separate notice of appeal. *RAP 7.2(i)*, see also *RAP 2.4(g)*.

Under RCW 4.28.185(5), ICBC was entitled to an award of reasonable attorney’s fees and costs as the prevailing party on a motion to dismiss for lack of personal jurisdiction. An order and judgment to that effect was entered by the trial court on April 20, 2009. CP at 2-7. Should this court conclude that the trial court committed reversible error in dismissing this

action against ICBC, the statutory rationale underlying the award of fees and costs would be extinguished. In that event, the Tepeis are entitled to have the judgment for fees and costs vacated, and seek an order from this court to that effect.

CONCLUSION

For the foregoing reasons, the Tepeis contend that the trial court committed reversible error in its January 2009 order granting ICBC's motion to dismiss for lack of personal jurisdiction. CP at 228-29. The Tepeis respectfully request that this court reverse this order, vacate the April 2009 judgment for ICBC's statutory attorneys' fees and costs which relied upon the dismissal order, and remand this matter to the trial court for further proceedings on the merits.

Respectfully submitted this 9th day of February, 2010.



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CERTIFICATE OF SERVICE

I certify that I served a copy of the foregoing document as follows:

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