
**COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON**

KIM HANN, a single person,

Respondent,

v.

METROPOLITAN PROPERTY AND CASUALTY INSURANCE
COMPANY,

Appellant.

FILED
COURT OF APPEALS
DIVISION TWO
STATE OF WASHINGTON
MAY 14 2013
9

AMENDED OPENING BRIEF OF APPELLANT

Philip M. deMaine, WSBA #28389

phild@jgkmw.com

Wade N. Neal, WSBA #37873

waden@jgkmw.com

Thomas P. McCurdy, WSBA #41568

thomasm@jgkmw.com

Johnson, Graffe, Keay, Moniz & Wick, LLP

Attorneys for Appellant

2115 N. 30th St.

Tacoma, WA 98403

Telephone: (253)572-5323

Facsimile: (253)572-5413

ORIGINAL

TABLE OF CONTENTS

I. INTRODUCTION1

II. ASSIGNMENTS OF ERROR.....2

III. STATEMENT OF ISSUES2

IV. STATEMENT OF THE CASE.....3

V. ARGUMENT12

A. Standard of Review12

B. Metropolitan Had the Right to Intervene in the
Underlying Action12

C. Metropolitan Should Have Been Granted Full Party
Status.....16

D. The Trial Court Ignored Ms. Hann’s Contractual
Duties to Metropolitan21

E. Ms. Hann Violated her Statutory Duty of Good Faith.....24

F. The Trial Court Erred in Denying Full Party Rights
to Metropolitan.....26

1. Metropolitan’s Constitutional Right to a Jury
Trial Was Violated.....26

2. Metropolitan’s Rights to Discovery under the
Civil Rules Were Violated.....30

VI. CONCLUSION31

TABLE OF AUTHORITIES

CASES

<i>American Manufacturers Mut. Ins. Co. v. Osborn</i> 104 Wash.App. 686, 17 P.3d 1229 (2001), review denied 144 Wash.2d 1005, 29 P.3d 717 (2001).....	24
<i>Blackmon v. Blackmon</i> 155 Wash.App. 715, 230 P.3d 233 (2010).....	26
<i>Brown v. Safeway Stores, Inc.</i> 94 Wash.2d 359, 617 P.2d 704 (1980).....	26
<i>Columbia Gorge Audubon Soc. 'y v. Klickitat County</i> 98 Wash.App 618, 623, 989 P.2d 1260 (1999).....	13
<i>Finney v. Farmers Ins. Co.</i> 21 Wash.App. 601, 586 P.2d 519 (1978), aff'd, 92 Wash.2d 748, 600 P.2d 1272 (1979).....	14, 16
<i>Fisher v. Allstate Ins. Co.</i> 136 Wash.2d 240, 961 P.2d 350 (1998).....	15-16
<i>Hanson v. Puget Sound Navigation Co.</i> 52 Wash.2d 124, 323 P.2d 655 (1958).....	23
<i>In re Marriage of Firchau</i> 88 Wash.2d 109, 558 P.2d 194 (1977).....	26
<i>In re Relationship of Eggers</i> 30 Wash.App. 867, 638 P.2d 1267 (1982).....	23
<i>Jones v. Best</i> 134 Wash.2d 232, 950 P.2d 1 (1998).....	23
<i>Lenzi v. Redland Ins. Co.</i> 140 Wash.2d 267, 996 P.2d 603 (2000).....	4, 7-8, 15-20, 22, 25
<i>Loveless v. Yantis</i> 82 Wash.2d 754, 513 P.2d 1023 (1973).....	13

<i>Mathioudakis v. Fleming</i> 140 Wash.App. 247, 161 P.3d 451 (2007).....	12, 21
<i>Mercier v. GEICO Indem. Co.</i> 139 Wn.App. 891, 165 P.3d 375 (2007), review denied, 163 Wn.2d 1028 (2008).....	14, 26
<i>Olver v. Fowler</i> 161 Wash.2d 655, 168 P.3d 348 (2007).....	13
<i>Peterson-Gonzales v. Garcia</i> 120 Wash.App. 624, 86 P.3d. 210 (2004).....	16
<i>State v. Severns</i> 19 Wash.2d 18, 141 P.2d 142 (1943).....	28
<i>Trotzer v. Vig</i> 149 Wash.App. 594, 203 P.3d. 1056 (2009).....	12
<i>Wagner v. Wagner</i> 95 Wash.2d 94, 621 P.2d 1279 (1980).....	23
<i>Westerman v. Cary</i> 125 Wn.2d 277, 892 P.2d 1067 (1994).....	13

CONSTITUTION, STATUTES & RULES

Civil Rule 24.....	12
Civil Rule 26.....	30
RCW 48.01.030	24
Wash. Const. Art. 1, Sec. 21	3, 26

I. INTRODUCTION

This appeal arises out of the trial court's refusal to permit Metropolitan full intervention rights in the underlying uninsured motorist action. The law is clear that an uninsured motorist / underinsured motorist ("UM/UIM") insurer is bound to a judgment if the insurer is provided timely notice of the underlying action and is given the opportunity to intervene. In this case, Ms. Hann obtained an order of default against the uninsured driver. Only after obtaining this order of default did she notify Metropolitan of her lawsuit against the uninsured driver.

Metropolitan moved to intervene in the underlying litigation, but the trial court granted only a "limited intervention", denying Metropolitan the right to depose plaintiff's witnesses, the right to conduct discovery under the Civil Rules, the right to a jury trial, and the right to cross-examine Ms. Hann's expert and lay witnesses. The trial court also improperly modified the private insurance contract between Metropolitan and Ms. Hann, which required Ms. Hann to file a lawsuit against Metropolitan in the event of a dispute between the parties. After a reasonableness hearing was held, the trial court ordered that Metropolitan was bound to over \$250,000 of the \$733,483.71 judgment entered against the uninsured driver.

This Court should order that Metropolitan is not bound by the judgment entered against the uninsured driver and remand this matter to the trial court with instructions that Metropolitan be allowed to intervene in the underlying action with all of the rights of a full party to the action.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in not granting Metropolitan full party rights when it moved to intervene. CP at 28, 121.
2. The trial court erred when it ruled that Metropolitan was bound by the judgment entered against the uninsured driver. CP at 1570-1571.

III. STATEMENT OF ISSUES

The following issues pertain to the above assignments of error:

1. Does a UM/UIM insurer receive adequate notice of its insured's lawsuit against the uninsured tortfeasor when the insured does not provide any notice of the lawsuit until after an order of default is entered? (Assignment of Error 1.)
2. Does a UM/UIM insurer receive adequate opportunity to intervene to protect its interests where it only receives "limited" intervention rights? (Assignment of Error 1.)
3. Is a UM/UIM insurer bound by a default judgment obtained by its insured against a tortfeasor where notice of the lawsuit is only given

after entry of a order of default and the insurer is afforded only limited intervention rights? (Assignment of Error 2.)

4. Was Metropolitan's constitutional right to a jury trial (Wash. Const. Art. 1, Sec. 21.) abrogated by the trial court's grant of "limited" intervention? (Assignment of Error 1.)

5. Was the private insurance contract between Metropolitan and Ms. Hann requiring the filing of a lawsuit in the event of a dispute improperly modified when the trial court ruled that Metropolitan was not entitled to intervene as a party and was bound to the judgment against Mr. Squire? (Assignment of Error 2.)

IV. STATEMENT OF THE CASE

The underlying action in this UM/UIM dispute arises out of a September 9, 2005, motor vehicle accident between plaintiff, Kim A. Hann ("Hann"), and defendant, Richard Squire ("Squire"). CP at 2. At the time of the accident, Ms. Hann was a passenger in her own vehicle, which was being driven by non-party John Combs.¹ CP at 395. Mr. Squire was without automobile insurance. CP at 382. Metropolitan insured Ms. Hann, and the policy contains a UIM provision. CP at 5.

Ms. Hann filed her complaint in the underlying action against Mr. Squire on August 26, 2008. CP at 1. Ms. Hann moved for and was

¹ Mr. Combs brought suit against Metropolitan in a separate action, which resolved at arbitration.

granted an order of default against Mr. Squire on October 24, 2008. CP at 404. Ms. Hann provided Metropolitan with notice of her action against Mr. Squire on November 18, 2008, twenty-five days after obtaining an order of default against Mr. Squire. CP at 40. After settlement negotiations failed, Metropolitan filed a notice of appearance with intent to intervene on February 3, 2009. CP at 1639-1640.

On February 26, 2009, Metropolitan filed its motion to intervene. CP at 5. In its motion, Metropolitan apprised the trial court of Washington case law requiring timely notice of the filing of a lawsuit by an insured and an opportunity to intervene in the lawsuit to protect its interests. CP at 7-8. On March 4, 2009, Ms. Hann filed her opposition to Metropolitan's motion to intervene. CP at 9.

At the March 6, 2009, hearing on Metropolitan's motion to intervene, the trial court disallowed Metropolitan to intervene in the underlying action as a party. In explaining its reasoning, the Court stated:

Well, it creates a real strange scenario when to allow you intervention as full-party status, the party seated at defense counsel is actually the plaintiff's insurance company, it's not the tortfeasor. And I think, unfortunately, in the Lenzi opinion, I think Justice Talmadge through some, perhaps, less than careful writing created conundrum as to treating it as a very simple process allowing this intervention into the default process, but he didn't really address the situation where you have intervention after default has already been taken..." RP, Vol. I, at 10, lines 4-14.

Here, when there has already been entry of an order of default, to then require the plaintiff to have to go through time and expense of a trial basically undermines her ability to move forward with her litigation. She's then put to an entirely different process than she would be if the tortfeasor had insurance." RP, Vol. I, at 10, line 23 to 11, line 3.

I am not granting intervention as a party; I am granting limited intervention to participate in any reasonableness hearing prior to the ascertainment of damages under the default judgment rule." RP, Vol. I, at 12, line 20-23 (emphasis added).

On March 6, 2009, the trial court entered its Order granting Metropolitan limited intervention. CP at 28. Metropolitan's intervention was limited to the following: notice of a hearing for entry of judgment; copies of supporting evidence to be presented by plaintiff at the hearing; the opportunity to challenge the sufficiency of the evidence at the time of the hearing; and, the opportunity to bring a motion to allow limited discovery as to damages as Metropolitan deems such discovery necessary. CP at 29.

On March 16, 2009, Metropolitan filed its motion for reconsideration of the trial court's March 6, 2009, Order granting limited intervention. CP at 30. In its motion for reconsideration, Metropolitan sought reconsideration of the trial court's grant of limited intervention on the grounds that Metropolitan was not provided notice of Ms. Hann's lawsuit prior to Ms. Hann obtaining an order of default against Mr. Squire.

CP at 30. Alternatively, Metropolitan sought an order declaring that it was not bound by any subsequent judgment that may be entered against Mr. Squire in the underlying action. CP at 30.

Ms. Hann's insurance policy with Metropolitan contained the following language: "If any legal action is begun before we make payment under any coverage, a copy of the summons and complaint or other process must be forwarded to us immediately." CP at 77.

Despite Ms. Hann's contractual obligation to provide notice to Metropolitan of any lawsuit, and the undisputed fact that Ms. Hann did not notify Metropolitan of her lawsuit prior to obtaining a default order, the trial court nonetheless denied Metropolitan's motion for reconsideration.

At oral argument on the motion for reconsideration, Metropolitan's counsel provided a succinct appraisal of the basis of the trial court's original decision regarding intervention and explained the error with the Court's rationale. Counsel stated:

This court, Your Honor, based your reasoning at that time of that oral argument on the fact that this was a post-default order situation, and therefore you determined that the rights of the plaintiff would be prejudiced if Metropolitan would be permitted to intervene as a full party at that time.

And the problem with that is that we were never provided notice, which is an undisputed fact, before the default order was entered...

And I really want to look to the language of the Lenzi case, the Supreme Court of Washington, and they talk about this situation because the holding in that case is that a UIM insurer is bound by the default judgment where it had timely notice of the filing of the lawsuit by its insured, ample opportunity to intervene in the lawsuit to protect its interests, but declines to do so.

That is not the case here. RP, Vol. I, at 14, line 9 to 15, line 3.

Metropolitan's counsel went on to explain the consequences of the trial court's ruling if it upheld its original decision, which is a departure from the *Lenzi* precedent. Counsel noted:

And the court stated that Redlands [the insurer in *Lenzi*]...could have intervened when it received the Summons and Complaint, it would have been a party, which is a term used in that case, and entitled to receive all subsequent, including *Lenzis'*, motion for default judgment against the uninsured motorist.

The court uses the word "party" several times in there. And specifically I want to quote that the court says, "In this case, notice was timely. The *Lenzis* did not provide the insurer a copy of the summons and complaint only days before entry of default. To the contrary, the letter enclosing the summons and complaint was sent on September 29. The default was not taken until November 23rd. Redland had ample time to appear, to intervene formally, or request informally notice of Davis's service to the *Lenzis*."

That's the reason in that case, which is the controlling case here, the court, the Supreme Court, found the insurance company bound by the default judgment.

Here we don't have that. And if we're going to set a precedent where insurance companies are bound by and not permitted to intervene – not permitted to intervene as a party and to fully litigate as a party and have a trial and, in fact, a trial by jury, which I argue is a constitutional right, then what we are saying is any plaintiff can take a default

against any uninsured driver, provide notice at some later time after entry of the default order, and the insurance company will never be able to intervene as a full party. And that's not – that's contrary to Washington law, contrary to Lenzi. RP, Vol. I, at 15, line 9 to 16, line 14.

In addition to noting the constitutional implications of the trial court's decision, Metropolitan's counsel went on to note:

The point that plaintiffs completely miss, this is not about default order or default judgment, this is about notice versus no notice. This is about timely notice versus untimely notice. And again, Your Honor, you relied on the fact that an order of default had been entered. That was a very important, pivotal fact that you relied upon in only allowing us to have this intervention on a limit[ed] basis. We were not provided a notice of this default order.

We cannot be limited as some sort of – I am not even sure how we would describe ourselves. We are not a party at this point, we are kind of in limbo as an interested observer on the side line, perhaps allowed to talk about what the damages are. RP, Vol. I, at 23, lines 1-14.

The trial court explained its decision to deny Metropolitan's motion for reconsideration as follows:

Well, I think the – my concern is that the plaintiff is in a difficult position if this case goes forward with the requested full jury trial in order to recover any UIM benefits.

I don't think that's reasonable, under these kinds of facts. I think the issue is: What are her measure of damages and that could be ascertained in the form of a reasonableness hearing after you have had an opportunity to do limited discovery.” RP, Vol. I, at 23, line 24 to 24, line 7.

The trial court denied Metropolitan's Motion for Reconsideration in its April 10, 2009, Order and further ordered the following:

Metropolitan shall be allowed to conduct reasonable discovery as follows: (1) interrogatories – limited to request for 10 yrs. from today's date re: medical records; (2) ruling reserved re: CR 35 exam; (3) live witnesses that plaintiff intends to call at reasonableness hearing can be deposed by Metropolitan. CP at 121-122.

On August 13, 2009, Metropolitan moved for a continuance of the reasonableness hearing. CP at 123. At the August 21, 2009, hearing on the motion for continuance the trial court explained its short continuance of the reasonableness hearing as follows:

Well, I will grant some limited additional time to have the records reviewed and deal with the additional potential discovery issues. But I am not inclined to go for February of 2010. I think that defeats the purpose of basically the plaintiff, who is able to obtain a default against a non-responding defendant tortfeasor, who is then put to additional time delay, et cetera, to try to recover a judgment against that person.

I granted Metropolitan limited rights of discovery. It sounds to me like Metropolitan has the bulk of the information that is going to be presented at the reasonableness hearing, and I don't think that – I did not intend to grant you carte blanche discovery over, you know, every record that may be out there. I think really what was intended was that you have a chance to review the documents that Mr. Barcus plans to use for the reasonableness hearing, that you have a chance to depose any of those witnesses that are going to be called live. It sounds like that's not contemplated at this point. But I think at some point the plaintiff is entitled to move forward and get their judgment amount and deal with it thereafter. RP, Vol. I, at 42, line 13 to 43, line 10.

On October 9, 2009, the trial court conducted a reasonableness hearing. In his December 18, 2009, Amended Order Entering Judgment and Findings of Fact/Conclusions of Law upon Reasonableness Hearing, the trial court found that Ms. Hann's special damages totaled \$81,000.68. CP at 380-381. The trial court found that Ms. Hann's past pain and suffering was "reasonably valued at \$275,000.00" and that her future pain and suffering was "reasonably valued at \$375,000.00, for total general damages in the amount of \$650,000.00." CP at 381. The total default judgment entered against Mr. Squire was thus \$733,483.71, inclusive of \$2,483.03 in statutory attorney's fees and costs. CP at 380.

On December 22, 2009, immediately after the trial court's judgment was entered, Metropolitan filed its notice of appeal to the Court of Appeals, Division Two. CP at 385. On February 4, 2010, Ms. Hann filed a motion to bind Metropolitan to the December 18, 2009, judgment entered against Mr. Squire. CP at 1510. Metropolitan opposed this motion on the grounds that it did not receive adequate notice of Ms. Hann's action against Mr. Squire before entry of the order of default, did not have a reasonable opportunity to intervene in that action, and was not afforded the rights of a party sufficient to bind it to the default judgment entered against Mr. Squire. CP at 1516-1521.

On February 12, 2010, the trial court entered an Order binding Metropolitan to the Default Judgment in the amount of \$252,483.03, which amount includes Ms. Hann's \$250,000.00 uninsured motorist policy and \$2,483.03 in statutory attorney's fees and costs. CP at 1570-1571. Under the terms of the trial court's order, Metropolitan was not permitted to depose Ms. Hann's witnesses, it was not permitted to conduct complete discovery under the Civil Rules, it was not permitted to request a jury trial, and it was not permitted to cross-examine Ms. Hann's expert and lay witnesses.² CP at 28-29, 121-122.

On February 22, 2010, Metropolitan filed its motion for reconsideration of the Order binding Metropolitan to the default judgment entered against Mr. Squire. CP at 1578. The trial court denied Metropolitan's motion for reconsideration on March 5, 2010. CP at 1593-1594.

On March 22, 2010, Metropolitan filed its amended notice of appeal of the February 12, 2010, Order binding it to the default judgment against Mr. Squire and the March 5, 2010, Order denying its motion for reconsideration. CP at 1643-1648.

///

² Based on the Court's ruling, Ms. Hann did not call any live witnesses at the October 9, 2009, Reasonableness Hearing, thereby preventing Metropolitan from cross-examining any of the 13 lay and expert witnesses Ms. Hann presented at the Hearing by way of Declaration.

V. ARGUMENT

A. **Standard of Review.**

The trial court erred in its interpretation of the Civil Rules and case law concerning the rights of a UM/UIM insurer in the context of intervention. The trial court erred in ordering that Metropolitan was bound to the default judgment against Mr. Squire, in violation of Washington law.

The appellate court reviews alleged errors of law de novo. *Trotzer v. Vig*, 149 Wash.App. 594, 612, 203 P.3d 1056 (2009) (internal citations omitted). The appellate court reviews a trial court's interpretation of case law de novo. *Mathioudakis v. Fleming*, 140 Wash.App. 247, 252, 161 P.3d 451 (2007) (internal citations omitted). Thus, all issues on appeal are subject to de novo review.

B. **Metropolitan Had the Right to Intervene in the Underlying Action.**

Civil Rule 24 provides in relevant part:

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 the applicant's interest is adequately represented by existing parties.

In *Westerman v. Cary*, 125 Wn.2d 277, 302, 892 P.2d 1067 (1994), the Washington Supreme Court articulated four requirements for intervention as a matter of right:

(1) timely application for intervention; (2) an applicant claims an interest which is the subject of the action; (3) the applicant is so situated that the disposition will impair or impede the applicant's ability to protect the interest; and (4) the applicant's interest is not adequately represented by the existing parties." *Id.* at 303.

As the Supreme Court noted in *Olver v. Fowler*, 161 Wash.2d 655, 664, 168 P.3d 348 (2007), "we liberally construe our rules in favor of intervention." (Citing *Columbia Gorge Audubon Soc. 'y v. Klickitat County*, 98 Wash.App 618, 623, 989 P.2d 1260 (1999); *Loveless v. Yantis*, 82 Wash.2d 754, 759, 513 P.2d 1023 (1973).) Here, Metropolitan met the requirements for intervention under the Civil Rules and met the low standard for granting intervention as a matter of right. Notwithstanding meeting the criterion for intervention, Metropolitan was denied full intervention rights and was not allowed to participate as a "full party."

Metropolitan's application for intervention was timely.

Metropolitan was first given notice of the lawsuit by letter dated November 11, 2008, which its records note as having been received on November 18, 2008. CP at 7, 40. Metropolitan and Ms. Hann engaged in settlement negotiations after receiving notification of Ms. Hann's lawsuit

against Mr. Squire. These negotiations were unsuccessful and Metropolitan filed its notice of appearance with intent to intervene on February 3, 2009, and its motion to intervene on February 26, 2009. CP at 5, 1639. There is no dispute that Metropolitan's motion was timely filed.

Metropolitan had an interest in the underlying action because it "stands in the shoes of the tortfeasor, and its liability to the insured is identical to the tortfeasor's" up to the UM/UIM policy limits. *Mercier v. GEICO Indem. Co.*, 139 Wn. App. 891, 903, 165 P.3d 375 (2007), review denied, 163 Wn.2d 1028 (2008). Ms. Hann claimed damages as a result of a motor vehicle accident with Mr. Squire, who was uninsured at the time of the accident. Ms. Hann had a \$250,000 UM/UIM policy with Metropolitan. Thus, Metropolitan had an interest to protect in the Mr. Squire litigation.

Metropolitan's ability to protect its interest was impaired and impeded by the trial court's grant of only limited intervention. In *Finney v. Farmers Ins. Co.*, 21 Wash.App. 601, 586 P.2d 519 (1978), aff'd, 92 Wash.2d 748, 600 P.2d 1272 (1979), the Washington Supreme Court held that a UIM carrier can protect its rights by intervening in an arbitration between its insured and a tortfeasor. Thus, so long as the carrier "has notice and an opportunity to intervene in the underlying action against the tortfeasor," it will be bound by the findings, conclusion, and judgment of

any proceeding. *Fisher v. Allstate Ins. Co.*, 136 Wash.2d 240, 246, 961 P.2d 350 (1998).

Furthermore, the subsequent case of *Lenzi v. Redland Ins. Co.*, 140 Wash.2d 267, 269, 996 P.2d 603, 604 (2000), affirmed the *Fisher-Finney* rule and clearly articulated that a UIM insurer will be bound by a default judgment where it had timely notice of the filing of the lawsuit by its insureds and ample opportunity to intervene in the lawsuit to protect its interests, by declined to do so. It is thus well settled that insurers are required to intervene in situations like that in the underlying action.

The only party before the trial court prior to Metropolitan's notice of appearance and motion for intervention was Ms. Hann herself.³ The unrepresented defendant, Mr. Squire, did not have an attorney, did not appear in the case, and made no attempt to defend the lawsuit. Given the posture of the case and Ms. Hann's adverse interests, Metropolitan was not adequately represented by any party before the trial court.

There can be no bona fide dispute that Metropolitan had the right to intervene in the underlying action.

//

//

³ Progressive Insurance insured Mr. Combs, the driver of Ms. Hann's vehicle at the time of the subject accident. Progressive moved to intervene in Ms. Hann's action against Mr. Squire, but the trial court denied Progressive's motion. CP at 1635, 1641-1642

C. Metropolitan Should Have Been Granted Full Party Status.

Washington courts have explicitly held that where an insurer has a right to defend a UIM claim, that insurer must be allowed to participate at trial. *Peterson-Gonzales v. Garcia*, 120 Wash.App. 624, 86 P.3d. 210 (2004). When an insurer is permitted to intervene, it must be considered a party to the action with the same rights and obligations under the Civil Rules as every other party to a lawsuit.

The trial court erred when it granted Metropolitan only limited intervention rights. As Ms. Hann's UM/UIM insurer, Metropolitan has the right to intervene and defend the UM claim as a party. The trial court's remedy of limited intervention deprived Metropolitan of its rights under the case law authorities and under its insurance contract with Ms. Hann.

The law in the State of Washington regarding intervention and UM/UIM claims has remained unchanged for more than 30 years. The *Finney-Fisher-Lenzi* line of cases is clear in its very simple mandate: if an UM/UIM insurer has timely notice of an insured's lawsuit and has an opportunity to intervene then the insurer will be bound by the results. *Finney v. Farmers Ins. Co.*, 21 Wash.App. 601, 586 P.2d 519 (1978), *aff'd*, 92 Wash.2d 748, 600 P.2d 1272 (1979); *Fisher v. Allstate Ins. Co.*,

136 Wash.2d 240, 961 P.2d 350 (1998); *Lenzi v. Redland Ins. Co.*, 140 Wash.2d 267, 269, 996 P.2d 603, 604 (2000).

In *Lenzi*, the plaintiffs sued the uninsured driver for injuries sustained during a car accident. *Id.* at 270. The plaintiffs notified their UM/UIM carrier and sought personal injury protection (“PIP”) payments under the terms of their policy. *Id.* The plaintiffs retained legal counsel who made a demand on the insurer for UM/UIM coverage. Settlement negotiations continued with the insurer, but the dispute was not resolved. *Id.* at 271. The parties did not agree to commence arbitration. However, the plaintiffs sent the insurer a letter enclosing the summons and complaint they filed against the tortfeasor prior to the expiration of the statute of limitations. *Id.* at 272. The complaint was stamped by the court indicating the date it had been filed. *Id.*

Without further notification to the insurer regarding the lawsuit, the plaintiffs served the tortfeasor with the summons and complaint and obtained a default judgment against him. *Id.* Shortly after obtaining the default judgment, the plaintiffs demanded the insurer pay the default judgment amount. *Id.* In response to the insurer’s refusal to pay the default judgment amount, the plaintiffs instituted a declaratory judgment action seeking a determination that the insurer was obligated to pay the amount of the default judgment. *Id.*

The insurer did not consider itself bound by the default judgment for the following reasons: “[The insurer was] (1) never given notice that the lawsuit had been perfected by service, (2) not given an opportunity to defend the claim on the merits, and (3) never asked by the insured [Lenzi] to participate in the lawsuit as a defendant...” *Id.*

In the appeal that followed the trial court’s grant of summary judgment, in which the trial court ruled the insurer was bound by the default judgment, the Washington State Supreme Court reaffirmed the *Finney-Fisher* rule. The Court stated: “Thus, so long as the carrier “has notice and an opportunity to intervene in the underlying action against the tortfeasor,” it will be bound by the findings, conclusions, and judgment of the arbitral proceeding.” *Id.* at 274 (internal citations omitted).

In holding that the insurer was bound by the default judgment, the Court explained why notice to the insurer was sufficient:

“In this case, notice was timely. **The Lenzis did not provide their insurer a copy of the summons and complaint only days before entry of the default.** To the contrary, the letter enclosing the summons and complaint was sent on September 29. The default was not taken until November 23. Redland had ample time to appear, to intervene formally, or to request informally notice of Davis’s service or the Lenzis’ subsequent steps in the suit.” *Id.* at 276 (emphasis added).

Here, the trial court made a distinction between intervention before entry of default and after entry of default. The trial court noted that

because the entry of default had already been entered, Metropolitan was not granted intervention as a party. The trial court stated:

Here, when there has already been entry of an order of default, to then require the plaintiff to have to go through the time and expense of a trial basically undermines her ability to move forward with her litigation. She's then put to an entirely different process than she would be if the tortfeasor had insurance. RP, Vol. I, at 10, line 23 to 11, line 3.

At the August 21, 2009, hearing on Metropolitan's motion for continuance of the reasonableness hearing, the trial court noted that a five month continuance of the reasonableness hearing in order for Metropolitan to conduct additional discovery "would defeat the purpose of basically the plaintiff, who is able to obtain a default against a non-responding defendant tortfeasor, who is then put to additional time delay, et cetera, to try to recover a judgment against that person." RP, Vol. I, at 42.

The trial court's rationale in this case is erroneous. The *Finney-Fisher-Lenzi* line of cases imposes an affirmative duty on the insured to notify the insurer of the filing of the summons and complaint. The *Lenzi* court asserted: "Neither the *Finney-Fisher* rule nor ordinary notions of fair play and substantial justice dictate the Lenzis had any duty to Redland **other than timely^{FN3} notifying Redland of the filing of the summons and complaint.**" *Lenzi*, 140 Wash.2d at 276 (emphasis added). In

Footnote 3, the Supreme Court elaborated on the parameters of this duty as follows:

“The duty of the insured under the *Finney-Fisher* rule to provide *timely* notice of the filing of the lawsuit to the insurer is important. The insurer should be afforded appropriate time to assess the implications of the lawsuit for its coverage and to take appropriate action.” *Id.* at 276 (emphasis in original).

Here, Ms. Hann did not notify Metropolitan about the lawsuit against Mr. Squire. Unlike the facts of *Lenzi*, Ms. Hann sent a copy of the summons and complaint only several weeks **after** obtaining the default order. Ms. Hann thus failed to comply with her duty under the *Finney-Fisher-Lenzi* rule. Metropolitan was not provided timely notice and was therefore not provided an opportunity to take appropriate action in response to the filing of the summons and complaint.

The corollary to the *Finney-Fisher-Lenzi* rule must be that an insurer is *not* bound where it does not receive notice of an insured’s lawsuit and is not given an opportunity to intervene as a full party. This is to say, if the insured does not comply with her duties under the rule, she cannot bind the insurer to any subsequent judgment. If this parallel proposition is not true, it would render moot the *Finney-Fisher-Lenzi* rule and all case law interpreting this rule.

This corollary must be true or otherwise absurd and unjust results would occur in every UM/UIM case in the State of Washington. A ruling

that Metropolitan is bound by this judgment would signal to every insured that she does not need to provide notice to her insurer and only needs to obtain a judgment and then collect from that insurer. This result would completely eliminate the rights of the insurer to defend against an action brought by its insured.

D. The Trial Court Ignored Ms. Hann's Contractual Duties to Metropolitan.

The provisions of Ms. Hann's insurance policy with Metropolitan contemplate the situation where an insured will bring suit, including suit against an underinsured or uninsured tortfeasor. Similar to the duty imposed under the *Finney-Fisher-Lenzi* rule, these policy provisions impose upon Ms. Hann the duty to notify Metropolitan of any lawsuit and provide copies of the summons and complaint to Metropolitan. The policy states:

“If any legal action is begun before we make payment under any coverage, **a copy of the summons and complaint or other process must be forwarded to us immediately.**”

CP at 77. (Emphasis added.)

The policy explicitly requires that the insured send a copy of the summons and complaint to Metropolitan in any third party action involving an uninsured or underinsured motor vehicle. Moreover, the

policy reserves Metropolitan's right to defend any claim for liability or damages. Ms. Hann breached her contractual duties to Metropolitan by not timely providing a copy of the summons and complaint and by opposing Metropolitan's efforts to intervene in the underlying action.

Importantly, a recent Court of Appeals, Division Two case elaborated on the justification for an insurer to intervene in an UM/UIM action. In *Mathioudakis v. Fleming*, 140 Wash.App. 247, 161 P.3d 451 (2007), the court noted that the *Finney-Fisher* rule is not based on an insurer's right to intervene, but is rather based on the insurer's contractual obligation to pay. *Mathioudakis*, 140 Wash.App. at 254, citing *Lenzi*, 140 Wash.App. at 280-81. The court stated that "the *Finney-Fisher* rule is based on an insurer's contractual promise to pay its insured, or another whom the insured has injured." *Id.*

Just as Ms. Hann contended in the trial court that Metropolitan should be bound by its duties under the terms of her insurance policy, so too should Ms. Hann be held to her duties under the policy. Proper notice of the underlying lawsuit was not provided and Metropolitan was not afforded the opportunity to intervene in Ms. Hann's suit against Mr. Squire as a party. If the trial court's rulings are permitted to stand, the effect would be widespread. Plaintiffs could avoid an UM/UIM lawsuit in court by simply obtaining an order of default and then, only after

obtaining a default order, provide notification of the lawsuit to the insurer. These sharp practices are contrary to established Washington law and basic tenets of fundamental fairness.

Here, the trial court improperly modified the contract between Ms. Hann and Metropolitan because it did not recognize Ms. Hann's duties to Metropolitan. Modification of a contract by subsequent agreement "arises out of the intentions of the parties and requires a meeting of the minds." *Jones v. Best*, 134 Wash.2d 232, 240, 950 P.2d 1 (1998); citing *Wagner v. Wagner*, 95 Wash.2d 94, 103, 621 P.2d 1279 (1980); *Hanson v. Puget Sound Navigation Co.*, 52 Wash.2d 124, 127, 323 P.2d 655 (1958). In order for there to be a valid modification "mutual assent is required and one party may not unilaterally modify a contract." *Id.*; citing *In re Relationship of Eggers*, 30 Wash.App. 867, 638 P.2d 1267 (1982).

In the instant matter, there was no "meeting of the minds" as to the modification that Ms. Hann could simply proceed with her third party action without proper notification to Metropolitan. The terms of the contract between Ms. Hann and Metropolitan requiring notification of the filing of the summons and complaint in any legal action, including a third party UM/UIIM action, were binding and enforceable against Ms. Hann. The trial court's refusal to permit Metropolitan to intervene as a party and

fully defend the case was an improper modification of the contract between Ms. Hann and Metropolitan.

E. Ms. Hann Violated her Statutory Duty of Good Faith

RCW 48.01.030 provides as follows:

“The business of insurance is one affected by the public interest, requiring that all persons be actuated by good faith, abstain from deception, and practice honesty and equity in all insurance matters. Upon the insurer, the insured, their providers, and their representatives rests the duty of preserving inviolate the integrity of insurance.”

This statutorily prescribed duty encompasses all conduct on the part of the insured. As one Washington State court noted: “The duty to act in good faith is broad, and conduct that does not amount to intentional bad faith or fraud may be a breach of the duty.” *American Manufacturers Mut. Ins. Co. v. Osborn* (2001) 104 Wash.App. 686, 697, 17 P.3d 1229, review denied 144 Wash.2d 1005, 29 P.3d 717. The *Lenzi* court addressed this statute in the context of UM/UIM actions and the court’s opinion is instructive in determining the extent of Ms. Hann’s violation of this duty here.

In *Lenzi*, as detailed above, the plaintiff was found to have provided timely notice to its insurer. The insurer failed to intervene in the *Lenzis’* action against the tortfeasor and the insurer failed to file a notice of appearance. Subsequent to providing their insurer notice of the lawsuit,

the *Lenzis* sought a default judgment. The court stated: “In an ordinary litigation setting, a plaintiff has no ethical or good faith obligation to inform a defendant who has not answered or filed a notice of appearance that it will seek a default judgment.” *Lenzi*, 140 Wash.2d at 277.

The court noted that the “*Lenzis*’ conduct here does not smack of sharp practice and does not amount to a violation of the strictures of the statute [RCW 48.01.030].” *Id.* By contrast, here Ms. Hann has engaged in the “sharp practice” described by the *Lenzi* court. When Ms. Hann’s conduct is juxtaposed with that of the plaintiffs in *Lenzi*, her breach of the statutory duty of good faith is apparent. The *Lenzis* provided notification of the filing of a lawsuit prior to commencement of the default proceedings. Ms. Hann provided notice of the underlying lawsuit only after she obtained an order of default. Furthermore, Ms. Hann opposed Metropolitan’s efforts to intervene, yet still sought to bind Metropolitan to the default judgment against Mr. Squire. These sharp practices are precisely the violations of the statutory duty of good faith contemplated by the *Lenzi* decision. The trial court should have recognized this and allowed full intervention.

//

//

//

F. The Trial Court Erred in Denying Full Party Rights to Metropolitan

1. Metropolitan's Constitutional Right to a Jury Trial was Violated.

The right to a jury trial is guaranteed by Article I, Section 21 of the Washington State Constitution. *Blackmon v. Blackmon*, 230 P.3d 233, 235, 155 Wash.App. 715 (2010). The courts in this state have consistently interpreted this constitutional provision as “guaranteeing those rights to trial by jury which existed at the time of the adoption of the constitution.” *Id.* at 2; citing *Brown v. Safeway Stores, Inc.*, 94 Wash.2d 359, 365, 617 P.2d 704 (1980); *In re Marriage of Firchau*, 88 Wash.2d 109, 114, 558 P.2d 194 (1977). “[T]here is a right to a jury trial where the civil action is purely legal in nature.” *Brown v. Safeway Stores, Inc.*, 94 Wash.2d 359, 365, 617 P.2d 704 (1980).

Here, the underlying action is purely legal in nature, as Ms. Hann’s claim against Mr. Squire involved claims of personal injury for which she sought monetary compensation. Because Metropolitan “stands in the shoes” of the uninsured driver Mr. Squire, it was clear that Ms. Hann was ultimately going to seek compensation from Metropolitan for her injuries. *Mercier, supra* at 903. Thus, there can be no dispute that Metropolitan was entitled to a jury trial under the Washington Constitution.

The harm suffered by Metropolitan as a result of being denied a jury trial is significant. The manner in which the trial court arrived at the default judgment is objectionable. Among other things, Metropolitan was not allowed to cross-examine Ms. Hann's lay and expert witnesses and Metropolitan was not allowed to call its own witnesses live. As noted, Metropolitan was only allowed to depose those witnesses that Ms. Hann was going to call live at the reasonableness hearing.

Based on the Court's ruling, Ms. Hann intentionally refrained from calling any live witnesses at the reasonableness hearing, thus preventing Metropolitan from deposing any of her witnesses. Thus, the trial court impermissibly delegated its authority to control the proceedings before it by granting to Ms. Hann the power to control whom Metropolitan could depose. By presenting her witnesses exclusively by declaration and expert reports, Ms. Hann effectively foreclosed any opportunity for Metropolitan to cross-examine these lay and expert witnesses and challenge the sufficiency of the evidence presented by Ms. Hann.

It is axiomatic that cross-examination is one of the bedrock principles of the adversarial system. The Washington State Supreme Court noted: "Our theory of permitting a broad scope of cross-examination is in reality based on the belief that, of all the tests which the law has provided for the ascertainment of truth, the right of cross-

examination is justly deemed the most powerful and efficacious.” *State v. Severns*, 19 Wash.2d 18, 26, 141 P.2d 142 (1943).

The importance of a jury trial, and all of the attendant circumstances of such a proceeding, such as live witnesses subject to cross-examination, cannot be overstated. In the underlying action, it would have provided an opportunity for the trial court to more fully understand and appreciate the evidence presented.

The effect of a failure to have a jury trial in this case is best exemplified by the trial court’s findings regarding Ms. Hann’s injuries. Ms. Hann sustained an injury at C6-7 that she relates to the subject accident with Mr. Squire. She underwent an MRI scan on October 26, 2005, just over six weeks after the subject accident, which was normal and showed no abnormalities at the C6-7 level of her spine. Ms. Hann had another MRI scan on February 11, 2008, more than two and a half years after the subject accident, which showed new positive findings at the C6-7 level. In his October 14, 2009, letter opinion, the trial court accounted for the discrepancies in the 2005 and 2008 MRI scans by stating: “She received trigger point injections that may have masked the injury at C6-7 and only after the repeat MRI in 2008 was the injury discovered. That does not mean that it did not exist shortly after the 2005 MRI.” CP at 371.

The trial court's statement and the reasoning behind it have no evidentiary or medical support. The trial court's lack of understanding of the discrepancies between the MRI findings demonstrates why medical testimony, including cross examination, was imperative in order to fully grasp Ms. Hann's complex medical issues. The trial court's reasoning is analogous to the proposition that narcotic pain medication would mask a fractured arm on an x-ray film. Simply put, how one feels at the time of a MRI scan, i.e. whether the person is in pain or is not in pain, will not impact the objective signs and findings disclosed by the MRI scan.

Metropolitan's inability to cross-examine Ms. Hann's treating medical providers and expert witnesses on this issue clearly contributed to the trial court's lack of understanding of the medical issues and contributed to the more than \$730,000 default judgment entered in the underlying action.

The risk that exists when evidence is limited and an adversary's challenge to that evidence is foreclosed is that a decision will be premised upon erroneous propositions. This is precisely what happened in the underlying action. However, this risk is significantly reduced when a party is permitted to impanel a jury and present all of the evidence for the jury's deliberation, including testimonial evidence obtained by way of

cross-examination. Accordingly, Metropolitan should have been afforded its constitutionally protected right to a jury trial.

2. Metropolitan's Rights under the Civil Rules to Discovery Were Violated.

The scope of permissible discovery in Washington is broad. Civil Rule 26(B)(1) states in relevant part that “[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action...” Inherent in this basic principle of discovery is the right to investigate the claims of the opposing party.

Although the trial court has the power to govern the proceedings before it, the trial court may not delegate this power to a person or entity before the court. However, this is what the trial court did when it conditioned whether Metropolitan could take Ms. Hann's witnesses' depositions on whether Ms. Hann chose to call these witnesses live at the reasonableness hearing. Thus, whether Metropolitan was going to be allowed to depose these witnesses was left entirely to the discretion of Ms. Hann.

Because the trial court and Ms. Hann prevented any opportunity Metropolitan would otherwise have under the Civil Rules to depose the lay and expert witnesses in this matter, Metropolitan was prevented from

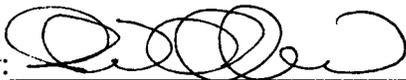
exploring the evidence upon which the trial court's default judgment against Mr. Squire was premised.

VI. CONCLUSION

Metropolitan respectfully requests this Court order that Metropolitan is not bound by the default judgment entered against Mr. Squire and remand this matter to the trial court with instructions that Metropolitan be allowed to intervene in the underlying action as a full party.

RESPECTFULLY SUBMITTED THIS 1st day of July, 2010.

JOHNSON, GRAFFE, KEAY,
MONIZ & WICK, LLP

By: 
Philip M. deMaine, WSBA #28389
Wade N. Neal, WSBA #37873
Thomas P. McCurdy, WSBA #41568
Attorneys for Appellant

FILED
COURT OF APPEALS
10 JUL -2 PM 1:23
STATE OF WASHINGTON
BY _____
CLERK

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

KIM A. HANN, a single person,)
Respondent,)
v.)
Metropolitan Property and Casualty)
Insurance Company,)
Appellant.)

NO. 08-2-11777-0
Appeal No. 40145-2-II

DECLARATION OF SERVICE

I, Krystle Bonnes, hereby certify that on July 1, 2010, I sent via ABC Legal Messengers, an original and one copy of Amended Opening Brief of Appellant to:

Washington State Court of Appeals
Division II
950 Broadway
Ste 300, MS TB-06
Tacoma, WA 98402

And that I also sent via ABC Legal Messenger one copy of Amended Opening Brief of Appellant to the following:

Ben F. Barcus
Law Offices of Ben F. Barcus

JOHNSON, GRAFFE, KEAY, MONIZ & WICK,
LLP

ATTORNEYS AT LAW
2115 NORTH 30TH ST., SUITE 101
TACOMA, WASHINGTON 98403
PHONE (253) 572-5323

ORIGINAL

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

4303 Ruston Way
Tacoma, WA 98402

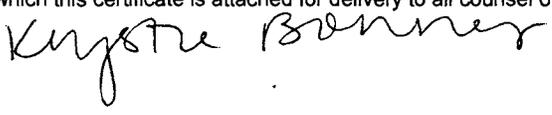
Dated this 1st day of July, 2010.



Krystle Bonnes

CERTIFICATION

I hereby certify that on 7-1-2010, I deposited in the U.S. Mail and/or placed with ~~ABC Legal Messengers~~ and/or faxed a copy of the document to which this certificate is attached for delivery to all counsel of record.



JOHNSON, GRAFFE, KEAY, MONIZ & WICK,
LLP

ATTORNEYS AT LAW
2115 NORTH 30TH ST., SUITE 101
TACOMA, WASHINGTON 98403
PHONE (253) 572-5323