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I. INTRODUCTION

The instant appeal is frivolous pursuant to RAP 18.9, due to procedural irregularities, and the failure to provide reasoned and appropriate arguments. In this case, appellant, Intervenor Metropolitan argued before the Trial Court, repeatedly, that it had a contractual right to intervene in this matter based on policy language which it was subsequently learned, **did not exist within Ms. Hann's policy of insurance with Metropolitan.** (CP 30-39) (CP 1578 - 1581). Thus, the record in this case is tainted by gross misstatements of critical facts, that so skew the analysis, that the harm done is simply irreparable. Further, as discussed in more detail below, most if not all of the arguments set forth within Metropolitan's amended opening brief are based on matters which were never properly brought to the attention of the Trial Court, have an inadequate foundation, were waived, or are simply argument without any meaningful citation to authority. The vast majority of the issues encompassed by Metropolitan's appeal are matters which were within the discretion of the Trial Court, and Metropolitan clearly has failed to show a scintilla of abuse of such discretion. As in *Durand v. HIMC*, 151 Wn.App 818, 828 n. 6, 214 P.3d 189 (2009), apparently Metropolitan is appealing simply because it does not like the result. In response, at the conclusion of Respondent's Brief, a detailed analysis is provided requesting an award of attorney's fees and compensatory damages pursuant to RAP 18.9.

Compounding such concerns is a basic fact that this dispute is between Ms. Hann, a Metropolitan insured, and it is her own insurance company who is pursuing this appeal, despite the fact it has not, (and cannot), mount a meaningful challenge to the Trial Court's conclusion that

Ms. Hann, as a result of a collision with an uninsured motorist, received injuries and damages well in excess of the applicable UIM policy limits provided by her Metropolitan automobile insurance policy. As discussed in more detail below, this case stems from the injuries received by Ms. Hann on September 9, 2005 in an automobile accident involving an uninsured motorist. (CP 318-319). As a direct and proximate result of that accident the Trial Court made a determination, and entered Findings of Fact, concluding that Ms. Hann suffered accident related injuries warranting compensation in the amount of \$731,000.00. Metropolitan has not assigned error to the judgment of the Trial Court in this matter which totals \$733,483.71. (CP 379-384). Nor has Metropolitan assigned error to the finding of fact set forth therein justifying the award of compensation at the amount awarded. Thus Ms. Hann's damages for the purposes of this appeal should be treated as verities. Yet despite the fact that in this appeal Metropolitan, by default or otherwise, has conceded that Ms. Hann's damages in total exceed over \$730,000.00, it has nevertheless pursued this appeal, even though the total of the UIM coverage at issue is only \$250,000.00.

Given such actions on the part of Ms. Hann's own insurance carrier, one can only conclude that the sole purpose of the subject appeal is to delay payment of the benefits which Ms. Hann is entitled to under an insurance policy for which she prudently and dutifully paid. When one actually places the contentions of Metropolitan under critical analysis, each and every contention Metropolitan is asserting within this appeal are without merit. Thus, not only should Metropolitan be provided no relief in this appeal, but

the respondent should be appropriately compensated under the terms of RAP 18.9.

II. COUNTERSTATEMENT OF ISSUES

1. Should the findings of facts entered by the Trial Court regarding the nature and extent of Ms. Hann's injuries be treated as verities on appeal due to the Appellant's failure to assign error to such findings of facts within their opening brief? (Appendix No. 1).

2. Due an unprecedented procedural irregularities relating to the record before the Trial Court, has the Appellant appropriately preserved errors?

3. Should the Appellate Court consider claimed errors and arguments when there has been no meaningful citation to authority or reasoned analysis?

4. Are issues regarding the Trial Court's decisions relating to the scope of intervention and discovery subject to review based on a "abuse of discretion "standard?"

5. When a party, such as Metropolitan seeks to intervene in a lawsuit, does it take that lawsuit as they find it, i.e., is it bound by all of the Trial Court's previous rulings in the case?

6. Can an intervening party substantially change the characteristics of the case in which it is intervening, i.e., can a party by intervening in a case where the underlying third party has defaulted, insist on a trial by jury, when prior to its intervention the case was appropriately postured for resolution by a default judgment reasonableness hearing?

7. Did the Trial Court abuse its discretion by limiting Metropolitan's intervention, when it made reasoned and well-tailored

decisions regarding the scope of intervention and management of discovery, which balanced the needs of the parties, and their interests within the litigation?

8. Did the Trial Court abuse its discretion by the method and manner in which it managed discovery in this case, when it provided Metropolitan all the discovery it expressly requested for and was amenable to allowing additional discovery?

9. Does the Trial Court have the inherent authority to manage discovery and place limitations upon it?

10. Did the Trial Court violate Metropolitan's right to a jury trial, when despite having notice months in advance, Metropolitan did not intervene until after the time for filing a jury demand under the Court's Case Scheduling Order had elapsed, and when Metropolitan never filed a jury demand, paid jury fees, or filed a motion requesting that the Trial Court permit it to file a late jury demand? (Appendix No. 2).

11. Assuming arguendo that the Trial Court abused its discretion with respect to limiting Metropolitan's discovery in this case, would such an abuse of discretion be deemed harmless error on appeal, when Metropolitan has failed to articulate what absent discovery would have provided, or how it was in any way prejudiced by the limitations imposed by the Trial Court?

12. Is Metropolitan's position, that it was somehow prejudiced by not being provided notice of this lawsuit, and an opportunity to intervene prior to the entry of a default order, frivolous, when, even if, Metropolitan had been provided notice of the lawsuit earlier and had intervened prior to the entry of the default order, it would have had no authority, ability or

standing to preclude the entry of a default order against a third party defendant who had failed to appear and who was in default?

13. Should respondent be awarded attorney's fees on appeal, and other compensatory sanctions pursuant to RAP 18.9, when on reasoned analysis this appeal, is solely for the purpose of delay, devoid of merit and presents no debatable issues (1) due to of procedural irregularities created by the Appellant relating to the Trial Court record; (2) when it is a verity on appeal that Ms. Hann's accident related damages far exceed the UIM coverage at issue; (3) the vast majority of Metropolitan's arguments are without any meaningful citation to authority, or are based on faulty premises that do not accurately reflect what occurred before the Trial Court; (5) a large portion, of Appellant's assertions are unsupported by the record, or were not passed on by the Trial Court, and (6) when it appears that the only reason this appeal is being pursued is because Metropolitan, after being fully heard, simply does not like the results reached by the Trial Court and its decisions, on matters which clearly rested within its discretion?

III. COUNTER STATEMENT OF THE FACTS

A. Factual Background Relating to Ms. hann's Claim for Uim Benefits Pursuant to Her Policy of Insurance with Metropolitan.

If one review's Metropolitan's Opening Brief in this matter it is clear that it does not assign error to the Trial Court's Finding of Facts, which were entered or about December 18, 2009, and which are attached hereto as Appendix No. 1. (CP 379-384). Under RAP 10.3(g), had the appellant desired to challenge the Trial Court's Findings of Fact it was obligated under Subsection (g) to provide a separate assignment of error for each finding of fact that it deemed to be improperly made, and should have included by

reference the finding by number. In addition under RAP 10.4(c), had Metropolitan desired to challenge the Trial Court's Findings of Facts, it was obligated to include a copy of the challenge findings within the appendix to its opening brief. If one reviews the opening brief of Metropolitan herein, clearly no such appendix is included.

By failing to assign any error to the Trial Court's findings of fact, such findings of fact must be deemed verities on appeal. See, *Robel v. Roundup Corp.*, 148 Wn.2d 35, 42-43, 59 P.3d 611 (2002) (unchallenged findings are deemed verities on appeal).¹

Thus, the Findings of Facts of the Trial Court must be viewed as undisputed. As indicated within Finding of Fact No. 1, on or about September 9, 2005 plaintiff Kim Hann was a passenger in her 1998 Ford Expedition, which was traveling westbound on Sixth Avenue in Tacoma, Washington. (CP 380). The evidence presented below established that at that time Ms. Hann was a passenger in her own vehicle and John Comb, a local Tacoma attorney, who had been her long term "significant other," was the driver. (CP 319). As Ms. Hann's vehicle approached the intersection of

¹ Even had Metropolitan appropriately included assignment of error relating to the Trial Court's Findings of Fact, it would make no difference. Finding of Facts will be upheld if they are supported by "substantial evidence". This is because the Trial Court is in the best position to evaluate such evidence through the evaluation of live witnesses, or the matters which have come before it. See, *Thorndyke v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 343 P.2d 183 (1959). "Substantial evidence" exists if the record contains evidence of a sufficient quantity to persuade a fair minded, rational person of the truth of the declared premise. See, *Bearing v. Share*, 106 W.2d 212, 721 P.2d 918 (1986). Under the "substantial evidence test" the Appellate Court will not substitute its judgment for that of the Trial Court so long as there is evidence, if believed, would support the results. See, *Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 107-108, 864 P.2d 937 (1994). Further, in this case, the Trial Court prior to making a determination as to Ms. Hann's damages examined the factors set forth within *Chaussee v. Maryland Casualty Co.*, 60 Wn. App. 504, 512, 803 P.2d 1339 (1991). When an Appellate Court is reviewing a Trial Court's determinations following a reasonableness hearing, such a determination is reviewed under the highly deferential abusive discretion standard. See, *Green v. City of Wenatchee*, 148 Wn. App. 351, 368, 199 P.3d 1029 (2009). Thus, it would be incumbent upon Metropolitan to establish that the Trial Court abused its discretion because its decision regarding Ms. Hann's damages rested upon "untenable grounds" or was manifestly unreasonable. *Id.* In this case, the Trial Court had before it more than "substantial evidence" from which to rest its decision. (CP 420-1265)

Sixth Avenue and Jackson Street in Tacoma, Washington, without warning it was “T-boned” on its driver’s side when a 1986 Chevy pickup truck, driven by defendant Richard Squire, which failed to stop at a red light. Apparently Mr. Squire, an uninsured motorist, was distracted in his driving, because as he went through the intersection, he was reaching for a piece of chicken and failed to notice that he had a red light. (CP 319).

The collision between Ms. Hann’s Expedition and Mr. Squire’s pickup truck was extremely serious. (CP 380). Ms. Hann’s 1998 Ford Expedition ultimately was declared a “total loss.” Attached hereto as Appendix No. 3 are color copies of the property damage suffered as a result of the September 9, 2005 collision to both Ms. Hann’s Expedition and Mr. Squire’s pickup truck.

As a result of the September 9, 2005 collision involving uninsured motorist Richard Squire, Ms. Hann suffered significant personal injuries including, but not limited to injuries to her head, neck, back and shoulder, all of which the Trial Court concluded were causing her ongoing suffering four years after the event, and which were permanent in nature. The Trial Court found that such injuries were more likely than not would cause her ongoing pain, suffering and disability indefinitely into the future. (CP 380); (CP 420-1265). (See, Finding of Fact/Conclusion of Law Nos. 3, 4 and 6).

By the time Ms. Hann’s claims were before the Trial Court on October 9, 2009, when the Court conducted a “Reasonableness Hearing,” Ms. Hann had accrued \$55,931.67 for past medical bills and related matters which were directly the result of the collision of September 9. (CP 381). (Id. No. 5).

In addition to accruing the above-referenced medical expenses, Ms. Hann also prior to the “Reasonableness Hearing” had accrued out-of-pocket expenses for prescriptions in the amount of \$5,157.97 out-of-pocket travel expenses in the amount of at least \$1,474.32 and other miscellaneous out-of-pocket expenses totaling \$4,390.59. Also significantly as a result of the subject collision, Ms. Hann had to expend out of her own pocket \$10,173.96 for occupational/ergonomic expenses, and she had to take days off from her job as result of the accident and for related treatment, thus she suffered a wage loss of \$3,872.17. (*Id.*, No. 9) (CP 381).

If one actually reviews the medical treatment Ms. Hann had to undergo because of the subject accident, it is clear that she suffered significant, debilitating, and life altering injuries as a result of the collision. As a result of her injuries Ms. Hann not only had to seek out medical care the day of the collision, but continued to be treating for her injuries up to the date of the reasonableness hearing of October 9, 2010. She underwent chiropractic treatment, physical therapy, and on three occasions had injections into her spine. Despite such efforts at conservative treatment, Ms. Hann’s accident related symptoms did not resolve and on September 21, 2009, a few weeks prior to the reasonableness hearing, Ms. Hann underwent a significant neck surgery under the supervision of Richard Wohns, M.D., a neurosurgeon. (CP 338). This surgery included (1) C6-7 anterior discectomy and osteophytectomy; (2) C6-7 disc arthroplasty with Synthes Pro Disc-C and (3) microdissection surgery. *Id.*

Thus, even if it were an issue, there was substantial evidence from which to base the Trial Court’s Finding of Fact No. 7, where it found that Ms. Hann’s testimony regarding her injuries, their nature and extent, and

their impact upon her life to be credible, and that all treatment including the above-referenced surgery was “more probable than not” accident related. (CP 381).

Once the Trial Court determined that Ms. Hann had suffered significant injuries in the September 9, 2005 collision he determined that the reasonable value for her pain, suffering, loss of enjoyment of life, disability and the like, which had been plaguing her up to the time of the reasonableness hearing, had a reasonable value of \$275,000.00. In addition, given Ms. Hann’s life expectancy of an additional 41 years, the Trial Court concluded that an award of \$375,000.00 was reasonable in order to compensation her for her future pain and suffering, and the like. (See, Finding of Fact and Conclusion of Law No. 7 and 11.) (CP 381).

Further, as discussed in more detail below, the Trial Court, when rendering it’s decision, had before it the result of a CR 35 exam by a Dr. James Blue, which had been ordered by the Court. (CP 1266-1507). The Trial Court also had before it two records reviews, which had been performed at the behest of Metropolitan by Drs. Cantini and Kjos. The Trial Court specifically found that Metropolitan’s medical evaluation was not credible, given the significant proof presented by Ms. Hann regarding the nature and extent of her injuries and the damages suffered as a direct result of the September 9, 2005 collision. (Id. Nos. 13 and 14.) Despite having a substantial opportunity to be heard, the trial also found that the Intervenor’s theory regarding the nature and extent of Ms. Hann’s damages, which was supported by a CR35 examination of the plaintiff, at Metropolitan’s behest and other records review performed for Metropolitan, not to be persuasive. (CP 381-382).

Ultimately the Trial Court entered a total Award in the amount of \$733,483.71. (Id.) (CP 383). It is noted that at the time of the September 9, 2005 collision, Ms. Hann , had a UIM policy limit of \$250,000.00. A neutral trial judge, the Honorable James Orlando, determined Ms. Hann's accident related injuries totaled nearly three times the amount of the UIM coverage. Yet, Metropolitan, despite having a full and fair opportunity to present its case/position to a neutral fact finder, nevertheless pursues this appeal.

B. Relevant Procedural History.

The instant case was filed by plaintiff Kim Hann against her own insurance company Metropolitan on August 26, 2008. (CP 1-4). Ms. Hann, a paralegal, filed her Complaint pro se and was able to perfect service against Mr. Squire, the uninsured motorist who caused the collision of September 9, 2005. Mr. Squire was served by a registered process server on September 28, 2008. Mr. Squire failed to appear and/or file an answer within the 20 days set forth in the CR 4, thus on or about October 24, 2008 Ms. Hann had entered an Order of Default against Mr. Squire. (CP 403). After the entry of the Order of Default against Mr. Squire, Ms. Hann placed her insurance company on notice that she had filed a lawsuit against the third party tortfeasor. Although the appellant, Metropolitan concede they received such notice, and are not disputing the quality thereof (only the timing) it is noted that counsel for Metropolitan before the Trial Court, represented at various times that such notice was received on November 11, 2009, or

November 18, 2009. As discussed below, ultimately the date Metropolitan received notice is academic.²

Upon the filing of the Complaint, the Superior Court for Pierce County generated a Case Scheduling Order which set the date for demanding a jury at December 30, 2008. (CP 402) (See Appendix No. 2). Despite the fact that Metropolitan was admittedly aware of this litigation, it did not attempt to intervene in this matter until February 26, 2009.³

In any event, on February 26, 2009 for the first time, despite being aware of the litigation for a number of months, Metropolitan through counsel sought to intervene into the third party action against Mr. Squire. (CP 5-8). Ms. Hann's current counsel, who appeared in the case in January, 2009, objected to Metropolitan's intervention, and argued that in order to be consistent with the insured's fiduciary obligations to its insured, any intervention should be substantially limited and subject to conditions. (CP 9-20). Naturally, Metropolitan replied that it believed it had an

² Metropolitan never disputed that it had adequate notice of Ms. Hann's lawsuit against the third party tortfeasor, Mr. Squire. To the extent Metropolitan may try to challenge the quality of notice in its reply brief, it is noted that it has long been recognized that issues cannot be raised for the first time in reply and having made such representations within its pleadings before the Trial Court, Metropolitan would be estopped by its pleadings and/or judicially estopped from changing its position in that regard. See Cowiche Canyon Conservancy v. Bosley, 188 Wn. 2d 801, 809, 828 P2d 549 (1992) (argument raised for the first time in a reply brief generally will not be addressed); See also King v. Clodfelter, 101 Wn.App 514, 518 P2d 206 (1974) and Falkner v. Foshaug, 108 Wn. App. 113, 29 P3d 771 (2001) (doctrine of judicial estoppel precludes a party from taking inconsistent positions in litigation).

^{EaP3} It is noted that on or about February 2, 2009 Metropolitan's counsel caused to be filed a "notice of appearance with intent to intervene".). Thus, despite being aware of the subject litigation in mid November, 2008, Metropolitan had made no effort to intervene in this action until nearly two months after the time for filing a jury demand in the case had expired under the terms of the court's scheduling order. If one reviews the Linx readout in this matter and the files and records herein, it is noted that there is no indication within the file that Metropolitan ever filed a jury demand, and/or paid required jury fees, or made any effort to file a motion seeking permission from the Trial Court to file a late jury demand, outside of the terms of the case schedule.

entitlement to intervene as a party and should be given the authority to engage in unfettered discovery. (CP 21-25)

On or about March 6, 2009 the Trial Court entered an Order Granting Limited Intervention to Metropolitan Insurance Company, and by way of interlineations invited Metropolitan to file a motion to allow for limited discovery on damage issues, as it deemed necessary. (CP 2829) (See Appendix No. 4). (Metropolitan has not disputed Mr. Squire's clear liability, and the only issue in this case in damages). Dissatisfied with the Trial Court's ruling, Metropolitan sought reconsideration regarding any limitations on its intervention. (CP 30-46). Such motion was denied however, during the course of deciding that issue, the Trial Court permitted Metropolitan to conduct reasonable discovery in this case. Under the terms of the interlineated portions of the court's order of April 10, 2009, which otherwise denying reconsideration, Metropolitan was allowed by the Trial Court to send interrogatories to the plaintiff but limited such discovery requests to a time frame of ten years from that date, reserved on whether or not Metropolitan could conduct a CR 35 examination, and permitted Metropolitan to depose any and all witnesses that Ms. Hann intended to call live at the reasonableness hearing. (CP 121-122). (Appendix No. 5).⁴

On or about August 13, 2009 plaintiff sought to have the court note on the motion docket a reasonableness hearing to be scheduled on

⁴If one examines Metropolitan's motion for reconsideration and subsequent pleadings, over time. Metropolitan was provided all discovery that it specifically requested. It was able to obtain years worth of Ms. Hann's medical records, it was able to submit interrogatories to her that resulted in substantial and substantive responses, it was able to have her subjected to a CR 35 examination with Dr. Blue, and it was permitted to take her deposition. Regarding Metropolitan's request to depose other individuals including plaintiff's healthcare providers, the Trial Court granted their order exactly as requested by Metropolitan. Obviously if Metropolitan wanted to depose a specific witness and/or healthcare provider it certainly could have expressly and directly asked the court that it be allowed to do so. However, if one reviews the record in this matter no such efforts occurred.

August 25, 2009, i.e., which was the trial date within the original case schedule. In response, Metropolitan filed a Motion to Continue and to Compel Discovery which was placed on the calendar for August 21, 2009. Such a Motion to Continue and to Compel Discovery was predicated on the fact that Metropolitan's counsel intended to go on vacation and based on a lack of diligence in pursuing authorized discovery and requesting any additional discovery. Despite the fact that as late as August 2009, Metropolitan had not sought to have Ms. Hann subjected to a CR 35 examination, on September 4, 2009, Metropolitan's request to have Ms. Hann subject to a CR 35 exam was granted. (CP 313-317) (Appendix No. 6). (Thus, as suggested by the Trial Court's prior actions, if Metropolitan in this case desired specific discovery, the Trial Court was clearly amenable to permitting such discovery to go forward.) (CP 123-129); (306-312).

The reasonableness hearing was held on October 9, 2009. In support of her claim for damages Ms. Hann submitted a detailed written presentation to the Trial Court which included her medical records, and approximately 13 declarations/affidavits from her healthcare providers, family, friends, employer and professional acquaintances.

Significantly, the Intervenor was also able to present to the Trial Court a substantial submission, which included a full and complete copy of the "IME" report from Metropolitan's CR 35 examiner James M. Blue, M.D., a declaration by an Evan M. Cantini, M.D. who had conducted a record review of Ms. Hann's medical records, and who expressed an opinion that Ms. Hann essentially received only minor injuries due to the accident, select excerpts of the medical records which all had been released by ms.

Hann to Metropolitan, excerpts of Ms. Hann's 70 page deposition, and a declaration from a Dr. Kjos a radiologist, who questioned Ms. Hann's physician's opinions with respect to the significance of various MRI studies conducted on Ms. Hann's cervical spine. (CP 1266-1507).

Based on such evidence, the Trial Court reached the conclusions discussed in detail above, and entered the judgment of which Metropolitan complains.

Following entry of judgment on December 18, 2009 Metropolitan filed a Notice of Appeal to Division II of the Court of Appeals. (CP 385-399). After the filing of such a Notice of Appeal, plaintiff moved for an order binding Metropolitan to the judgment which had been entered on December 18, 2009. Metropolitan objected to such an order, but nevertheless, on or about February 12, 2010 the court entered an "Ancillary Order Binding Intervenors to Judgment". (CP 1570-71). Naturally, as had been the pattern in this case, Metropolitan sought reconsideration of this Order. Reconsideration was denied on or about March 5, 2010.

On March 21, 2010 the Metropolitan filed an Amended Notice of Appeal which included the Trial Court's Order binding it to the subject judgment.

As discussed in the next section, following the filing of the Amended Notice of Appeal, it was learned for the first time by Ms. Hann and her counsel that in large part, the arguments that had been presented by Metropolitan before the Trial Court were based upon **policy language which did not exist within the actual terms of Ms. Hann's policy of insurance with Metropolitan.**

In response to Ms. Hann's protestations with respect to Metropolitan's counsel's clearly unreasonable and erroneous representations in the Trial Court, on or about July 2, 2010, counsel for Metropolitan filed a "Notice of Clarification" with the Trial Court, but made no effort to file a motion clarifying or correcting the record, and/or bringing such need for clarification to the attention of the Trial Court. (See, Supplemental CP ____) (See Appendix No. 7). Also, in recognition of this error, on July 2, 2009, Metropolitan filed an Amended Opening Brief, which excluded reference or argument relating to policy language, argued before the Trial Court but was not within Ms. Hann's policy of insurance with Metropolitan.

As discussed, this case certainly contains a unique irregularity as it relates to the record.

C. The Record on Appeal is Tainted by the Erroneous Representations by Metropolitan to the Trial Court Regarding the Terms of Ms. Hann's Policy of Insurance.

The record on appeal is tainted by the erroneous misrepresentations by Metropolitan, to the Trial Court, regarding the terms of Ms. Hann's policy of insurance. As acknowledged by the "Notice of Clarification of Record" filed on July 2, 2010 by Metropolitan with the Trial Court, (and as implied by the amendment of Appellant's Opening Brief), when arguing before the Trial Court, Metropolitan argued that it had a right to unlimited intervention, and that it should not be bound by the judgment entered by the Trial Court, because the following language was not contained within Ms. Hann's policy of insurance with Metropolitan:

If a person seeking coverage files a suit against the owner or driver of the uninsured or underinsured motor vehicle, copies of suit papers must be forwarded to us and we have the right to defend on the issues of the legal

liability of, and the damages owed by such owner or driver. However, we are not bound by any judgment against any person or organization obtained without our written consent.

As acknowledged within Metropolitan's "Notice of Clarification of Record," such policy language simply does not exist within Ms. Hann's insurance policy with Metropolitan. In fact, the only provision relating to dispute resolution regarding UIM claims under the terms of the policy is set forth in Amendatory Endorsement WA400A, which has the following language, "If there is disagreement between that person and us as to whether any persons legally entitled to collect damages from us under this section for the amount to which such person is entitled, the person seeking coverage shall file a lawsuit in the proper court against it." (Appendix No. 7). Based on the contract language which did not and does not exist within Ms. Hann's insurance policy, Metropolitan argued in its Motion for Reconsideration Regarding Intervention, that Ms. Hann had an explicit contractual duty to notify Metropolitan of her lawsuit against Mr. Squire and that given the breach of such duty, Metropolitan otherwise should be afforded the opportunity to fully defend against the lawsuit, including but not limited to unfettered discovery, and presumptively a jury trial. (CP 30-39).

Further, in its Opposition to Motion to Bind Intervenor to Judgment, Metropolitan argued that based on such policy language (which simply does not exist), that it was entitled to entry of an order that Metropolitan, was not bound to the judgment against Mr. Squire because it had not consented to the same.

As further indicated by Metropolitan's "Notice of Clarification of Record" and Amended Opening Brief, it appears now that Metropolitan is

trying to resurrect such arguments by pointing to a different provision within Ms. Hann's insurance policy which was never expressly brought to the attention of the Trial Court. See page 6 of Appellant's Amended Opening Brief. The language which Metropolitan now relies upon provides:

If any legal action has begun before we make payment under any coverage, a copy of the Summons and Complaint or other process must be forwarded to us immediately.

This provision, which was not brought to the attention of the Trial Court, is set forth within the policy's "General Policy Conditions" (CP40-96) within subsection 5 of that section under the heading of "If An Accident or Loss Occurs."

Thus, given the location of this provision within the General Provisions of the policy, it is on its face inherently ambiguous as to whether or not, and under what conditions, the above-quoted provision would apply.⁵

It has long been recognized that an Appellate Court may refuse to review any claim error which was not first raised in the Trial Court. See, RAP 2.5(a). See, *Boes v. Bisiar*, 122 Wn.App 569, 575, 94 P. 3d 975 (2004) (arguments raised for the first time on appeal are inappropriate, and failure to raise an issue before the Trial Court results in a waiver of any claimed error). See also, *Cotton v. Kronenberg* 111 Wn.App 258, 273 n. 37, 44 P. 3d 878 (2002). (An issue, theory or argument not presented at trial will not

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As the above provision is ambiguous, it must be construed in a manner favorable to the insured. See, *Allstate Insurance Co. vs. Peasley*, 131 Wn.2d 420, 423-24, 932 P 2d 1244 (1997). Further, insurance contracts must be construed as a whole and interpreted as it would be understood by an average insurance purchaser. *Daley v. Allstate Insurance Co.*, 135 Wn.2d 777, 784, 958 P2d 9990 (1998). The subject language is clearly ambiguous in that it is non-specific as to what payment, under which coverage, it should be deemed applicable.

be considered on appeal citing to *Rider v. Port of Seattle*, 51 Wn.App 144, 150, 748 P. 2d 248 (1987)).

Thus, the Appellate Court should not consider Metropolitan's argument with respect to the contractual language which is now before it, given Metropolitan's error before the Trial Court and failure to raise such "issue, theory, or argument" before the Trial Court. Further, clearly the Appellate Court should not consider the subject policy provision, which was not argued below, when the absence of such argument below, served to ensure that Ms. Hann was not afforded an opportunity to fully develop the record and address this inherently ambiguous policy provision. Had this matter been raised below, clearly Ms. Hann would have been afforded the opportunity to present to the Trial Court proof that benefits were paid under the property damage provision of her policy, and under the Personal Injury Protection (PIP) provisions also contained within its terms. Upon the receipt of such proof it reasonably could be argued that the operation of the above-referenced policy provision is essentially mooted because benefits were paid well in advance of the filing of the lawsuit thus, the quoted policy term no longer applies.

Further, the above language is ambiguous in that it is unclear as to whether it applies to every time benefits are being paid under any given coverage within the policy or, only regarding the first claim for any coverage whether property damage, PIP or UIM.

If it applies to any claim for coverage at any time, clearly Ms. Hann has not breached the provision because she provided notice of this lawsuit "before" the payment of any UIM benefits, and clearly she provided notice

of this lawsuit. In fact, to date Ms. Hann has been paid nothing under the terms of her UIM policy.

If the court is inclined to permit Metropolitan to raise this issue for the first time on appeal, Ms. Hann should be afforded an opportunity to appropriately develop evidence in order to respond to such arguments. Thus, pursuant to RAP 9.11, this matter should be subject to limited remand to the Trial Court for the taking of additional evidence with respect to what benefits were paid to Ms. Hann under the terms of her policy with Metropolitan, prior to the initiation of this lawsuit. It would simply be inequitable to permit Metropolitan to raise this issue for the first time on an appeal, while denying Ms. Hann the opportunity to appropriately develop an evidentiary response. The inclusion of such evidence likely would change and/or clarify any outcome with respect to resolution of the application of the above-referenced insurance policy provision. See, *Sackett v. Santilli 101 Wn.App. 128, 135-36, 5 P. 3d 11 (2000)* (RAP 9.11 allows an Appellate Court to take additional evidence, if among other things, the additional proof, would fairly resolve the issues, and if the evidence would probably change any decision).

As it is, the Appellate Court simply should reject and not consider Metropolitan's efforts to "bait and switch" the policy provision upon which it rests its argument. To do so would simply facilitate Metropolitan's violations of CR 11 which occurred before the Trial Court. By its express terms, CR 11 requires that a pleading be "well grounded in fact." In order to ensure that a pleading is not baseless, CR 11 places upon the attorney signing the pleading the duty of "reasonable inquiry under the circumstances." It is well established that CR 11 sanctions may be imposed

when a pleading is advanced without “factual support.” See, *Trohimovich v. State*, 90 Wn.App 554, 558, 952 P. 2d 192 (1998). In determining whether or not an attorney has engaged in a “reasonable inquiry,” regarding the factual basis of a pleading, the court must use an objective standard asking “whether a reasonable attorney in like circumstances could believe his or her action to be factually justified.” *MacDonald v. Korum Ford*, 80 Wn.App 877, 884, 912 P. 2d 1052 (1996).

Under the circumstances of this case, and upon utilization of objective standards, it is suggested that it is simply objectively **unreasonable for counsel for Metropolitan to be citing to the Trial Court, insurance policy provisions which were not, and are not part of Ms. Hann’s policy of insurance with Metropolitan, and which had been replaced by an amendatory endorsement specifically applicable to insurance policies issued within the State of Washington.**⁶

If the court is not inclined to take into consideration the CR 11 violation discovered only after the filing of this appeal when determining what matters should be considered by the Appellate Court, than this is

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If counsel for Metropolitan’s actions were done knowingly and purposefully, it is noted that RPC 3.3 (candor towards the tribunal) and RPC 3.4 (fairness to opposing party and counsel) are clearly implicated. While Respondent is hesitant to level accusations of inappropriate intent, it is noted that the deleted language which Metropolitan provided to the Trial Court is almost identical to that language set forth within the insurance policy at issue in *Petersen-Gonzales v. Garcia*, 120 Wn.App 624, 86 P. 3d 210 (2004) wherein it was held that based on the language set forth within the insurance contract, the UIM carrier (Metropolitan) had a contractual right to intervene and participate in the third party trial. On close examination, the *Petersen-Gonzales* decision rests solely upon the contractual language at issue in that case, and it is not instructive on the question of the scope of a UIM carrier’s intervention into actions against the third party tortfeasor, when such contractual language is absent. The absence of such language within Ms. Hann’s insurance contract clearly distinguishes this case from *Petersen-Gonzales*, and otherwise makes a difference. In any event, as sanctions under CR 11 are predicated on a “objective standard”, and the presence or absence of any inappropriate intent is immaterial. It can reasonably be found that under the circumstances Metropolitan’s actions were patently unreasonable and indicative of a lack of a “reasonable inquiry”.

another matter which should be subject to remand to the Trial Court, with the directions to consider whether or not CR 11 sanctions are appropriate.

As it is, at least for the purposes of appeal, it is suggested that the appropriate sanction is that the Appellate Court refuse to consider arguments which are not only procedurally irregular, but are indicative of a substantial sanctionable rule violation.

D. Motion To Strike:

For the reasons stated above, it is respectfully requested that the Appellate Court strike those portions of Appellant's Amended Opening Brief which rely on the above ambiguous insurance policy language which was never properly brought to the attention of the Trial Court. Respondent requests that Statement of Issue No. 5, at page 3 of the Amended Brief, be stricken and/or not considered by the Appellate Court. Further, page 6 beginning with "Ms. Hann's insurance policy," and concluding with "nonetheless deny Metropolitan's Motion for Reconsideration" should be stricken. Page 16 from "Washington courts have explicitly held to," to "under the civil rules as every other party to the lawsuit" should be stricken because it relies on the *Petersen-Gonzales* case which contains the same language as Metropolitan erroneously argued was contained within Ms. Hann's policy of insurance, and forms the predicate for an argument that "under its insurance contract with Ms. Hann" that Metropolitan was deprived of its rights "under its insurance contract with Ms. Hann".

Finally, page 21 and the entirety of the argument set forth within Section "D" under the heading of "the Trial Court ignored Ms. Hann's contractual duties to Metropolitan" should be stricken for the reasons stated above. Such text would be inclusive of page 21 inclusive of the above-

quoted heading to page 24 where the text ends with the beginning of heading “E.”

IV. ARGUMENT

A. Standards of Review and Other Considerations Affecting Scope of Review

As discussed in context above, there are a number of considerations which affect the scope of the Appellate Court’s review in this matter. As previously noted, in this case Metropolitan failed to assign error to any of the Trial Court’s findings of facts, and as such, all factual findings must be deemed verities on appeal. See, *Robel v. Roundup Corp.*, supra. Such a proposition is not only applicable to the court’s factual findings regarding the nature and extent of Ms. Hann’s injuries and the appropriate level of compensation related thereto, but also precludes, due to waiver, any effort on the part of Metropolitan to try to challenge the reasonings of the Trial Court as it relates to such issues. Thus, the argument set forth at page 28 and 29 of appellant’s amended opening brief challenging the Trial Court’s factual findings, should simply be disregarded.⁷

Further, as discussed above, the failure to raise issues before the Trial Court precludes the consideration of such issues by the Appellate Courts, save for those limited circumstances set forth in RAP 2.5(a).

While respondent generally agrees with Metropolitan’s assertions at page 12 of its brief that “the Appellate Court reviews the Trial Court’s interpretation of case law de novo,” that is hardly the standard of review

⁷ As discussed in footnote 1, even if such waiver had not occurred, any effort to challenge the Trial Court’s determination regarding damages would require the appellant to establish that such determinations were not supported by “substantial evidence”, which given the substantial amount of evidence presented by Ms. Hann at the reasonableness hearing, would be a dubious proposition at best. Further, the Trial Court’s determinations made during the course of a reasonableness hearing are reviewed under an “abuse of discretion” standard. See, *Werlinger v. Warner*, 126 Wn. App. 342, 349; 109 P. 2d. 22 (2005).

applicable to the issues raised within the four corners of Appellant's Opening Brief.

The Trial Court's decisions relating to intervention under CR 24 are reviewed under an abuse of discretion standard. See, *State Ex Rel. Keeler v. Port of Peninsula*, 89 Wn.2d 764, 766-67, 575 P 2d 713 (1978). See also, *Proctor v. Forsythe*, 4 Wn.App 238, 241, 480 P 2d 511 (1971).

Additionally, a Trial Court's decisions regarding discovery, including the decision to limit the scope of a party's requests is reviewed under an abuse of discretion standard. See, *Nakata v. Blue Bird, Inc.*, 146 Wn.App 267, 277, 191 P 3d 900 (2008). A Trial Court has broad discretion under CR 26 to manage the discovery process and, if necessary, limit the scope of discovery. *Id.*

Finally it is noted that a Trial Court's decision whether to permit the late filing of a jury demand, is a matter which is vested within its sound discretion, and decisions relating thereto should not be reversed absent a showing of an abuse of discretion. See, *Sackett v. Santilli*, 101 Wn.App at 134.

An abuse of discretion occurs when the Trial Court's decision is "manifestly unreasonable or rests upon untenable grounds or reasons." See, *Kim v. Moffett*, 156 Wn.App 689, 697, 234 P 3d 279 (2010). An abuse of discretion exists only if no reasonable person would have taken the view adopted by the Trial Court. *Id.* When a matter is subject to review under an abuse of discretion standard, even if the Appellate Court substantially disagrees with the Trial Court's determination, it may not substitute its judgment for the Trial Court, unless the basis for the Trial Court's ruling is

untenable. See, *Minehart v. Morningstar Boy's Ranch*, 156 Wn.App 457, 463, 232 P 3d 591 (2010).

As discussed in more detail below, the Trial Court in this case, clearly did not abuse its discretion and Metropolitan cannot establish even a colorable claim of error, or that it was treated unfair.

B. The Trial Court Appropriately Exercised Its Discretion When It Granted Metropolitan's Motion to Intervene But Limited The Scope of Such Intervention

As noted above, decisions regarding intervention are left to the sound discretion of the Trial Court. Generally when considering intervention under CR 24, the extent of the rights of a party seeking to intervene must be determined on a case by case basis. See, *Mariano Property Company v. Port of Commissioner*, 97 Wn.2d 307, 316, 644 P 2d 1181 (1982). In determining such issues, and in interpreting CR 24, Washington court's have looked to federal precedent, relating to the federal version of the rule, for guidance. See, *American Discount Corporation v. Saratoga West, Inc.*, 81 Wn.2d 34, 37, 499 P 2d 869 (1972).

For the purposes of this appeal, Ms. Hann is not disputing that the Trial Court appropriately exercised its discretion by allowing Metropolitan to intervene into this action. There is simply no question that under the *Finney-Fisher Rule* that Metropolitan is bound by the result in this case, and as Mr. Squire was in default and not defending, Metropolitan's interests were not otherwise being protected.⁸ However, having conceded that Metropolitan had the right to intervene in this action, does not mean that the

⁸ See, *Finney v. Farmers, Insurance*, 21 Wn.App 601, 586 P 2d 519 (1978), affirmed, 92 Wn. 2d 748, 600 P 2d 1272 (1979) and *Fisher v. Allstate Ins. Co.*, 136 Wn.2d 240, 961 P 2d 350 (1998).

Trial Court abused its discretion by placing reasonable limits on such intervention.

With respect to the “scope of intervention” 35A CJS Federal Civil Procedure § 173 (2010) provides significant guidance:

Intervention in an action in the federal courts, pursuant to the Federal Rules of Civil Procedure, must be in subordination to, and in recognition of, the propriety of the main proceeding. Accordingly, a person entering a case as an intervener must come in subordination to the main proceeding and not in defiance of it. A person intervening must, therefore, accept the litigation as it is presented in the main proceeding and must take the litigation as he or she finds it at the time of the intervention. The intervener is bound by such litigation. Accordingly, the intervener is bound by all prior orders and adjudications of fact and law as though such intervener had been a party from the commencement of the suit. Permission to intervene does not carry with it the right to re-litigate matters already determined, unless those matters are otherwise subject to reconsideration. However, an intervener must take the litigation as he or she finds it only in the sense that he or she cannot change the issues framed between the original parties, and must join subject to the proceedings that have occurred prior to his or her intervention (Footnote omitted) (Emphasis added).

As explained in 35A CJS, “the court, in granting a motion to intervene, is authorized to restrict the scope of the intervention, and permit it only for a limited purpose. The court is authorized to do this even though the intervention is a matter of absolute right and pursuant to a statutory provision granting an unconditional right to intervene, and where such a limitation is imposed, the intervener does not have a free reign in the litigation.” (Footnote omitted), See also, *U.S. v. board Ed. of Waterbury,*

605 F 2d 573, 576 (2d Cir. 1979). (Intervenor may participate in lawsuit within the limitations of purpose imposed at the time of intervention).

As discussed in more detail below in every instance where an insurer has been deemed bound under the *Finney Fisher Rule*, it has been under circumstances where it was bound to a proceeding, which was not the specific dispute resolution mechanism set forth within the insurance contract, or its preference. In this case, Metropolitan chose to intervene knowing it would be bound by the result of this proceeding given the amount of prior notice it had of the proceedings. It did not have the right, upon making the choice to intervene, to substantially expand the litigation. At the time Metropolitan finally made an effort to intervene, (despite having over two months notice of the ongoing litigation), a default order had already been entered against Mr. Squire who was in default, and as a result the case was already on track for a resolution by way of a reasonableness hearing, which ultimately would result in a default judgment. Upon intervening not only was Metropolitan bound by the court's prior case scheduling order, but also all other prior orders that had been entered, including the entry of the default order against Mr. Squire.

Thus, when considering balancing the interests of Metropolitan with those of Ms. Hann, the Trial Court was well within its broad discretion to enter orders which precluded Metropolitan from broadly expanding the already existing litigation, while at the same time affording Metropolitan a reasonable modicum of due process and a reasonable opportunity to be heard. See, RP, Vol. I at 12.

Further, and as discussed below, if one actually examines the limitations placed upon Metropolitan, even if it had a status of a party and

had been sued contemporaneous with Mr. Squire, the limitations that were imposed were the kind of limitations that the Trial Court had the authority to impose on any party pursuant to its discretionary authority to manage discovery and the proceedings before it.

As Metropolitan was bound by all prior Trial Court rulings upon intervening, the fact that a default order had been taken against Mr. Squire was simply one of the facts of the litigation it was entering into. Further, and perhaps the primary logical fallacy within Metropolitan's argument is that even if it had been notified and intervened prior to the entry of default order, it is simply a dubious proposition that Metropolitan would have had standing to prevent the entry of such an order. Metropolitan has cited to no authority nor is respondent aware of any, which provides a co-defendant in multiparty litigation, the power to engage in any act which would preclude a plaintiff from having a default order entered against a co-defendant which has failed to appear.⁹

When deciding issues relating to intervention, the court when making a case by case analysis must balance the relative concerns of the original parties to the actions against those of the parties seeking to intervene. See, *In Re Dependency of J.W.H.*, 106 Wn.App 714, 24 P 3d 1105 (2001).

In this case the Trial Court wisely exercised its discretion and appropriately balanced the interests of the parties. The orders limiting the scope of Metropolitan's intervention simply ensured that such intervention

⁹ It is noted that after intervening Metropolitan made no effort to file a motion to set aside the default order. Clearly Metropolitan would have had no standing to do so, given the fact that Mr. Squire was not its insured, nor counsel for Metropolitan's client. Also, there would be an absence of any factual basis for the filing of such a motion. Again it is emphasized that Mr. Squire had been appropriately served, failed to answer and was in default.

did not dramatically change the character of the litigation. That is exactly what the Trial Court was required to do.

C. **A Trial Court Has Broad Discretion Under CR 26 to Manage Discovery.**

The Trial Court has broad discretion to manage discovery within the cases that come before it. See, *Nakata v. Bluebird, Inc.*, 146 Wn. App. at 277. See also *Howard v. Royal Specialty Underwriting, Inc.*, 121 Wn. App. 372, 379-80, 89 P.3d 265 (2004). Simply because the court exercised its discretion to limit discovery, in the context of limiting the scope of Metropolitan's intervention, is simply a distinction without a difference. Clearly the Trial Court has substantial discretion to manage discovery within the cases which come before it.

In this case, the Trial Court did not abuse its discretion in providing and allowing Metropolitan to conduct substantial discovery prior to the October 9, 2009 reasonableness hearing. Despite Metropolitan's protestations, it is noted that the Trial Court was reasonably liberal in its allowance for Metropolitan to conduct discovery in preparation for the reasonableness hearing. Metropolitan was allowed to take an extensive deposition of Ms. Hann, and was provided access to copies of all of her relevant medical records. Metropolitan was allowed to propound interrogatories and requests for production to Ms. Hann, and she provided extensive responses.

Further, and perhaps most importantly, given the fact that the underlying matter involved only issues regarding the nature and extent of Ms. Hann's accident-related injuries, the Trial Court, even though it caused a continuance of the reasonableness hearing, permitted Metropolitan to conduct a CR 35 examination with Dr. Blue.

While Metropolitan continues to protest that it was not allowed unfettered opportunities to depose lay witnesses, and Ms. Hann's healthcare providers, it is noted that at no time did Metropolitan make a specific request to the Trial Court to allow a specific deposition of any person. It is suggested that when evaluating whether or not the Trial Court abused its discretion by limiting discovery the cases generated under CR 56(f) are instructive. Under CR 56(f), prior to gaining a continuance of a summary judgment motion, in order to conduct additional discovery, it is incumbent on the party desiring discovery to offer an explanation as to why there was a good reason for delay in obtaining the discovery, and must show by affidavit, what evidence the party seeks, and how it will help them. *See Durand v. HIMC Corporation*, 151 Wn. App. 818, 828, 214 P.3d 189 (2009).

In this case, while Metropolitan generally complains that it was denied discovery it has failed to articulate what exact discovery was denied. It is suggested without such a foundation, Metropolitan's vague complaints simply should be rejected. Further, without such information, Metropolitan cannot articulate any prejudice resulting from the Trial Court's discovery decisions, and even if the Appellate Court was inclined to substitute its judgment for that of the Trial Court, such claimed error necessarily fails because it constitutes nothing more than "a harmless error." *See, Hoskins v. Reich*, 142 Wn.App 57, 570-71, 174 P.3d 1250 (2008). (Error without prejudice is not grounds for reversal. An error will not be considered prejudicial unless it affects the outcome).

It is respectfully suggested that Metropolitan's hopeful speculations that if it had been permitted to engage in some yet-to-be-articulated and

unspecified discovery, it would have had any impact, or altered the outcome, are an insufficient basis to establish a prejudicial error warranting a reversal, and clearly it does not establish that any absence of discovery affected the outcome in this case.

D. Metropolitan was not Denied its Right to a Jury Trial Because it Never Asked for One.

As touched on above, Metropolitan admits that by mid November 2008 it was aware of this litigation. As Metropolitan was being represented by local counsel, surely he must have realized immediately upon such notice, that it would be likely that the Trial Court upon filing of the lawsuit generated a case schedule with relevant deadlines. (See, Appendix No. 2). Under the terms of the case schedule issued in this case, a jury demand had to be filed by December 30, 2008. Yet apparently unconcerned, and dilatory, Metropolitan did not even file a Motion to Intervene in this action until late February 2009. By that time, the period for filing a jury demand under the case scheduled had long since expired.

Before a party can contend that they have been denied their constitutional right to a jury trial, which is regulated by CR 38, it first must be shown that they actually made a demand for a jury. See, *Ford Motor Company v. Barrett*, 115 Wn.2d 556, 800 P.2d 367 (1990). (Failure to file a demand for a jury trial pursuant to CR 38, constitutes a waiver of the right and renders moot any contention on appeal that the right to a jury trial was denied). Further, even though given the timing of Metropolitan's intervention, any effort to file a jury demand would have been late, nevertheless the Trial Court would have had the discretion to permit the late filing of such a demand (if it were made). See, *Sackett v. Santilli*, 101 Wn.App 128, 5 P.3d 11, *aff'd* 146 Wn. 2d 498, 47 P.3d 948 (2002). Here,

the Trial Court should not be reversed because of a decision it was never properly asked to make.

Thus, having failed to file a jury demand in this case and not having paid the appropriate jury fee, Metropolitan has waived any contention that it was inappropriately denied a right to trial by jury by the Trial Court.

E. Metropolitan was Provided Reasonable Notice and a Full and Complete Opportunity to be Heard.

Metropolitan's contention that it received inadequate and untimely notice of Ms. Hann's third-party litigation against Mr. Squire, is predicated on the fallacious notion that had Metropolitan intervened earlier it would have been able to prevent the entry of an order of default against Mr. Squire. As discussed above such a proposition appears dubious at best, and is certainly not a matter on which Metropolitan has provided any meaningful citation to authority or reasoned argument.

Thus, any contention that Metropolitan had the capacity to prevent the entry of an order of default against Mr. Squire should simply be disregarded. See, *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d at 80. (Argument not supported by a citation to pertinent authority or adequate analysis should be disregarded). It is now well established that in order to trigger application of the *Finney-Fisher* rule all an insured need do is provide the UIM carrier with actual notice that a third-party litigation has been commenced. See, *Beck v. Farmers*, 113 Wn.App 217, 223-24, 53 P.3d 74 (2002). (Actual notice). See also, *American Economy Insurance Company v. Lyford*, 94 Wn.App 347, 353-54, 971 P.2d 964 (1999). (UIM carrier must be provided "actual notice of the third-party litigation"). Once such actual notice is provided the UIM insured is not obligated to do anything more in order to ensure the application of the *Finney-Fisher* rule.

See, *Lenzi v. Redland Insurance Company*, 140 Wn.2d 267, 278, 996 P.2d 603 (2000). (Under *Finney-Fisher* an insured is only required to provide timely notice to the insurer that an action has been commenced against the uninsured tortfeasor, providing an opportunity for the uninsured to intervene, and not notice of all pleadings filed).

In this case, Metropolitan received more than what was required in order to make an assessment and determine whether or not its interests would be served by intervening into the third-party litigation against the at-fault uninsured tortfeasor. *Id.* Given the fact that Metropolitan intervened months before the resolution of Ms. Hann's claim against Mr. Squire by way of the October 9, 2009 reasonableness hearing, and given the fact that Metropolitan was allowed substantial discovery and participation during the course of the reasonableness hearing, it can hardly be said that it received inadequate notice of a need to take the measures necessary to protect its position. In fact, Metropolitan's contentions to the contrary are simply specious.

Generally, notice must be "reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullan v. Central Hanover Bank and Trust Company*, 339 U.S. 306, 314, 70 S.Ct. 652, 94 L. Ed. 865 (1950). In *Lenzi*, the UIM insurer was bound when its insured provided it with a docket-stamped copy of the summons and complaint **two months before obtaining the default judgment**. 140 Wn.2d at 269, 271-72, *accord*, *Finney v. Farmers Insurance Company*, 21 Wn.App at 616. (UIM insurer bound by default judgment wherein insured provided copy of

summons, complaint, amended complaint, answers, police report and other documentation).

Indeed, in a slightly different context, **six days' notice, was deemed sufficient prior to the conducting of a reasonableness hearing relating to a settlement, when the party claiming prejudice otherwise had full knowledge of the underlying facts and was able to participate at the hearing.** See, *Howard v. Royal Specialty Underwriting, Inc.*, 121 Wn.App 372, 89 P.3d 265 (2004).

In this matter clearly Metropolitan received adequate notice and a full and complete opportunity to be heard. Unfortunately for Metropolitan the Trial Court simply rejected what it had to say. That is not reversible error.

Clearly Metropolitan either misapprehends the *Lenzi* opinion or is attempting to purposely mislead the Court. In *Lenzi*, it was held that notice of a lawsuit two months prior to entry of a default **judgment** was sufficient notice under the terms of the *Finney-Fisher Rule*. Clearly *Lenzi* does not stand for the proposition that notice is untimely if it occurs after entry of a **order of default**. Metropolitan cites to no authority and Ms. Hann is aware of none, which indicates that failure to provide notice of the litigation prior to entry of a **order of default** renders such notice untimely for the purposes of the *Finney-Fisher Rule*.

In fact, the plain implications of the *Lenzi* opinion are exactly to the contrary to the assertions of Metropolitan. As shown above, clearly Metropolitan under the facts of this case had more than an ample opportunity to intervene, (which it did), and to protect its interest and participate in the litigation. The *Finney-Fisher Rule* requires nothing more.

Frankly at the heart of Metropolitan's argument is simply the fact that it disagrees with the *Finney-Fisher Rule* and its application to it. Clearly the policy justifications set forth within the *Finney-Fisher-Lenzi* opinions trump Metropolitan's concerns, and by its very nature the *Finney-Fisher Rule* subplants the dispute resolution provisions otherwise set forth within an insurance company's contract for UIM benefits. Thus, any allegation by Metropolitan that Ms. Hann breached the terms of her insurance policy cannot withstand the underlying policies which animate the *Finney-Fisher Rule*. Further, and as discussed above, it is a dubious proposition that Ms. Hann breached any duty to Metropolitan, which in of itself apparently has no "no clue" regarding what are or are not the actual terms of its policy of insurance with Ms. Hann.

The *Finney-Fisher Ruler* has broad application, and by its very nature removes the claim from contractual dispute resolution provisions. See, *American Economy Insurance Company v. Lyford*, 94 Wn.App 347, 971 P.2d 964 (1999)(UIM insurer bound to settlement agreement, despite arguments that the settlement would violate of the terms of the underlying insurance policy); *Mencel v. Farmer's Insurance* 86 Wa.App. 480, 937 P.2d 627 (1997)(UIM insurer bound to the result of a jury verdict and subsequent settlement of the third-party litigation, even though under the terms of the UIM policy, disputes relating to entitlement to UIM benefits were subject to arbitration); *Fisher v. Allstate Insurance* 136 Wa. 2d 240, 961 P.2d 350 (1998)(UIM insurer bound by agreed binding arbitration, even though it only had notice of underlying lawsuit and was not a party to the binding arbitration agreement); *Lenzi v. Redlands Insurance, supra*, (UIM carrier bound by the result of a default judgment reasonableness determinations,

in which it had prior notice of, despite the fact that the UIM policy of insurance contained specific dispute resolution provisions); and see also *Mutual of Enumclaw Insurance Co., v. T&G Construction*, 165 Wa. 2d 255, 263, 199 P.3d 376 (2008)(First-party insurer bound by settlement between third-party tortfeasor and the first-party insured under the principle espoused by the *Finney-Fisher Rule*).

In sum, Ms. Hann did not ignore her contractual duties to Metropolitan, and given the operation of the *Finney-Fisher Rule*, even if she had, the policies which animate the *Finney-Fisher Ruler* control. As it is, she did not breach any terms of her contract of insurance with Metropolitan, nor did the actions of the Trial Court serve to modify her contract of insurance with Metropolitan. The Trial Court simply applied applicable legal doctrine, and did so appropriately.

F. Metropolitan Contentions That Ms. Hann Violated Her Statutory Duty of Good Faith Is Specious.

Although Metropolitan generally articulates the duty of "good faith" applicable to both parties to an insurance contract, it fails to cite to any authority that indicates that an insured's utilization of available legal doctrine, such as the *Finney-Fisher Rule* serves to breach the insured's good faith obligations. Further the Metropolitan's contentions that Ms. Hann failed to provide it with timely notice and a reasonable opportunity to be heard is at its core a frivolous allegation.

Obviously, given the amount of discovery it was provided and its participation before the Trial Court, Metropolitan was provided more than an ample opportunity to protect its interest before the Trial Court and because, in rather "sour grapes" fashion, it does not like the result, is no basis from which to assert that Ms. Hann has done anything inappropriate.

Ms. Hann, and the Trial Court followed the law. The operation of the *Finney-Fisher Rule* by its very nature binds a UIM insurer to a proceeding that more likely than not is a dispute resolution procedure within the terms of the insurance contract.

Further, and as discussed above, and which is essentially conceded by Metropolitan, Ms. Hann did all that she was required to do, i.e., provide Metropolitan with notice of the third-party litigation. Metropolitan's assertions of "bad faith" and "sharp practice" are simply specious.

If anything, it is noted that this appeal of a Judgment rendered by a neutral fact finder, which is almost three times the amount of available UIM benefits, is almost by definition "bad faith," and likely a "bad faith insurance practice" as a matter of law. Metropolitan had a full and complete opportunity to present its position to a neutral fact finder, Judge Orlando, and ultimately its positions with respect to the nature and extent of Ms. Hann's damages, were rejected after a full opportunity to be heard. Under such circumstances it is hard to imagine how the pursuit of this appeal by Metropolitan would not be considered "bad faith."

G. Plaintiff/Respondent should be awarded costs and attorney's fees pursuant to RAP 18.9.

As discussed above, this appeal is infected with a CR 11 violation perpetrated by counsel for Metropolitan. Further under the terms of RAP 18.9 the Appellate Court can award costs and attorney's fees, and other compensatory damages, on appeal, if the appeal is frivolous and for the purpose of delay. An appeal is considered frivolous, for RAP 18.9 purposes, if it presents no debatable issues and is so devoid of merit that there is no reasonable possibility of reversal. See *Carrillo v. City of Ocean Shores*, 122

Wn.App 592, 619, 94 P.3d 961 (2004), citing to, *Streater v. White*, 26 Wn. App 430, 434, 613 P.2d 187, *Rev. denied*, 94 Wn.2d 1014 (1980).

In this case, beyond the above discussed CR 11 violation it is noted that Metropolitan's appeal is simply "devoid of merit." In many instances, Metropolitan argues regarding the factual sufficiency of the Trial Court's determinations, yet failed to assign error to any of the Trial Court's Findings. Metropolitan in many instances raises arguments without any meaningful citation to authority or reasoned analysis. Metropolitan's appeal is predicated on the fallacious notion that had it been provided earlier notice, it could have somehow prevented the entry of a Default Order against Mr. Squire, the uninsured third-party tortfeasor, who clearly was in default. Yet Metropolitan fails to cite to any meaningful authority for such a proposition. Metropolitan is asserting that, under *Lenzi*, it has a right to notice of the litigation prior to entry of a Default Order, but the *Lenzi* opinion addresses notice prior to entry of a **default judgment**. Metropolitan accuses Ms. Hann of breaching the terms of her insurance policy with Metropolitan by engaging in actions which were clearly authorized under the terms of *Finney-Fisher Rule*, and its progeny, while at the same time, Metropolitan predicates its arguments based upon an obscured general provision within its insurance contract with Ms. Hann, that was never squarely placed before the Trial Court and on its face is exceptionally ambiguous, and even if construed in a manner most generous to Metropolitan, was never violated by Ms. Hann in this case.

It is suggested, when analyzing whether or not Metropolitan's appeal is frivolous the court should be extremely mindful that Metropolitan's underlying UIM limit is only \$250,000.00. This is significant, in that after

having a full opportunity to be heard, a Judgment for over \$730,000.00 was entered. Thus, it is difficult to understand why Metropolitan, despite a determination that this matter far exceeds policy limits by a neutral fact finder, would pursue this appeal. It is suggested that the only possible rationale is that for whatever reason, Metropolitan simply desires to delay payment, knowing that its efforts to overturn what are clearly discretionary ruling by the Trial Court have little or no chance for success.

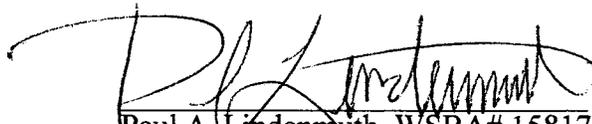
It is suggested that under the circumstances, fees are warranted under RAP 18.9 and Ms. Hann should be provided appropriate compensatory damages to ameliorate the harm perpetrated by her own insurance company.

IV. CONCLUSION

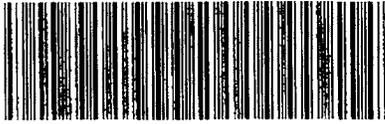
For the reasons stated above, Metropolitan should be afforded no relief by the Court of Appeals and the judgment of the Trial Court should be affirmed. At the heart of Metropolitan's appeal are fallacious and illogical assertions that are inconsistent with the law of the State of Washington. Although Metropolitan clearly does not like the result it acquired before the Trial Court, the decisions of which Metropolitan complains about are matters which were vested to the discretion of the Trial Court, and supported by substantial evidence submitted.

Finally, respondent, Kim Hann, who has been injured by her own insurance company, should be awarded attorney's fees and compensatory damages pursuant to RAP 18.9.

Dated this B day of September, 2010.


Paul A. Lindenmuth, WSBA# 15817
Attorney for Respondent

Appendix 1



08-2-11777-0 33394908 JD 12-18-09

The Honorable James R. Orlando



**SUPERIOR COURT OF WASHINGTON
FOR PIERCE COUNTY**

KIM A. HANN, a single person,
Plaintiff,

NO. 08-2-11777-0

v.

RICHARD SQUIRE and "JANE DOE"
SQUIRE, individually and the marital
community comprised thereof,
Defendants.

**AMENDED ORDER ENTERING
JUDGMENT AND FINDINGS OF FACT/
CONCLUSIONS OF LAW UPON
REASONABLENESS HEARING**

JUDGMENT SUMMARY

- 1. Judgment Creditor: Kim Hann
- 2. Judgment Creditor's Attorney: Ben F. Barcus
- 3. Judgment Debtor: Richard Squire and "Jane Doe" Squire
- 4. Judgment Debtor's Attorney: None
- 5. Principal Judgment Amount: \$ 731,000.68

ORDER ENTERING JUDGMENT AND FINDINGS OF FACT/ CONCLUSIONS OF LAW UPON REASONABLENESS HEARING - 1 Law Offices Of Ben F. Barcus & Associates, P.L.L.C.
4303 Ruston Way
Tacoma, Washington 98402

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- 1
- 2 7) The Court further finds that more probably than not, the C6-7 injuries suffered by
- 3 Ms. Hann is related to the collision with Mr. Squire. Ms. Hann reported for years
- 4 that she was suffering ongoing arm, shoulder and hand pain and numbness. She
- 5 received trigger point injections that may have masked the injury at C6-7 and only
- 6 after the repeat MRI in 2008, was the injury discovered. That does not mean that it
- 7 did not exist shortly after the prior 2005 MRI. The Court finds that Ms. Hann's
- 8 testimony is credible on both her injuries and how the extent of those injuries has
- 9 impacted her life. The Court also finds that Ms. Hann's neurosurgeon, Dr. Richard
- 10 N. W. Wohns has causally-related the C6-7 injury and need for subsequent surgery
- 11 to the collision, on a more probable than not medical basis.
- 12
- 13 8) The Court does not find that there is any evidence that Ms. Hann suffered a
- 14 subsequent injury (after the September 2005 automobile collision), that in any
- 15 fashion caused the C6-7 injury as referenced above.
- 16
- 17 9) Ms. Hann incurred Out of Pocket Medical Expenses for Prescriptions in the amount
- 18 of \$5,157.97; Out of Pocket Travel Expenses in the amount of at least \$1,474.32;
- 19 Out of Pocket Miscellaneous Expenses in the amount of \$4,390.59; Out of Pocket
- 20 Occupational/Ergonomic Expenses in the amount of \$10,173.96; in addition, due to
- 21 her injuries, Plaintiff had to take days off work from at least September 12, 2005 to
- 22 May 5, 2009 as a result of this accident and therefore lost \$3,872.17 in wages.
- 23
- 24 10) The Court further finds that despite her course of treatment, Plaintiff Kim Hann has
- 25 suffered from collision-related disability and continues to suffer from such ongoing
- 26 disability as a result of the Defendant's negligence in this action.
- 27
- 28 11) The Court finds that Ms. Hann's past pain and suffering to be reasonably valued at
- \$275,000.00 as it has been four years since the injury occurred, and Ms. Hann has
- shown a significant impact on her life and activities. With regard to future pain and
- suffering (general damages) the Court finds that Ms. Hann is now 41 years old and
- has a life expectancy of 41.3 additional years. Accordingly, the Court finds that Ms.
- Hann's future pain and suffering (general damages) from the collision to be
- reasonably valued at \$375,000.00, for total general damages in the amount of
- \$650,000.00.
- 12) The Court further finds that a \$733,483.71 judgment, including statutory costs, is
- reasonable, and entirely consistent with jury verdicts regarding similar injuries.
- 13) The Court further finds that during the course of a defense medical examination of
- Ms. Hann by Dr. James Blue, Ms. Hann asked him if he could make her well. Dr.
- Blue responded that he would leave that to Ms. Hann's neurosurgeon, Dr. Richard

1 N.W. Wohns. The medical evidence supports on a more probable than not basis that
2 Ms. Hann's collision-related injuries are permanent in nature.

3 14) The Court further finds that the reports of two medical experts presented by
4 Intervenor Metropolitan through their counsel, including reports of Dr. Evan M.
5 Cantini and Dr. Bent O. Kjos, are not credible in light of the significant proof
6 presented by Ms. Hann as to the nature of her injuries and damages from the
7 *collision trauma of September 9, 2005.*

8 15) The Court further finds that there is no valid defense to liability in this matter and
9 that the Defendant's liability was clear, absolute, and indefensible.

10 16) The Court was not persuaded by the Intervenor's theory in this case as to the medical
11 evidence.

12 17) The Court further finds that the defendant was entirely liable for the subject collision
13 and all of the resulting injuries sustained by Plaintiff Kim Hann.

14 18) The Court further finds that the risk and expense to Plaintiff Kim Hann of continued
15 litigation was extreme as the Defendant is uninsured and likely has little or no assets.

16 19) The Court further finds that if Plaintiff Kim Hann had proceeded to trial, she would
17 have incurred significant additional expenses in preparing for trial and presenting
18 expert witness testimony that would have further reduced her net recovery.

19 20) The Court further finds that the Plaintiff has done significant preparation and
20 investigation in this case;

21 21) The Court further finds that there were no other parties to the litigation whose
22 interests were affected, except for Intervenor Metropolitan, who appeared and
23 participated in defending damages at the time of the Reasonableness Hearing in this
24 matter. Intervenor Metropolitan was allowed to conduct reasonable discovery in
25 defense of the damages requested by Ms. Hann.

26 22) On March 6, 2009, this Court granted limited intervention rights to Metropolitan.
27 On March 16, 2009, Metropolitan filed a motion for reconsideration regarding the
28 Court's limited grant of intervention. On April 10, 2009, the Court denied
Metropolitan's motion for reconsideration, but modified its earlier March 6, 2009,
Order and permitted Metropolitan to conduct certain discovery which the Court
limited to interrogatories that Metropolitan could propound to plaintiff, access to
plaintiff's medical records for the past 10 years, and the right to depose plaintiff and
witnesses plaintiff intended to call live at the reasonableness hearing.

II. CONCLUSIONS OF LAW

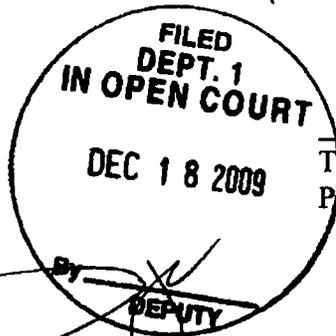
- 1) Defendant Richard Squire's negligent driving was the proximate cause of Plaintiff Kim Hann's injuries and damages; the direct sequence which produced her injuries and damages was the collision; but for Defendant's act of causing the subject collision, there would be no such injuries and damages.
- 2) A judgment of \$733,483.71, including statutory costs, is fully reasonable and appropriate for damages sustained by Plaintiff Kim Hann as a result of defendant's clear negligence in the automobile collision that occurred on September 9, 2005.
- 3) That the Court approves the reasonableness of the Judgment.
- 4) All Findings of Fact that are deemed Conclusions of Law and all Conclusions of Law that are deemed Findings of Fact shall be treated as if appropriately designated within this pleading.

III. ORDER

It is therefore,

ORDERED, ADJUDGED AND DECREED that the Plaintiffs shall be and are hereby awarded Judgment against the Defendants in the amount of \$733,483.71, including statutory costs, and the Judgment entered herein shall bear interest from today's date until said Judgment is satisfied in full at the highest statutory amount allowable under the law (which is 2.294% as of today's date).

DONE IN OPEN COURT THIS 18 day of December 2009.



[Signature]
 THE HONORABLE JAMES R. ORLANDO
 Pierce County Superior Court, Dept. 1

Presented by:

[Signature]
 Ben F. Barcus WSBA#15576

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Attorney for Plaintiff

Approved as to form; Notice of
Presentment Waived:

 WSBA 41568

Philip M. deMaine, WSBA#28389
Attorney for Intervenor Metropolitan

Appendix 2

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR PIERCE COUNTY

E-FILED
IN COUNTY CLERK'S OFFICE
PIERCE COUNTY, WASHINGTON

August 26 2008 11:43 AM

No. 08-2-11777-0

KEVIN STOCK
COUNTY CLERK

ORDER SETTING CASE SCHEDULE

Type of case: TMV
Estimated Trial (days): 4
Track Assignment: Standard
Assignment Department: 01
Docket Code: ORSCS

Confirmation of Service	9/23/2008
Confirmation of Joinder of Parties, Claims and Defenses	12/23/2008
Jury Demand	12/30/2008
Settlement Conference Date with Judge/Commissioner MEAGAN M. FOLEY	1/20/2009
Status Conference (Contact Court for Specific Date)	Week of 1/20/2009
Plaintiff's Disclosure of Primary Witnesses	2/17/2009
Defendant's Disclosure of Primary Witnesses	3/17/2009
Disclosure of Rebuttal Witnesses	5/5/2009
Deadline for Filing Motion to Adjust Trial Date	6/2/2009
Discovery Cutoff	7/7/2009
Exchange of Witness and Exhibit Lists and Documentary Exhibits	7/21/2009
Deadline for Hearing Dispositive Pretrial Motions	7/28/2009
Joint Statement of Evidence	7/28/2009
Settlement Conference (To be held)	Week of 7/28/2009
Pretrial Conference (Contact Court for Specific Date)	Week of 8/11/2009
Trial	8/25/2009 9:00

Unless otherwise instructed, ALL Attorneys/Parties shall report to the trial court at 9:00 AM on the date of trial.

NOTICE TO PLAINTIFF/PETITIONER

If the case has been filed, the plaintiff shall serve a copy of the Case Schedule on the defendant(s) with the summons and complaint/petition: Provided that in those cases where service is by publication the plaintiff shall serve the Case Schedule within five (5) court days of service of the defendant's first response/appearance. If the case has not been filed, but an initial pleading is served, the Case Schedule shall be served within five (5) court days of filing. See PCLR 1.

NOTICE TO ALL PARTIES

All attorneys and parties shall make themselves familiar with the Pierce County Local Rules, particularly those relating to case scheduling. Compliance with the scheduling rules is mandatory and failure to comply shall result in sanctions appropriate to the violation. If a statement of arbitrability is filed, PCLR 1 does not apply while the case is in arbitration.

Dated: August 26, 2008

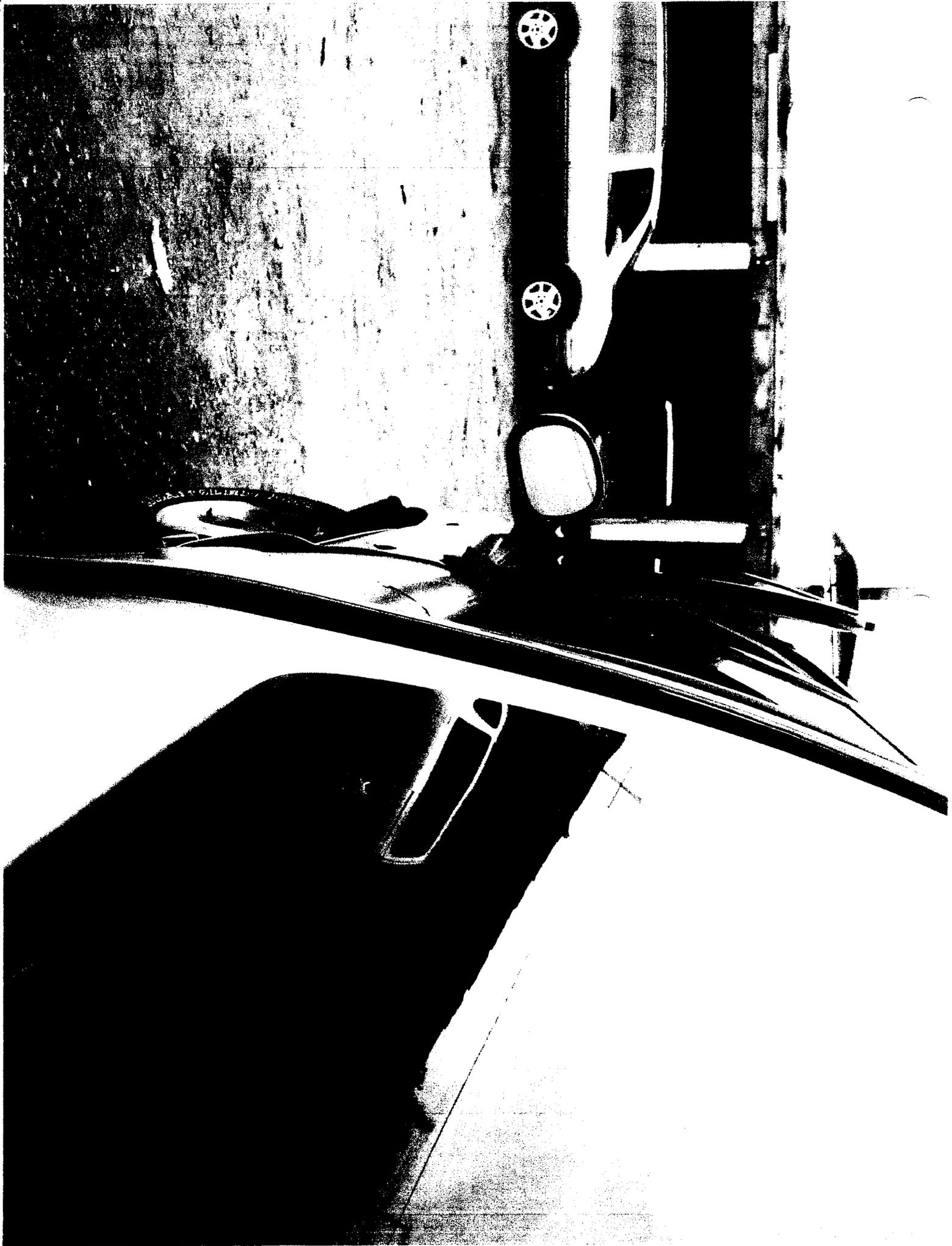


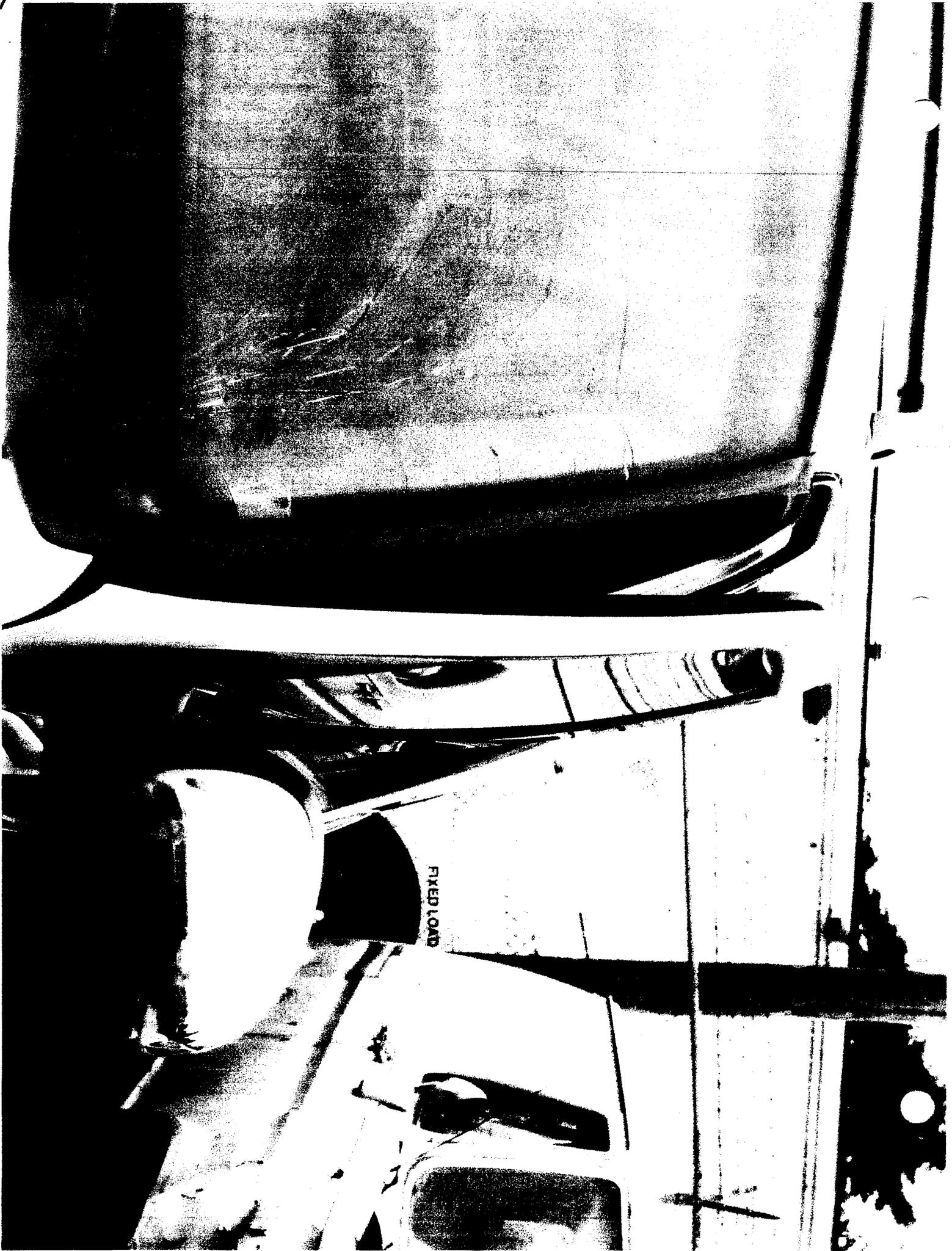
Judge JAMES ORLANDO
Department 01



Appendix 3









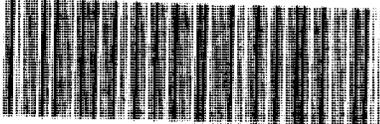






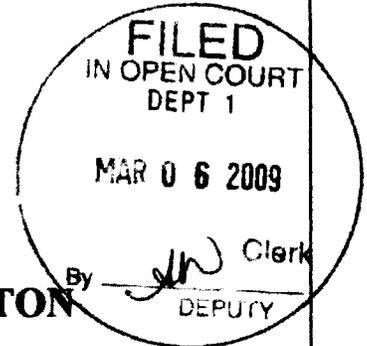


Appendix 4



08-2-11777-0 31626902 ORG 03.06.09

The Honorable James R. Orlando
Noted for Hearing Friday, March 6, 2009 - 9:00 a.m.



**SUPERIOR COURT OF WASHINGTON
FOR PIERCE COUNTY**

KIM A. HAAN, a single person,
Plaintiff,

v.

RICHARD SQUIRE and "JANE DOE"
SQUIRE, individually and the marital
community comprised thereof,
Defendants.

NO. 08-2-11777-0

~~PROPOSED~~ *GRANTING LIMITED
INTERVENTION*

~~ORDER DENYING METROPOLITAN
INSURANCE COMPANY'S MOTION
TO INTERVENE~~

THIS MATTER having come on regularly before the undersigned Judge upon motion of Metropolitan Insurance Company to Intervene, Metropolitan represented by and through its attorney of record, Philip M. deMaine of Johnson, Graffe, Key, Moniz & Wick, LLP; Plaintiff Kim Hann represented by and through her attorney of record, Ben F. Barcus of The Law Offices of Ben F. Barcus & Associates, P.L.L.C.; the Court having considered argument of counsel, having reviewed the files and records herein, including the following:

1. Metropolitan's Motion to Intervene;
2. Plaintiff's Opposition Memorandum;
3. Metropolitan's Reply Memorandum ~~to Intervene~~;

Law Offices Of Ben F. Barcus
& Associates, P.L.L.C.

**ORDER DENYING METROPOLITAN'S
MOTION TO INTERVENE - 1**

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and the Court being otherwise fully advised in the premises, now, therefore it is hereby
ORDERED, ADJUDGED AND DECREED that Metropolitan's Motion to Intervene in this
matter shall be and is hereby DENIED, with the exception that Metropolitan Insurance Company
shall be allowed limited intervention herein, to include notice of a hearing for entry of judgment,
along with copies of supporting evidence, and shall be given the opportunity to challenge the
sufficiency of the evidence at the time of the hearing.

Metropolitan shall have the opportunity to bring a motion to allow limited discovery as such discovery necessary.
DONE IN OPEN COURT this ___ day of March, 2009. *To discover if it seems*

[Signature]
The Honorable James R. Orlando
Pierce County Dept. # 1

Presented by:

[Signature]
Ben F. Barcus, WSBA # 15567
Attorney for Plaintiff

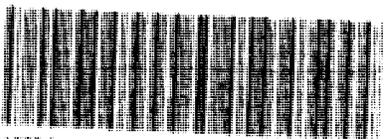
Copy received; Approved as to form and content;
Notice of presentation waived:

[Signature]
Philip M. deMaine, WSBA # 28389
Attorney for Metropolitan Insurance Company



Law Offices Of Ben F. Barcus
& Associates, P.L.L.C.

Appendix 5



The Honorable James R. Orlando

FILED
PIERCE COUNTY
DEPT 1
APR 10 2009
Clerk
By DEPUTY

Noted for Hearing Friday, April 10, 2009 - 9:00 a.m.

08-2-11777-0 31851644 ORCYMT 04 10 09

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**SUPERIOR COURT OF WASHINGTON
FOR PIERCE COUNTY**

KIM A. HANN, a single person,
Plaintiff,

NO. 08-2-11777-0

v.

**ORDER DENYING INTERVENOR'S
MOTION FOR RECONSIDERATION
REGARDING INTERVENTION AND
ALTERNATIVELY FOR AN ORDER
PERMITTING DISCOVERY**

RICHARD SQUIRE and "JANE DOE"
SQUIRE, individually and the marital
community comprised thereof,
Defendants,

THIS MATTER having come on regularly before the undersigned Judge upon motion of Metropolitan Casualty Insurance Company (Metropolitan); Plaintiff Kim Hann represented by and through her attorney of record, Ben F. Barcus of The Law Offices of Ben F. Barcus & Associates, P.L.L.C.; Metropolitan represented by and through Philip M. deMaine of Johnson, Graffe, Keay, Moniz & Wick, LLP; and the Court having reviewed the files and records herein, having considered argument of counsel and being otherwise fully advised in the premises, now therefore it is hereby

ORDERED, ADJUDGED AND DECREED that Metropolitan's Motion for Reconsideration Regarding Intervention and Alternately for an Order Permitting Discovery shall be and is hereby DENIED; and it is further

ORDER DENYING INTERVENOR'S
MOTION FOR RECONSIDERATION RE:
INTERVENTION AND ALTERNATIVELY FOR AN
ORDER PERMITTING DISCOVERY - 1

Law Offices Of Ben F. Barcus
& Associates, P.L.L.C.
4303 Ruston Way
Tacoma, Washington 98402

ORIGINAL

5

* ORDERED, ADJUDGED AND DECREED that Plaintiff shall be awarded attorney's fees in the amount of \$ _____ for having to respond, appear and argue this motion.

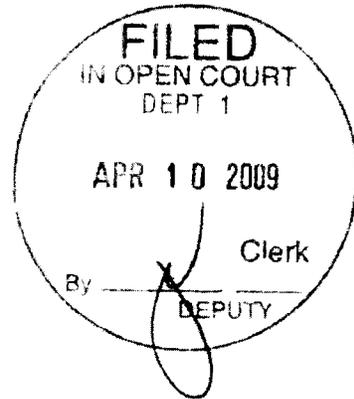
DONE IN OPEN COURT this 10 day of April, 2009.

The Honorable James R. Orlando

Presented by:

[Signature]

Ben F. Barcus, WSBA # 15567
Attorney for Plaintiff



Copy received; Approved as to form and content;
Notice of presentation waived:

[Signature]

Philip M. deMaine, WSBA #28389
Attorney for Metropolitan

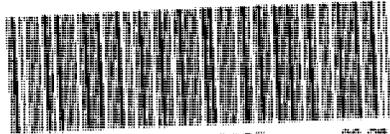
* Metropolitan shall be allowed to conduct reasonable discovery as follows:

- (PD) 1) Interrogatories - limited to request for 10 yrs. from today's date re: medical records
- 2) Ruling reserved re: ER ST exam
- 3) Live witnesses that plaintiff intends to call at reasonableness hearing can be deposed by Metropolitan.

ORDER DENYING INTERVENOR'S MOTION FOR RECONSIDERATION RE: INTERVENTION AND ALTERNATIVELY FOR AN ORDER PERMITTING DISCOVERY - 2

Law Offices Of Ben F. Barcus & Associates, P.L.L.C. 4303 Ruston Way Tacoma, Washington 98402

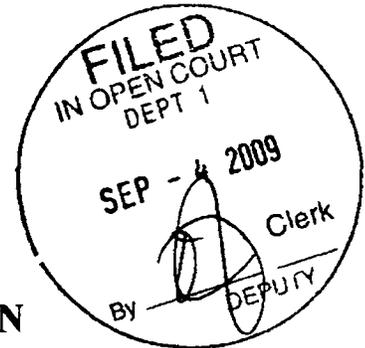
Appendix 6



08-2-11777-0 32785971 ORRE 09-08-09

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The Honorable James R. Orlando
Department No. 1
Hearing Date: September 4, 2009 @ 9:00 a.m.



**SUPERIOR COURT OF WASHINGTON
FOR PIERCE COUNTY**

KIM A. HANN, a single person,
Plaintiff,

No. 08-2-11777-0

v.

**ORDER RE: DEFENSE
CR 35 EXAMINATION**

RICHARD SQUIRE and "JANE DOE"
SQUIRE, individually and the marital
community comprised thereof,
Defendants.

THIS MATTER having come on regularly upon motion of Intervenor Metropolitan herein,
a CR 35 examination of Plaintiff, Kim A. Hann, the Court having reviewed the files and records
herein, having considered argument of counsel on behalf of Plaintiff Kim A. Hann, by and through
her attorney of record Ben F. Barcus and The Law Offices of Ben F. Barcus & Associates,
P.L.L.C.; and Intervenor Metropolitan Casualty Insurance Company; by and through their attorney
of record, Phillip M. deMaine of Johnson, Graffe, Keay, Moniz & Wick, LLP ; and the Court being
otherwise fully advised in the premises, now, therefore,

ORIGINAL

The Law Office of Ben F. Barcus
& Associates, P.L.L.C.
4303 Ruston Way
Tacoma, WA 98402
(253)752-4444 ● FAX 752-1025

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1
2 it is hereby

3 ORDERED, ADJUDGED AND DECREED that the CR 35 examination as requested by
4 Intervenor Metropolitan shall take place only upon compliance with the following terms and
5 conditions:

- 6
- 7 1. **Notice of CR35 Examination** - - That Plaintiff Kim A. Hann shall be examined by
8 James Blue, M.D., pursuant to CR 35 concerning injuries she claims to have
9 sustained as a result of the motor vehicle collision of September 9, 2005;
 - 10 2. **Time and Place of CR35 Examination** - - That Plaintiff Kim Hann shall present
11 herself for examination by Dr. Blue **Friday, September 11, 2009, at 9:30 a.m., at**
12 **Walton Chiropractic Centre, 7808 Pacific Avenue, Suite 6, Tacoma, WA.**
13 Should the interview/examination process not commence within 30 minutes of the
14 scheduled time, or by 10:00 a.m., the interview/examination shall be cancelled, and
15 the defense shall not be allowed to reschedule another CR35 examination, unless
16 it can be proven that the examination did not timely commence as a result of
17 extraordinary circumstances, and "good cause" shown by the defense;
 - 18 3. **Scope of CR35 Examination** - - That Dr. Blue shall conduct an ^{medical} ~~orthopedic~~
19 examination of Ms. Hann pursuant to the usual manner, conditions and scope of
20 such orthopedic medical examinations. The ~~orthopedic~~ examination may include
21 customary ~~orthopedic~~ testing, but will not include any invasive testing, including
22 but not limited to x-ray, CT scan or MRI testing;
 - 23 4. **Length of a Interview/Examination** - - The examination/interview of Plaintiff
24 shall be limited to a maximum of ~~1 to 1-1/2 hour(s)~~; *2 hours*
 5. **Testing Not Permitted** - - The Plaintiff shall not be subjected or required to submit
to any testing other than normal ^{medical} ~~orthopedic~~ testing during the course of the
examination process by the defense examiner;
 6. **Embarrassing Questions** - - The defense examiner, should not seek to embarrass
or to antagonize the Plaintiff. Should such occur, the examination may be aborted
to prevent harm to the Plaintiff;

The Law Office of Ben F. Barcus
& Associates, P.L.L.C.
4303 Ruston Way
Tacoma, WA 98402
(253)752-4444 • FAX 752-1025

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7. **Permitted Inquiry** - - The defense examiner shall not inquire as to facts surrounding liability in this case. The inquiry shall be limited to the facts that support Plaintiff's claim of medical injury;
8. **Identity of Examiner** - - The only examiner authorized to examine the Plaintiff is James Blue, M.D. No other examiner shall be present, nor shall any representative of the Defendant be allowed to be present;
9. **Counsel or Observer Present; audio and videotaping** - - The Plaintiff shall be entitled to have her counsel present or an observer of her choice. Plaintiff shall have the right to audiotape and videotape the proceeding, with master copies of such taping to be maintained by Plaintiff's counsel. A copy to be provided to the defense only if it will be used for impeachment. Plaintiff intends to have a Legal Nurse Consultant and professional videographer present at the examination, at no additional charge to the Plaintiff;
10. **Report** - - The defense examiner shall be required to produce a report no later than fifteen (15) days following the examination. A copy of the report shall be provided to Plaintiff's counsel within three (3) calendar days of receipt by defense counsel, but not later than fifteen (15) days following the examination. Counsel for the defense should also produce to Plaintiff's counsel at the same time, a full and complete index of all materials reviewed by the defense doctor, and copies of all notes, memoranda, correspondence or other materials reviewed, or any materials produced by the defense examiner in hard copy, computer files, or otherwise compiled. The defense examiner's report shall comply with the requirements of CR35(b). The report shall contain all matters to be testified to at hearing, and shall otherwise comply with the expert witness requirements of CR26(b). The doctor shall not be permitted to testify at hearing, or render opinions concerning matters not disclosed in his report;
11. **No Dissemination** - - The Court further Orders that no part of the doctor's report, conclusions, opinions, and files may be given or shown to any Defendant or employee of Defendant for any reason. The doctor and Defendant's counsel shall be permitted to use these materials for Hearing and in Hearing only. Such materials shall not be disseminated to any other person at any time for any reason, without further Order of the Court; *Exam report may be shared with DAWSON METROPOLITAN INS.*
12. **Protective Order** - - A protective Order shall issue which limits dissemination requiring the return to Plaintiff's counsel of all materials of the defense doctor

The Law Office of Ben F. Barcus
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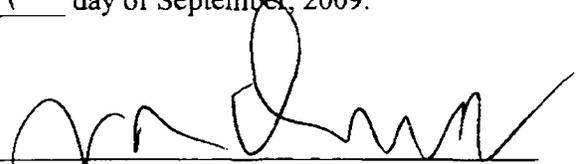
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2 provided to such doctor and defendant's counsel at the conclusion of this case, or
3 a declaration stating that the materials have been destroyed;

- 4 13. **Discovery / Deposition** - - The Plaintiff shall be permitted to depose the defense
5 examiner upon reasonable notice and agreement on the date, time, and place, no
6 later than five (5) days prior to the hearing date in this matter, or such other date
7 upon agreement of the parties. The defense examiner shall not be permitted to
8 charge an hourly fee in excess of \$500.00 per hour, or at any greater amount than
9 that being charged to defendant per hour by Plaintiff's doctor for Deposition. The
10 doctor shall be required to disclose the details of his prior professional relationship
11 with any defense counsel law firm, including the identity, number of cases, and fees
12 paid to him, for the five (5) years proceeding his examination. Plaintiff shall also
13 be permitted to inquire of the doctor of details relating to income earned in the past
14 five (5) calendar years from other professional legal consulting, and require a listing
15 by the defense examiner of such cases that the defense has been involved in, as well
16 as the law firms, insurers, or other persons requesting his services;
- 17 14. **Reimbursement of Expenses** - - The Defendant shall be required to reimburse
18 Plaintiff for her cost of travel at \$.505 per mile from her home to and from the place
19 of the examination, as well as any other expenses related to the defense
20 examination, including parking fees, if any;
- 21 15. **No Forms to be Completed** - - The Plaintiff shall not be required to complete any
22 forms requested by the defense examiner, ~~except~~
- 23 16. **Preservation of Material Reviewed by Defense Examiner** - - The defense
24 examiner shall maintain all materials reviewed in this matter as well as computer-
based data or other information generated by the defense examiner, or provided
through any defense counsel or representative pending return of such materials to
Plaintiff's counsel as set forth above;
- 17 17. **Copy of Order to Defense Examiner** - - Defense counsel shall provide a copy of
18 this Stipulation and Order to the defense examiner at least twenty (24) hours before
19 the examination. Defense counsel shall be responsible to see that the defense
20 examiner is fully aware of the requirements of this Order; OK
- 21 18. **Limitation of Interview/Examination** - - The defense examiner shall be limited
22 to an interview/examination in the field of the expertise of the examiner. The
23 examiner shall not conduct an inquiry or examination for other fields outside his or
24 her expertise (i.e., vocational, medical, etc.) at the request of others; OK

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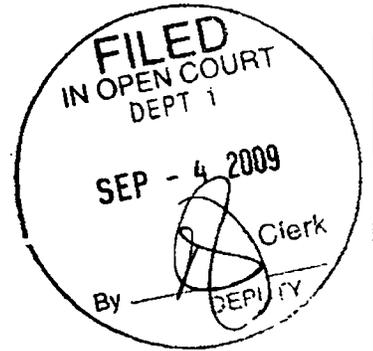
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DONE IN OPEN COURT this 4 day of September, 2009.


THE HONORABLE JAMES R. ORLANDO
Pierce County Superior Court, Dept. 1

Presented by:


Ben F. Barcus, WSBA # 15576
Attorney for Plaintiff



Approved as to Form and Content;
Notice of Presentation Waived:


Phillip M. deMaine, WSBA #28389
Attorney for Defendants

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Appendix 7



08-2-11777-0 34597858 NT 07-08-10

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

KIM A. HANN, a single person,
Plaintiff,

NO. 08-2-11777-0

NOTICE OF CLARIFICATION OF
RECORD

RICHARD SQUIRE and "JANE DOE"
SQUIRE, husband and wife and the
marital community comprised thereof,
Defendants.

COMES NOW Metropolitan Casualty Insurance Company, ("Metropolitan") and provides the following notice of clarification of the record in the Superior Court.

The citations to the insurance policy contained on page three of Metropolitan's Motion for Reconsideration of the Court's Order Denying Intervention and on page three of Metropolitan's Response to plaintiff's Motion for Ancillary Order Binding Intervenor to Judgment were incorrect. The correct policy provisions applicable to Metropolitan's position were contained in Exhibit four (page 19 of 24) to the Motion for Reconsideration and in Exhibit one (page 19 of 24) to the Response Brief as well as in Endorsement WA400A, which was not attached to Metropolitan's Motion or Response Brief.

JOHNSON, GRAFFE, KEAY, MONIZ & WICK, LLP
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The applicable portion of the policy provision contained in Exhibit four to the Motion and Exhibit one to the Response Brief is as follows: "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." The applicable language in Endorsement WA400A is as follows: "If there is a disagreement between that person and us as to whether any person is legally entitled to collect damages from us under this section or the amount to which such person is entitled, the person seeking coverage shall file a lawsuit in the proper court against us."

While Metropolitan regrets this citation error, it notes that its position and the analysis in support of its position otherwise remains the same and would have been unaffected had the correct policy provisions been cited.

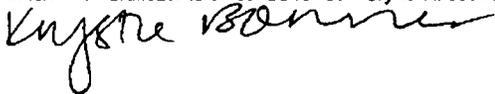
Dated this 2nd day of July, 2010.

JOHNSON, GRAFFE, KEAY, MONIZ & WICK, LLP

By 
Philip M. deMaine, WSBA #28389
Thomas P. McCurdy, WSBA #41568
Attorneys for Metropolitan Casualty Insurance Company

CERTIFICATION

I hereby certify that on 7/2/2010, 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.



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FILED
COURT OF APPEALS
DIVISION II

10 SEP 13 PM 4: 15

STATE OF WASHINGTON

BY _____
DEPUTY

No: 40145-2--II

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

KIM A. HANN, individually,

Respondent,

vs.

METROPOLITAN PROPERTY AND CASUALTY INSURANCE
CO.

Appellant.

DECLARATION OF SERVICE

Ben F. Barcus, WSBA# 15576
Paul A. Lindenmuth, WSBA#15817
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