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DIVISION II

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No. 40145-2-II

STATE OF WASHINGTON

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

KIM HANN, a single person,

Respondent,

v.

METROPOLITAN PROPERTY AND CASUALTY INSURANCE
COMPANY,

Appellant.

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

Contrary to Ms. Hann's assertions, Metropolitan was not permitted to "mount a meaningful challenge" to the evidence presented or to any of the trial court's rulings because of the procedural errors that occurred prior to the presentation of evidence and entry of the default judgment. These errors occurred at the very outset of Metropolitan's efforts to intervene and occurred as a result of the trial court's misapplication of Washington law as it pertains to UM/UIM cases.

Metropolitan appropriately attempted to intervene despite not receiving proper notice of the underlying action between Ms. Hann and Mr. Squire. But the trial court denied meaningful intervention from occurring thereby securing a one-sided hearing for Ms. Hann and a judgment that is a product of a default proceeding.

Ms. Hann goes to great lengths to distract the court from the ultimate issues to be decided. Ms. Hann had a duty to adequately and timely notify Metropolitan of her lawsuit, which she did not do, so that Metropolitan would have an opportunity to protect its rights, which it had an obligation and right to do. Metropolitan was denied its right to intervene, its right to a jury trial, its rights under the Civil Rules, and its right to protect its interest in this UM claim. The only just result is an order remanding this case to the trial court with instructions that

Metropolitan be permitted to intervene as a full party and meaningfully “step into the shoes of the tortfeasor.”

II. ARGUMENT

A. Where a Lower Court Errs in Its Interpretation of Case Law the Lower Court’s Decision is Reviewed De Novo.

The trial court erred in its interpretation of the civil rules and case law concerning the rights of a UM/UIM insurer in the context of intervention. The appellate court is to review the alleged errors of law de novo. *Trotzer v. Vig*, 149 Wash.App. 594, 612, 203 P.3d. 1056 (2009) (internal citations omitted). Additionally, the appellate court reviews a trial court’s interpretation of case law de novo. *Mathioudakis v. Fleming*, 140 Wash.App. 247, 252, 161 P.3d. 451 (2007) (internal citations omitted).

Metropolitan filed this appeal because the trial court erred in denying Metropolitan its proper request for intervention under the rule pronounced in the *Finney-Fisher-Lenzi* line of cases. The issues on appeal are whether the trial court erred in not requiring Ms. Hann to fulfill her duties under Washington common law and whether the trial court erred when it did not recognize Metropolitan’s obligation and right to intervene. Metropolitan did not receive notice of Ms. Hann’s lawsuit against Mr. Squire in sufficient time to protect its interests under the rule enunciated in

the *Finney-Fisher-Lenzi* cases.

The trial court stated, while completely disregarding the notice requirement, the following:

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

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

The trial court erred in interpreting the insured’s duty to notify and the corresponding obligation and right to intervene in the UM/UIM context as established by Washington common law. Appellate Courts review questions of law, including questions of adequacy of notice and constitutional law, under the de novo standard. *Rosander v. Nightrunners Transport, Ltd.*, 147 Wash.App. 392, 399 196 P.3d 711 (2008) (internal citations omitted). Accordingly, the issues on appeal are subject to de novo review.

Ms. Hann’s contentions that the trial court’s grant of limited intervention is subject to review under an abuse of discretion standard

ignores the context of this claim and, specifically, the case law that governs UM/UIM proceedings. Ms. Hann cites to *State Ex Rel. Keeler v. Port of Peninsula*, 89 Wn.2d 764, 575 P.2d. 713(1978) for the proposition that decisions under CR 24 are reviewed under an abuse of discretion standard; however, that case did not involve a UM/UIM claim and there were no issues regarding any affirmative duty to notify or corresponding obligations and rights to intervene. The court in *Keeler* was not presented with any issues similar to those in the present matter, nor with issues similar to any Washington case law concerning UM/UIM cases. However, even if this appeal were governed by an abuse of discretion standard, the trial court's ruling not to permit Metropolitan intervention as a party would clearly constitute an abuse of discretion.

Ms. Hann also notes that a trial court's decision regarding discovery matters are reviewed under an abuse of discretion standard; however, this claim ignores the fact that the discovery limited by the trial court was solely the result of the trial court's initial procedural error in refusing to permit Metropolitan to intervene as a party. Consequently, because the instant appeal concerns alleged errors of law, all issues on appeal are subject to de novo review.

B. The Trial Court's Findings of Fact and Conclusions of Law Cannot be Deemed Verities on Appeal.

The trial court's findings of fact and conclusions of law are the direct result of the trial court's erroneous ruling denying Metropolitan the opportunity to appropriately challenge the evidence presented. As noted, the underlying issue on appeal is the trial court's error in absolving Ms. Hann of her duties under the *Finney-Fisher-Lenzi* rule and its error in prohibiting Metropolitan from intervening as a party in the underlying action. Every action taken by the trial court after Metropolitan was denied party status was premised upon the court's erroneous ruling and was tainted because of this initial procedural error. It is this error which forms the basis of Metropolitan's appeal.

The authority cited by Ms. Hann in support of her argument is irrelevant to the issues raised by this appeal. Ms. Hann cites to an employment discrimination case, *Robel v. Roundup Corp.*, 148 Wn.2d 35, 59 P.3d 611 (2002), for the proposition that unchallenged findings of fact and conclusions of law are deemed verities on appeal if no error is assigned to a specific finding or conclusion. In *Robel*, the defendant challenged specifically the trial court's findings of fact and conclusions of law. *Id.* at 42. Thus, the basis of the *Robel* appeal was to the substantive findings of the trial court; whereas Metropolitan's appeal here is premised

upon the trial court's initial procedural missteps in refusing Metropolitan its right to intervene and ignoring Ms. Hann's duties under Washington common law regarding notification of her UM/UIM lawsuit. Had the trial court permitted intervention as a party, a jury trial would have followed and there would have been no entry of findings of fact or conclusions of law.

Metropolitan's appeal concerns two very specific assignments of error. First, Metropolitan is seeking review on the issue of whether the trial court erred in not granting Metropolitan full party rights when it moved to intervene. CP 128, 121. Second, Metropolitan is seeking review of whether the trial court erred when it ruled that Metropolitan was bound by the judgment entered against the uninsured driver given that Metropolitan was not provided timely notice prior to the entry of the default order and that Metropolitan was not conferred party rights when it moved to intervene. CP 1570-1571.

These two issues are the assignments of error. Everything else that occurred in the trial court, including the subsequent findings of fact and conclusions of law at the default hearing, is subsumed by these assignments of error. Ms. Hann's efforts throughout her brief to distract the court from this basic issue are unavailing.

C. **Respondent Seeks to Distract the Court with Ancillary Issues and Inflammatory Rhetoric.**

Ms. Hann claims the instant appeal is frivolous without addressing the procedural irregularities that form the basis of this appeal. Ms. Hann waits until the end of her response brief to address the legal basis for Metropolitan's appeal. Even then, Ms. Hann's analysis is flawed.

As fully set forth in Metropolitan's amended opening brief, Metropolitan has an interest in the action between Ms. Hann and Mr. Squire because it "stands in the shoes of the tortfeasor, and [Metropolitan's] liability to [Ms. Hann] is identical to [Mr. Squire's]" up to UM/UIM policy limits. *Mercier v. Geico Indem. Co.*, 139 Wn.App 891, 903, 165 P.3d 375 (2007), review denied, 163 Wn.2d 1028 (2008). Metropolitan's ability to protect this interest was impaired and impeded by the trial court's grant of only limited intervention.

In *Finney v. Farmers Ins. Co.*, 21 Wash.App 601, 586 P.2d 519 (1978), aff'd, 92 Wash.2d 748, 600 P.2d 1272 (1979), the Washington Supreme Court held that a UIM carrier can protect its rights by intervening in an arbitration between its insured and a tortfeasor. The court said that so long as the carrier "has notice and an opportunity to intervene in the underlying action against the tortfeasor" the insurer will be bound by the findings and conclusions and judgment of any proceeding. *Id.* at 246.

Subsequently, in *Lenzi v. Redlands Ins. Co.*, 140 Wash.2d 267, 269, 996 P.2d 603 (2000) the court affirmed the rule enunciated in *Finney* and *Fisher* and clearly articulated that a UIM insurer will be bound by a default judgment where it had timely notice of the filing of the lawsuit by its insureds and ample opportunity to intervene in the lawsuit to protect its interest. It is well settled Washington law that insurers, like Metropolitan, are required to intervene in situations like that in the underlying action because, where there is timely notice of a lawsuit, the insurer will be bound by any judgment. *Id.* at 269.

In other words, the *Finney-Fisher-Lenzi* line of cases is clear in its simple mandate: if a UM/UIM insurer has timely notice of an insured's lawsuit and has an opportunity to intervene, then the insured will be bound by the results. *Finney*, 21 Wash.App. at 601; *Fisher v. Allstate Ins. Co.*, 136 Wash.2d 240, 961 P.2d 350 (1998); *Lenzi*, 140 Wash.2d at 267.

The corollary to this well defined rule must also be true. That is, where a UIM/UM insurer does not receive adequate and timely notice of its insured's lawsuit against the tortfeasor, it cannot be bound by a judgment against the tortfeasor. Additionally, the corollary that an insurer who attempts to intervene, but is denied full intervention as a party is also not bound by any subsequent judgment entered must also be true.

The above cited case law and trial court's misapplication of the

duties, rights, and obligations which flow from those cases are at issue in this appeal. Ms. Hann tries to distract this court with issues that have no relevance to the claimed errors on appeal and which only serve as ad hominem attacks against Metropolitan.

Ms. Hann suggests that Metropolitan got all discovery it needed and requested. This suggestion is incorrect and ignores the record from the trial court. The trial court stated:

“I granted Metropolitan limited rights of discovery...I did not intend to grant you carte blanche discovery over, you know, every record that may be out there. I think really what was intended was that you have a chance to review the documents that Mr. Barcus plans to use for the reasonableness hearing, that you have a chance to depose any of those witnesses that are going to be called live...” RP, Vol. I, at 42, line 22 to 43, line 6.

Metropolitan requested but did not get an opportunity to depose, cross-examine, or otherwise challenge any of the lay and medical witnesses Ms. Hann presented by way of declaration at the reasonableness hearing; it did not get all of Ms. Hann’s medical records, despite the fact that the trial court initially ordered Metropolitan was permitted to get 10 years of medical records; and, it had to file repeated motions over Ms. Hann’s vigorous objections to obtain even the most basic interrogatories and a CR 35 examination.

1. Metropolitan’s Citation Error in the Trial Court has No Impact on the Ultimate Analysis in this Matter.

Metropolitan’s motion to the appellate court to file an amended

opening brief details that Metropolitan learned that the UM/UIM policy provisions cited in its opening brief were inapplicable at the time of the subject accident. The UM/UIM policy provision applicable to the September 9, 2005, motor vehicle accident between Ms. Hann and Mr.

Squire reads as follows:

SETTLEMENT

Whether any person is legally entitled to collect damages from the owner or driver of an **underinsured motor vehicle** or the amount of damages that person is entitled to collect may be reached by an agreement between that person and the owner or driver of the **underinsured motor vehicle**. We request that **you** inform **us** prior to this agreement being finalized.

Whether any person is legally entitled to collect damages from **us** under this section and the amount to which such person is entitled, will be determine by agreement between that person and **us**.

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**.

The items in bold in the above cited policy provisions are defined in the policy. Thus, the term “underinsured motor vehicle” is defined to include both an underinsured and an uninsured motor vehicle. Attached hereto as Appendix 1 is the applicable policy endorsement, WA400A.

Metropolitan is not requesting that the court consider any additional argument or documentation in connection with Metropolitan’s

opening brief. Rather, Metropolitan provides the endorsement so the court can appreciate the extent of the minor citation error and so the court can see the differences between the originally cited language and the language in the endorsement.

Metropolitan withdrew those portions of the original opening brief and replaced it with the appropriate policy language in the amended opening brief; however, the analysis is in no way impacted. Ms. Hann's duty to notify Metropolitan of any lawsuit is the same under Washington common law as it is under the correct policy language. Metropolitan opposes Ms. Hann's efforts to have this matter remanded so that the applicable policy language can be ruled upon as to any claimed ambiguities. There are no ambiguities as it is clear that Ms. Hann had a contractual duty to file a lawsuit against Metropolitan.

However, ignoring the insurance policy altogether (as suggested by Ms. Hann) does not impact the analysis because Ms. Hann had a corresponding duty under *Finney-Fisher-Lenzi*, which she failed to fulfill. This appeal can be resolved under a common law analysis only and no contract interpretation is necessary. Nevertheless, if the court is inclined to give weight to the contract language, it is clear from Appendix 1 that Ms. Hann had a contractual duty to provide notice and to commence a lawsuit against Metropolitan relating to a UM/UIM action.

The claimed error is nothing more than a citation error because Ms. Hann's duty under the inapplicable policy provision is nearly identical to her duty under the applicable policy provision. Thus, under the language of both policies, Ms. Hann had a duty to notify Metropolitan and to commence a lawsuit against Metropolitan.

No sanctions are warranted given this minor clerical error, which was not discovered by either Ms. Hann or Metropolitan until it was brought to Metropolitan's attention by Ms. Hann's counsel during the appeal process who threatened to bring an ethics complaint for this citation error. Additionally, no harm has occurred because of this citation error. The duties under the applicable policy and the inapplicable policy are nearly identical and the same line of Washington cases controls the issues, so both parties' arguments in the trial court would have been the same. That is to say, Ms. Hann would have rejected any argument that she was obligated under the contract to provide notification to Metropolitan of her lawsuit. No harm occurred, so no sanctions are warranted.

Significantly, Ms. Hann concedes that the *Finney-Fisher-Lenzi* rule removes the claim from contractual dispute resolution provisions and controls the issues on this appeal. See Brief of Respondent at 34. Despite this concession, Ms. Hann continues to claim that Metropolitan's citation error is an egregious mistake warranting imposition of severe sanctions.

Ms. Hann raises the citation error as an issue in order to distract attention from the relevant issues in this appeal. There is nothing ambiguous about the policy language cited in Metropolitan's amended opening brief and nothing which would warrant the court's granting Ms. Hann's motion to strike those portions of Metropolitan's opening brief. However, even if the court did strike those portions, the analysis under Washington common law would remain the same.

2. The Determinations Made by the Trial Court are not Relevant to Any Issue on Appeal.

Ms. Hann spends a significant amount of time devoted to a recitation of the trial court's findings at the default judgment hearing. What Ms. Hann glosses over and conclusively asserts is that Metropolitan had a chance to mount a meaningful challenge to the evidence presented. Ms. Hann's claim in this regard has no basis in fact and ignores the reality of the hearing which resulted in the default judgment.

Metropolitan suffered significant harm because it was prevented from mounting a challenge to the evidence presented at the reasonableness hearing. Ms. Hann called no live witnesses at the hearing so Metropolitan was unable to cross examine any witnesses. The trial court made its award without ever hearing Ms. Hann or any other witness testify on the witness stand. Though fully set forth elsewhere, a brief example of what transpired

at the reasonableness hearing is worth noting here.

The trial court made numerous findings regarding Ms. Hann's injuries. Specifically, it noted that Ms. Hann suffered an injury at the C6-C7 level of her spine that she relates to the subject accident with Mr. Squire. However, this finding was not supported by Ms. Hann's MRI films. The trial court accounted for the relevant discrepancies in Ms. Hann's 2005 and 2008 MRI scans by noting "she received trigger point injections that may have masked the injury at C6-C7 and only after the repeat MRI in 2008 was the injury discovered. That does not mean that it did not exist shortly after the 2005 MRI." CP 371.

The trial court's statement and its finding regarding Ms. Hann's injury have no support. The trial court's failure to allow expert depositions and cross-examination of Ms. Hann's providers led to the trial court's inability to understand the nature of the evidence presented. How one feels at the time of an MRI scan will not impact the objective signs and findings disclosed by an MRI.

Metropolitan's inability to conduct cross examination is directly relevant to the fact that it was not given a meaningful opportunity to challenge the one sided presentation of evidence at the default hearing.

D. Metropolitan did not Receive Timely Notice of Ms. Hann's Complaint Against Mr. Squire.

Finney-Fisher-Lenzi imposes an affirmative duty on the insured to notify the insurer of the filing of the Summons and Complaint. The *Lenzi* court found that “[n]either the *Finney-Fisher* rule nor ordinary notions of fair play of substantial justice dictate the *Lenzis* had any duty to Redland **other than timely^{FN3} notifying Redland of the filing of the summons and complaint**”. *Lenzi*, 140 Wash.2d at 276 (emphasis added). The court illustrated what would constitute untimely notice. As that court stated: “The *Lenzis* did not provide their insurer a copy of the summons and complaint only days before entry of the default.” *Id.*

Ms. Hann suggests in Footnote 2 of her brief that Metropolitan has not disputed the adequacy of the notice of her Complaint against Mr. Squire. Metropolitan absolutely challenges the adequacy of the notice received: the fact that Ms. Hann failed to comply with her common law duty to provide timely notice raises the adequacy issues on appeal now.

Ms. Hann makes an issue of the fact that Metropolitan received her Complaint in November 2008 and filed a notice of appearance in February 2009. As has been established, the parties engaged in settlement negotiations during this period of time, which failed. CP 1639-1640.

Ultimately, the timing of the notice of appearance is academic because Ms. Hann had already obtained a default order by the time she notified Metropolitan. Because the default order had already been entered

and Metropolitan was not granted intervention as a party, the timing of Metropolitan's notice of appearance is irrelevant. Metropolitan was not granted party rights, so it had no standing to set aside the default order, to request a jury trial, or to petition the trial court for any of the relief Ms. Hann suggests Metropolitan ought to have sought from the trial court.

CR 55(c) provides in relevant part that a court may set aside entry of an order of default or default judgment in accordance with CR 60(b). CR 60(b) includes the following language: "On motion and upon such terms as are just, **the court may relieve a party** or his legal representative from a final judgment, order, or proceeding for the following reasons..." (Emphasis added.) Thus, the very terms of the civil rules limit relief to a party and, because Metropolitan was not a party, it had no standing to move to set aside the default order or default judgment.

Similarly, CR 38(b), which governs demands for jury trials, limits demands to parties. In relevant part, CR 38(b) provides: "At or prior to the time the case is called to be set for trial, any **party** may demand a trial by jury..." (Emphasis added.) Despite this clear language, Ms. Hann contends Metropolitan waived its right to a jury trial because it did not pursue a jury demand. Metropolitan did not have standing to make a jury demand in the first instance because it was not a party to the default proceeding.

The trial court was explicit that there would not be a trial. As the trial court stated: “Here, when there has already been entry of an order of default, to then require the plaintiff to have to go through time and expense of a trial basically undermines her ability to move forward with her litigation.” RP Vol. I, at 10, line 23 to 11, line 1. Regarding how Ms. Hann’s alleged damages would be established, the trial court stated:

“I don't think it is required by statute they be resolved by jury, but the court can certainly conduct hearings as it deems appropriate to establish damages in this case. And that's, I guess, my -- the way I intend to handle it. So rather than, you know, a full trial, it may be a half day hearing on reasonableness...” RP Vol. I, at 11, lines 19-25.

Arguing that Metropolitan should have done something it was explicitly told by the trial court would not be permitted is intellectually dishonest.

The *Lenzi* court specifically refers to the insurer as a party.

Metropolitan pointed this fact out to the trial court; however, the trial court refused to permit Metropolitan to intervene as a party and was specific in its ruling that Metropolitan was not a party:

“I am not granting an intervention as a party; I am granting limited intervention to participate in any reasonableness hearing prior to the ascertainment of damages under the default judgment rule.” RP Vol. 1 at 12 Lines 20-23.

Thus, had Metropolitan been given adequate and timely notice of Ms. Hann’s lawsuit against Mr. Squire, it would have been able to intervene and would not have been denied the party status to which it is

entitled under Washington common law and the insurance contract.

The authority cited by Ms. Hann in support of her claim that Metropolitan was provided appropriate notice is inapposite. Ms. Hann cites to *Howard v. Royal Specialty Underwriting, Inc.*, 121 Wash.App. 372, 89 P.3d 265 (2004), for the proposition that six days notice is sufficient prior to conducting a reasonableness hearing. The insurer who moved to intervene in that case received 30 days notice of the reasonableness hearing, not six. *Id.* at 379. However, Ms. Hann's citation error is of no consequence because the important portion of the *Howard* decision is the court's rationale for not continuing the reasonable hearing.

Howard is not a UM/UIM case, but instead involved a settlement between two parties in a multi-party negligence action.¹ One of the non-settling parties moved to intervene in the reasonableness hearing in order to contest the amount of the settlement. *Id.* at 376. In addition to moving to intervene, this party sought to conduct discovery. *Id.* In denying the request for discovery, the court noted that because the non-settling party provided a defense to its insured, it already had an opportunity to conduct discovery. *Id.* at 377. Additionally, the court specifically noted that the intervenor was **allowed to cross-examine the plaintiff's treating**

¹ Ms. Hann characterizes the *Howard* case as one involving a "slightly different context", but it is clear that this is an entirely different context from the UM/UIM setting and does not implicate any of the specialized area of case law that has been developed around UM/UIM actions.

physician in denying the request for additional discovery. *Id.* at 379.

Nothing contained in the *Howard* decision supports any argument that Metropolitan received adequate notice of Ms. Hann's UM/UIM action.

E. The Trial Court does not have Authority to Limit the Scope of Intervention in the UM/UIM Context.

Ms. Hann cites to no authority for the proposition that a Washington court can properly limit intervention of an insurer in a UM/UIM action. The sole support that intervention can be limited is a citation to a federal treatise and federal case law, none of which are from Washington or even the ninth circuit and none of which concerns intervention in the context presented by the instant appeal.

Ms. Hann makes no attempt to address the Washington State authority that stands for the proposition that a UM/UIM insurer "stands in the shoes of the tortfeasor" and is obligated to intervene in an insured's lawsuit against the tortfeasor when it receives timely and adequate notice of the lawsuit. Ms. Hann makes no attempt to reconcile the inconsistencies between the cited authorities and the relevant Washington authorities concerning notice and intervention in the UM/UIM context.

Furthermore, as though a tacit acknowledgment that the trial court improperly denied Metropolitan party status, Ms. Hann provides an unavailing post hoc justification that the trial court's denial of party status

to Metropolitan was somehow “not that bad.”

The Washington authority Ms. Hann did cite is distinguishable from the issues presented by this appeal. First, Metropolitan was seeking intervention under Washington case law authority. The *Marino Property Company v. Port of Commissioner*, 97 Wn.2d 307, 644 P.2d 1181 (1982) decision cited by Ms. Hann does note that the extent of intervention rights is subject to a case by case determination. However, that case, in which the court permitted limited intervention, is wholly distinguishable from a UM/UIM proceeding and the well established case law governing the respective rights, duties, and obligations in the UM/UIM setting.

Marino involved a challenge to the Port of Seattle’s attempt to convey certain tidal lands to the City of Seattle. *Id.* at 308. The case cited by Ms. Hann was the second time that the *Marino* case had been litigated. This second proceeding was ultimately limited to the issues of the character of the property transferred to the City. In order to properly convey the tidal lands to the City, the lands needed to be deemed “surplus” under RCW 39.33.010. *Marino*, 97 Wn.2d at 308-310. The *Marino* court determined that the limited grant of intervention was appropriate and that *Marino* could intervene for the limited purpose of challenging the port’s determination that the lands were surplus. *Id.* at 311-313.

Here, the issues for adjudication are broader than those presented

in *Marino*, *Mercier* and the *Finney-Fisher-Lenzi* cases impose duties and rights beyond those duties and rights addressed in *Marino*. Because the underlying issues in *Marino* were limited, the scope of intervention was found to be appropriately limited. In the instance case, there are common law duties, rights, and obligations to timely notify the insurer and permit the insurer to intervene in the underlying action.

The issues presented by Ms. Hann's claim were not limited. Ms. Hann filed a personal injury action against Mr. Squire which would require significant discovery into the claimed damages; a full, fair and reasonable opportunity to cross examine those witnesses in support of Ms. Hann's claim; and, a full, fair and reasonable opportunity to present evidence to a jury. Because Metropolitan's intervention was limited, it was improperly denied these opportunities. This alone makes the instant case distinguishable from *Marino* and the limited nature of that proceeding.

Ms. Hann also cites to *American Discount Corporation v. Saratoga West Inc.*, 81 Wn.2d 34, 499 P.2d 869 (1972) for the proposition that the court can look to federal precedent for "guidance" when interpreting CR 24. *Id.* at 37. This holding necessarily requires that "guidance" is required; however, no "guidance" is necessary here.

The necessary guidance for the trial court's ruling can be found in Washington case law concerning intervention in UM/UIM actions. The

Mercier case and the *Finney-Fisher-Lenzi* line of cases taken together are dispositive and no reference to federal authorities is necessary. There is no need to seek “guidance” from federal authorities in the UM/UIM context because this is a well defined area of Washington law and one which was misinterpreted by the trial court.

F. **Ms. Hann’s Position that Metropolitan was not Denied a Right to a Jury Trial Because it Never Asked for One is Invalid.**

Pursuant to the trial court’s order, Metropolitan was not a party to the default proceeding and, therefore, had no standing under CR 38(b) to make a demand for a jury trial. Additionally, the trial court ruled that there would not be a jury trial. Indeed, had Metropolitan made such a demand, it would have likely been attacked as frivolous.

Ms Hann’s own briefing on this issue is instructive. Ms. Hann notes “before a **party** can contend they have been denied their constitutional right to a jury trial, which is regulated by CR 38, it first must be shown they actually made a demand for jury.” Respondent’s Brief, at page 30 (emphasis added) (citations omitted). The authority cited by Ms. Hann presupposes that the person making a jury demand is a party to the litigation. Metropolitan was not a party to the underlying action because the trial court did not grant Metropolitan party status. Therefore, it could not have brought a demand for jury trial.

Ms. Hann provides no meaningful opposition to Metropolitan's argument that it was denied a jury trial because of the underlying procedural irregularities. Metropolitan set out the issues regarding a loss of a right to a jury trial in its amended opening brief and so will not recite it here. Suffice it to say, the denial of a right to a jury trial raised significant due process issues including the denial of the right to significant discovery, the denial of the right to cross examine witnesses, the denial of the benefits and protections of the Civil Rules, and, perhaps most fundamentally, denial of a Constitutionally protected right.

G. Ms. Hann's Request for Attorney's Fees and Costs Must be Denied.

Ms. Hann premises her request for attorney's fees and costs on the notion that Metropolitan's appeal is frivolous and devoid of merit. The lynchpin for Ms. Hann's position appears to be the notion that "had [Metropolitan] been provided earlier notice, it could have prevented the entry of a Default Order against Mr. Squire." Respondent's Brief, at 37. Ms. Hann's claim that Metropolitan would have been unable to prevent entry of a default order had it been provided timely and adequate notice is as illogical as it is contrary to Washington State law.

Metropolitan "stands in the shoes" of Mr. Squire in the context of a UM/UIM proceeding. *Mercier*, 139 Wn.App at 903. Had Metropolitan

been provided notice of Ms. Hann's lawsuit when it was filed, or been provided notice at any time prior to the entry of a default order, no default order could have been entered because Metropolitan would have been the party defendant in lieu of Mr. Squire.

Ms. Hann claims notice is appropriate if given after a default order is entered but before entry of a default judgment. *Lenzi* does not support this position. It is clear from the chronology of events in *Lenzi* that notice must occur prior to the entry of a default order. Simply providing notice before entry of a default judgment, as was the case here, is insufficient.

The *Lenzi* plaintiffs filed their complaint on August 17, 1998. *Lenzi*, 140 Wash.2d at 271. On September 29, 1998, the plaintiffs sent a copy of the summons and complaint to their UIM insurer and noted on the enclosure letter that the tortfeasor **had not yet been served**. *Id.* They served the tortfeasor on October 28, 1998. *Id.* The plaintiffs obtained a default judgment against the tortfeasor on November 23, 1998. *Id.* at 272. The *Lenzi* decision does not state the precise date that the default order was entered, but it is abundantly clear that it occurred sometime between service of process on the tortfeasor and the entry of default judgment because a default cannot be entered unless and until the tortfeasor has been served. CR 55(b); See also *Rosander*, 147 Wash.App. at 399-401.

The issues on appeal are meritorious and do not warrant an award

of fees and costs. If Ms. Hann's interpretation of *Lenzi* were correct, it would mean that no insurer would ever get a jury trial. Instead, plaintiffs in uninsured motorist actions would simply need to obtain orders of default and only then provide notice to their insurers, who would be unable to obtain any relief. The implications of Ms. Hann's interpretation of *Lenzi* render any notice requirements prior to entry of an order of default meaningless. Ms. Hann's reasoning is not sound policy in uninsured motorist litigation and is contrary to the holding in *Lenzi*.

III. CONCLUSION

For the foregoing reasons, and for the reasons stated in Metropolitan's amended opening brief, Metropolitan respectfully requests this court order that Metropolitan is not bound by the default judgment entered against Ms. Squire and that this court remand this matter to the trial court with instructions that Metropolitan be allowed to intervene in the underlying action as a full party.

RESPECTFULLY SUBMITTED THIS 13th day of October, 2010.

JOHNSON, GRAFFE, KEAY,
MONIZ & WICK, LLP

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

APPENDIX 1

**WASHINGTON
UNDERINSURED MOTORISTS COVERAGE
ENDORSEMENT**

UNINSURED AND UNDERINSURED MOTORISTS is deleted and replaced by:

UNDERINSURED MOTORISTS

ADDITIONAL DEFINITIONS FOR THIS COVERAGE

The following definitions apply to this coverage only:

"COVERED AUTOMOBILE" means:

1. an **automobile** described in the Declarations to which the Automobile Liability coverage of this policy applies and for which a specific premium is charged.
2. an **automobile** newly acquired by **you**, if:
 - a. it replaces a vehicle described in the Declarations; or
 - b. it is an additional **automobile**, but only if:
 - i. **we** insure all other **automobiles** owned by **you** on the date of acquisition;
 - ii. **you** notify **us** within 30 days of acquisition of **your** election to make this and no other policy issued by **us** applicable to the **automobile**; and
 - iii. **you** pay any additional premium required by **us**.
3. a **substitute automobile**.
4. a **motor vehicle**, while being operated by **you** or a **relative** with the owner's permission, which is not owned by, furnished to, or made available for the regular use to **you** or any **relative** in **your** household.

EXCEPTION: A **motor vehicle** owned by, furnished to, or made available for regular use to any **relative** in **your** household is covered when operated by **you**.

"HIT-AND-RUN VEHICLE" means a **motor vehicle** which causes **bodily injury** to a person covered under this section if:

1. the identity of the driver and the owner of the **motor vehicle** is unknown;
2. the injured person or someone on their behalf files with **us** as soon as practicable after the accident a statement made under oath that the injured person has a cause or causes of action due to the accident for damages against someone whose identity is unknown; and
3. the injured person makes available for inspection by **us**, at **our** request, the **motor vehicle occupied** by that person at the time of the accident.

"PHANTOM VEHICLE" means a **motor vehicle** which causes **bodily injury** to a person covered under this section without physical contact with that person or with a **motor vehicle** that person is **occupying** at the time of the accident if:

1. the injured person or someone on their behalf has reported the accident within 72 hours to the appropriate law enforcement agency; and
2. the facts of the accident can be corroborated by competent evidence other than **your** testimony or the testimony of any other person having claim under this or any similar insurance as a result of the accident.

"SUBSTITUTE AUTOMOBILE" means a **motor vehicle** not owned by **you** or any resident of the same household and which is used with the owner's permission to replace for a short time a **covered automobile**. The **covered automobile** has to be out of use for servicing or repair or because of breakdown, **loss** or destruction.

"UNDERINSURED MOTOR VEHICLE" means:

1. a **motor vehicle** with respect to the ownership, maintenance or use of which there is:
 - a. no bodily injury liability bond or insurance policy in effect at the time of the accident for any person legally responsible for the use of the **motor vehicle**.
 - b. one or more bodily injury liability bonds or insurance policies in effect at the time of the accident for any person legally responsible for the use of the **motor vehicle**, but the sum of the limits of the bonds or policies is less than the damages which **you** are entitled to recover.
 - c. a bodily injury liability bond or insurance policy is in effect at the time of the accident but the writing company denies coverage or is or becomes insolvent.
2. a **hit-and-run vehicle**.
3. a **phantom vehicle**.

The term **underinsured motor vehicle** does not include a **covered automobile** or **non-owned automobile** regularly furnished or available for the use of **you** or any **relative**. However, this does not apply to **bodily injury** sustained by **you** or any **relative** arising out of the ownership, maintenance or use of a **covered automobile**.

UNDERINSURED MOTORISTS COVERAGE

This coverage is provided only if a premium is shown in the Declarations.

We will pay damages for **bodily injury** sustained by:

1. **you** or a **relative**, caused by an accident arising out of the ownership, maintenance, or use of an **underinsured motor vehicle**, which **you** or a **relative** are legally entitled to collect from the owner or driver of an **underinsured motor vehicle**; or
2. any other person, caused by an accident while **occupying** a **covered automobile**, who is legally entitled to collect from the owner or driver of an **underinsured motor vehicle**.

We will also pay damages to any person for damages that person is entitled to recover because of **bodily injury** sustained by anyone described in 1. or 2. above.

COVERAGE EXCLUSIONS

We do not cover:

1. any person **occupying** a **motor vehicle** owned or available for the regular use by **you** or a **relative**, other than a **covered automobile**.
2. any claim which would benefit any insurer or self-insurer under any worker's compensation or disability benefits law.
3. any person, other than **you** or a **relative**, while **occupying**:
 - a. a **covered automobile** while it is being used to carry persons or property for a fee.
EXCEPTION: This exclusion does not apply to shared expense car pools.
 - b. a vehicle while being used without the permission of the owner.
4. **bodily injury** or **property damage** awards designated as punitive, exemplary, or statutory multiple damages.
5. a **relative** who owns, leases or has available for their regular use, a **motor vehicle** not described in the Declarations.
6. any claim for which benefits are provided under the Personal Injury Protection or Medical Expense coverage of this policy.

SETTLEMENT

Whether any person is legally entitled to collect damages from the owner or driver of an **underinsured motor vehicle** or the amount of damages that person is entitled to collect may be reached by an agreement between that person and the owner or driver of the **underinsured motor vehicle**. We request that **you** inform **us** prior to this agreement being finalized.

Whether any person is legally entitled to collect damages from **us** under this section and the amount to which such person is entitled, will be determined by agreement between that person and **us**.

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**.

LIMIT OF LIABILITY

The limit of liability shown in the Declarations for "each person" is the most **we** will pay for all damages, including damages for care, loss of consortium, emotional distress, loss of services or death, arising out of **bodily injury** sustained by any one person as the result of any one accident. Subject to this limit for "each person", the limit shown in the Declarations for "each accident" for **bodily injury** liability, is the most **we** will pay for all damages, including damages for care, loss of consortium, emotional distress, loss of services or death, arising out of **bodily injury** sustained by two or more persons resulting from any one accident. If a single limit of liability is shown in the Declarations for this coverage, it is the most **we** will pay for any one accident for all damages, including damages for care, loss of consortium, emotional distress, loss of services or death.

This is the most **we** will pay regardless of the number of:

1. covered persons;
2. claims made;

3. vehicles or premiums shown in the Declarations; or
4. vehicles involved in the accident.

REDUCTIONS

The amount payable under this coverage will be reduced by any amount:

1. paid by or on behalf of any liable parties.
2. paid or payable under any workers' compensation, disability benefits or similar laws.
3. paid or payable under the **AUTOMOBILE LIABILITY** section of this policy.

The amounts specified above shall reduce the damages which **you** may be entitled to recover and will not reduce the limit for this coverage shown in the Declarations.

OTHER INSURANCE

If there is other similar insurance, **we** will pay only **our** fair share. The total amount of recovery under all policies will be limited to the highest of the applicable limits of liability of this insurance and such other insurance.

Our fair share is the proportion that **our** limit bears to the total of all applicable limits. However, if **you** do not own the **motor vehicle**, **our** insurance will be excess over other similar underinsured insurance available but only in the amount by which the limit of liability of this policy exceeds the limits of liability of the other available insurance. If there is other excess or contingent insurance, **we** will pay **our** fair share.

No payments will be made until the limits of all other liability insurance and bonds that apply have been exhausted by payments.

All other provisions of the policy apply except as modified by this endorsement.

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DIVISION II

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STATE OF WASHINGTON

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

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

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

DECLARATION OF SERVICE

I, Krystle Bonnes, hereby certify that on October 13, 2010, I sent via ABC Legal Messengers, an original and one copy of Reply Brief of Appellant to:

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

And that I also hand delivered one copy of the Reply Brief of Appellant to the following:

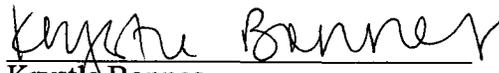
Ben F. Barcus
Law Offices of Ben F. Barcus

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4303 Ruston Way
Tacoma, WA 98402

Dated this 13 day of October, 2010.


Krystle Bonnes

CERTIFICATION

I hereby certify that on _____, 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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