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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY _____

DEPUTY

No. 42780-0-II
COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

KARYN CARBAUGH, an individual, Appellant,

v.

JOHN N. JOSLIN and "JANE DOE" JOSLIN, husband and wife and the
marital community comprised thereof;
NORMA O. JOSLIN and "JOHN DOE" JOSLIN, wife and husband and
the marital community comprised thereof, Respondents;
and PROGRESSIVE NORTHWEST INSURANCE COMPANY,
Respondent Intervenor.

APPELLANT'S REPLY BRIEF

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A. BRIEF FACTS IN REPLY

There is no dispute in this case that Ms. Carbaugh maintained Uninsured/ Underinsured (UM/UIM) motorist coverage with Progressive with policy limits of only \$25,000. Similarly, there is no dispute that under her UM/UIM coverage, Ms. Carbaugh is entitled to recover all of her damages, up to the limits of liability, that she would otherwise be entitled to recover from an uninsured/ underinsured tortfeasor as follows:

INSURING AGREEMENT– UNDERINSURED MOTORIST BODILY INJURY COVERAGE

Subject to the Limits of Liability, if **you** pay the premium for Underinsured Motorist Coverage, **we** will pay for damages, other than punitive or exemplary damages, which an **insured person** is legally entitled to recover from the **owner** or operator of an underinsured motor vehicle because of **bodily injury**: 1. sustained by an **insured person**....

CP 47 (emphasis in original). Under this same quoted provision, there is no dispute that Progressive's liability to Ms. Carbaugh under her UM/UIM coverage is limited to \$25,000.00, even when, as in this case, Ms. Carbaugh's total damages exceed that amount. Id.

At mandatory arbitration, Ms. Carbaugh was awarded \$27,131.70 in damages arising from a collision with an uninsured tortfeasor. CP 14-15.

The trial court initially ruled that Ms. Carbaugh was entitled to enter judgment for her full UM/UIM policy limits of \$25,000 when her damages exceeded her policy limits. CP 95-96; September 16, 2011, Report of Proceedings at RP 17.

Then, on Progressive's motion for reconsideration, the trial court ruled that Ms. Carbaugh's \$25,000 UM/UIM policy limits should be partially offset by \$5,099.28 out of the \$7230.28 in PIP benefits Progressive paid, leaving Ms. Carbaugh with an award that was even less than the amount of her general damages she was awarded in at Mandatory Arbitration. See October 7, 2011, Report of Proceedings at RP 1, lines 11-25; RP 5, lines 7-15.

B. ARGUMENT

1. Progressive does not dispute that the appropriate standard of review is de novo review.

As stated in Ms. Carbaugh's opening brief, the interpretation of an insurance policy is a question of law that is reviewed de novo. McIllwain v. State Farm Mut. Auto. Ins. Co., 133 Wn. App. 439, 443, 136 P.3d 135 (2006). As only questions of law remain on appeal, the de novo standard is the appropriate standard of review. Littlefair v. Schulze, 278 P.3d 218,

221, (Division 2, June 5, 2012) (“We review questions of law and conclusions of law de novo.”)

2. **In its responsive brief, Progressive completely ignores the rule of law that a PIP offset against an uninsured motorist (UM) award of damages is not allowed when the injured party’s total damages exceed the UM policy limits.**

In responding to Ms. Carbaugh’s opening brief, Progressive simply ignores the out of jurisdiction cases that Ms Carbaugh cited to both the trial court below and to this Court in her Appellant’s brief. One of those cases was the Louisiana¹ decision in Barnes v. Allstate Ins. Co., 608 So.2d 1045, 1047 (La.App.1992). In Barnes, the Louisiana Court of Appeals announced the rule of law regarding when an insurer may as follows:

Furthermore, it is a well settled rule that where a plaintiff’s total damages do not exceed the UM policy limits and the language of the policy allows it, the UM carrier is entitled to a credit for any amount which it has paid to the plaintiff under the medical payments coverage. White v. Patterson, 409 So.2d 290, 294 (La.App. 1st Cir.1981), writ denied,412 So.2d 1110 (La.1982); Webb v. Goodley, 512 So.2d 527, 531 (La.App. 3d Cir.1987);

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The Washington Supreme Court has stated “[t]o determine the intent of our [underinsured motorist] legislation we are guided by the reasoning of the Louisiana State Supreme Court, the only court to interpret a statute which in all pertinent respects is identical to ours.” Millers Cas. Ins. Co., of Texas v. Briggs, 100 Wn.2d 1, 5, 665 P.2d 891(1983). See also Hamilton v. Farmers Ins. Co.,107 Wn.2d 721, 729-730, 733 P.2d 213 (1987).

Taylor v. State Farm Mutual Automobile Insurance Company, 237 So.2d 690, 693 (La.App. 4th Cir.1970).

The Louisiana decision in Barnes v. Allstate was later quoted with approval in Barney v. Safeco Ins. Co. of America, 73 Wn.App. 426 , 869 P.2d 1093 (1994), *overruled on other grounds*, Price v. Farmers Insurance Company of Washington, 133 Wn.2d 490, 946 P.2d 388 (1997) (“**where a plaintiff's total damages do not exceed the UM policy limits . . . the UM carrier is entitled to a credit for any amount which it has paid to the plaintiff under the medical payments coverage**” (Emphasis added)).

Similarly, Progressive ignores the New Mexico Court of Appeals decision in Fickbohm v. St. Paul Ins. Co. 133 N.M. 414, 63 P.3d 517, 522 (N.M.App. 2002), where the court specifically held “[w]henver insureds have UM/UIM coverage less than the amount of their damages, the [medpay/PIP] offset cannot be enforced.”

A similar rule of law is stated in *Corpus Juris Secundum* as follows: “[w]here provided by statute, in particular, uninsured-motorist benefits are subject to an offset or credit for medical or personal-injury protection payments as provided, at least where the insured’s total damages do not exceed the underinsured-motorist policy limits. . . .”

46A C.J.S., Insurance, § 2302 (2007).

In addition to the foregoing authorities, the state of Oregon also denies insurance companies any PIP offset when an injured party's damages exceed their UM/UIM policy limits. In the case of Farmers Insurance Company v. Conner, 182 P.3d 878, 880 (Or. App. 2008), review denied, 189 P.3 749, the injured party, Conner, was struck by a motorist who maintained only \$25,000 bodily injury liability limits. Conner, however, maintained \$50,000 UM/UIM policy limits with Farmers Insurance. Id. Conner also had a very large PIP policy with coverage of up to \$100,000. Id.

As a result of Conner's injuries, Farmers paid \$28,589.20 in PIP benefits for Conner. Id. Conner then recovered the tortfeasor's bodily injury liability limits of \$25,000. Id. Conner later submitted an underinsured motorist claim against Farmers Insurance. Id.

At arbitration, the arbitrator determined that Conner had suffered \$30,376.99 in economic damages and \$60,000 in non-economic damages, for a total of \$90,376.99. Id. Thus, when the tortfeasor's bodily injury limits of \$25,000 was subtracted from Conner's total damages of \$90,376.99, leaving an underinsured amount of damages equaling

\$65,376.99, that amount exceeded Conner's \$50,000 UM/UIM policy limits. Nonetheless, Farmers insurance then claimed that Conner was required to reimburse Farmers for the \$28,589.20 in PIP benefits it had paid. Id. The trial court ruled in favor of Farmers, granting Farmers a right of reimbursement. Id.

On appeal, the narrow issue before the Oregon Court of Appeal was framed by the court as follows:

Does ORS 742.542 [a statute requiring PIP reimbursement] limit an insurer's entitlement to reimbursement from its own insured when the insured has been less than fully compensated for his or her total damages?

Id. at 881.

The PIP reimbursement statute at issued in Conner, ORS 742.542, allows insurers to reduce the amount of damages paid under UM/UIM coverages for amounts paid under PIP coverages as follows:

Payment by a motor vehicle liability insurer of personal injury protection benefits for its own insured shall be applied in reduction of the amount of damages that the insured may be entitled to recover from the insurer under uninsured or underinsured motorist coverage for the same accident but may not be applied in reduction of the uninsured or underinsured motorist coverage policy limits.

On appeal, the Court of Appeals reversed the trial court and ruled that Farmers Insurance was not entitled to an offset for its PIP payments

made to Conner when Conner's total damages exceeded his UM/UIM policy limits. Id. at 887-888. There, the Court explained its ruling as follows:

[W]e conclude that the legislature intended ORS 742.542 to limit an insurer's ability seek an offset or reimbursement of PIP benefits to the extent that the insured's damages exceed the limits of the UM/UIM policy. . . . Therefore, Conner was entitled to the benefits of both his UIM and PIP coverage, and Farmers cannot be permitted to recover the PIP payments through reimbursement, thereby reducing Conner's "underinsured motorist coverage policy limit" below \$50,000.

Id.

Accordingly, the net result in Farmers Ins. Co. v. Conner, was that Conner recovered \$25,000 from the tortfeasor's liability insurer, and recovered his full \$50,000 UM/UIM policy limits with Farmers Insurance when his total damages were found to be \$90,376.99, which was in excess of his policy limits. Farmers was not entitled to an offset of the \$28,589.20 in PIP benefits it paid, even though that would mean that Conner's total amounts received as a result of the car crash was \$25,000 (3rd party liability) + \$50,000(UIM) + \$28,589.20(PIP) for a total of \$103,589.20.

In the present case, there is no dispute that Ms. Carbaugh's damages of \$27,131.70 exceed her UM/UIM policy limits of \$25,000. Thus, under the "well settled rule" announced in Barnes v Allstate, *supra*, the same rule announced in Fickbohm, *supra*, (applying the Washington Supreme Court decision in Keenan), and the rule announced in Corpus Juris Secundum, because Ms. Carbaugh's damages exceeded her UM/UIM limits, a PIP offset clause in the insurance policy cannot be enforced. Accordingly, the trial court erred in granting reconsideration and allowing a PIP offset. Thus, the trial court's order granting reconsideration should be reversed, and judgment should be entered against Progressive for the balance of Ms. Carbaugh's \$25,000 UM/UIM policy limits.

3. Progressive misinterprets the Washington decisions in Keenan v. Industrial Indem. Ins. Co., and Taxter v. Safeco Ins. Co. of America.

In 1987 in its decision in Keenan v. Industrial Indem. Ins. Co., our Supreme Court directly adopted the following holding from the Court of Appeals in Taxter v. Safeco Ins. Co. of America 44 Wn. App. 121, 721 P.2d 972 (1986):

We conclude that *a PIP setoff against underinsured motorist coverage is valid only when the extent of the insured's damages are less than his policy limits*. Where the insured's damages exceed those limits, public policy dictates against any PIP offset.

(Italics in original) Keenan 108 Wn.2d 314, 318-319, 738 P.2d 270 (1987), *overruled on other grounds* by Price v. Farmers Ins. Co., 133 Wn.2d 490, 946 P.2d 388, 393 (1997) (quoting from Taxter v. Safeco Ins. Co. of America, 44 Wn. App. 121, 131, 721 P.2d 972 (1986)).²

Ms. Carbaugh argued to the trial court below and to this Court on appeal that the references to “policy limits” in Keenan and Taxter wherein any PIP setoff against UM/UIM coverage is only allowed when the insured’s damages are “less than his policy limits” means the insured’s UM/UIM limits. Otherwise, public policy dictates against any offset. Keenan, 108 Wn.2d at 318.

Progressive misconstrues this holding in Keenan and Taxter. Progressive argues that the court should read a number of words into those holdings, claiming that a PIP setoff against underinsured motorist

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In the Court of Appeals decision in Taxter, the court relied on our Supreme Court decision in Thiringer v. American Motors Ins. Co., 91 Wash.2d 215, 588 P.2d 191 (1978), which held that it is the public policy of Washington State to prevent a less than “make whole” recovery under the uninsured motorist statute is in accord with 12A G. Couch, Insurance § 45.652, at 213 (rev. ed. 1981), wherein it was stated that “deductions of payments under medical coverages, whether included in the automobile policy or otherwise, are normally not allowed unless the loss is less than the policy limits.” Taxter, 44 Wn. App. at 131 (emphasis added).

coverage is valid when the insured's damages are less than the combined policy limits of both the insured's UM and PIP coverages. See Progressive's Respondent's Brief at p. 12. No authorities are cited in support of this assertion. Moreover, Progressive's assertion is not supported by either the Keenan or Taxter decisions themselves, cases interpreting those decisions, or Washington cases dealing with the issues of full compensation and when PIP insurers may recoup monies previously paid.

- a. **A case interpreting Keenan holds that a PIP offset is not allowed where the injured party's damages exceed UM/UIM policy limits.**

In Fickbohm v. St. Paul Ins. Co. 133 N.M. 414, 63 P.3d 517 (N.M.App. 2002), the issue before the Court was whether an insurer was entitled to PIP offsets from both uninsured and underinsured motorist benefits payable to two plaintiffs. Fickbohm 63 P.3d at 518. There, the New Mexico Court noted that while there were no New Mexico decisions on point, Washington State courts had addressed the issue, stating as follows:

As we have noted there are no New Mexico cases precisely on point. But, we do not write on a blank slate. The issue has been resolved by other jurisdictions. Of the authority

cited to us by the parties, we believe the Washington cases are the better reasoned. See Keenan v. Indus. Indem. Ins. Co., 108 Wn.2d 314, 738 P.2d 270 (1987) (en banc), *overruled on other grounds* by Price v. Farmers Ins. Co., 133 Wn.2d 490, 946 P.2d 388, 393 (1997). In Keenan, the Washington Supreme Court addressed a similar offset clause for payments made under a no-fault clause commonly called "PIP" that included medical expense and income continuation benefits. The policy in Keenan provided for reimbursement of PIP payments if the insured recovered "from another." Id. at 272. The insured received \$25,000 from the tortfeasor and proceeded to arbitration under her UIM coverage. Her UIM award was \$44,478.28. The insurance company deducted the \$25,000 paid by the tortfeasor and \$9,999.90 PIP payments from the arbitration award. Emphasizing the fact that the insured was fully compensated, and that the setoff did not reduce UM coverage below policy or statutory limits, the Washington Court affirmed. We agree with the court's rationale in Keenan.

Id. at 523.

In following Washington's Keenan decision, the Fickbohm court specifically held "**Whenever insureds have UM/UIM coverage less than the amount of their damages, the [medpay/PIP] offset cannot be enforced.**" Id. at 522 (emphasis added). Clearly, in stating that the "issue has been resolved in other jurisdictions" and the "Washington Courts are the better reasoned" the Fickbohm court interpreted the statement in Keenan that a PIP setoff against underinsured motorist coverage is applicable only when the insured's damages are less than her UM/UIM

policy limits, not some combination of PIP and UM/UIM limits as

Progressive asserts.³

- b. Denying any PIP offset where an injured party's damages exceed UM/UIM policy limits is consistent with Washington cases that require an injured party actually recover PIP payments before a reimbursement offset is applied.**

In the case of Hamm v. State Farm Mut. Auto. Ins. Co., 151 Wn.2d 303, 309, 88 P.3d 395 (2004), the issue before the Court was the propriety of a PIP offset from a UM award. In Hamm, our Supreme Court made it clear that it is only when an insured recovers the total amount of her damages *from a source other than the PIP carrier* that the PIP carrier may seek reimbursement. There, the Court stated as follows:

If the insured subsequently recovers the total amount of her damages from another source (the tortfeasor, her UIM carrier, or both), the PIP coverage becomes redundant. Therefore, when the insured receives full recovery, the PIP carrier may seek reimbursement from its insured for the PIP benefits it previously paid. See Winters, 144 Wn.2d at 876,

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Under Progressive's argument, Ms. Carbaugh has UM limits of \$25,000 and PIP limits of \$10,000 for a total combined coverage limits \$35,000. Assume that Ms. Carbaugh had been awarded \$34,230.28 at arbitration, comprised of \$7,230.28 in special damages and \$27,000 in general damages. Under Progressive's theory, because Ms. Carbaugh's total damages of \$34,230.28 are less than the combined coverage limits of \$35,000, then Progressive would be entitled to a PIP offset. However, offsetting \$7,230.28 in PIP payments from a \$34,230.28 award, leaving \$27,000 is meaningless when Ms. Carbaugh's UM limits are only \$25,000.

31 P.3d 1164 (“the insured must be fully compensated before the insurer may recoup benefits paid”).

Id. at 309 (emphasis added).

Similarly, as this Court stated in Sherry v. Financial Indem. Co., 132 Wn. App. 355, 365, 131 P.3d 922 (2006), affirmed, 160 Wn.2d 611, 160 P.3d 31 (2007), it is only after the insured is fully compensated that the insurance contract provisions control the extent of reimbursement. 132 Wn.App. 355, 365, 131 P.3d 922 (2006), affirmed, 160 Wn.2d 611, 160 P.3d 31 (2007).

Likewise, in the case of Winters v. State Farm Mut. Auto. Ins. Co., 144 Wn.2d 869, 875, 31 P.3d 1164 (2001), our Supreme Court held that whether an insurance company seeks a right of subrogation, setoff or offset, “the insured must be fully compensated before the insurer may recoup benefits paid.”

Under the facts of the present case, it is clear that Ms. Carbaugh could never recover her \$27,230.28 in total damages, including PIP payments, from her \$25,000 UM policy with Progressive in order to trigger the right to a PIP reimbursement offset. Under the holding of Hamm, supra, because Ms. Carbaugh cannot recover “the total amount of

her damages from another source” in order to trigger the requirement of a PIP reimbursement offset, Progressive was not entitled to any offset in this case. The trial court erred in granting Progressive’s motion for reconsideration.

4. There is no such thing as “partial reimbursement” as Progressive asserts.

In Ms. Carbaugh’s Appellant’s Brief, Ms. Carbaugh set forth two hypothetical examples to illustrate that (1) that Progressive is not entitled to an offset under the facts of this case, and (2) Ms. Carbaugh should not be made worse off because she chose to purchase both PIP and UM/UIM coverage from the same insurer.

Example One

Assume that Ms. Carbaugh had PIP coverage with Progressive, but that she had declined any UM or UIM coverage. Assume that Progressive paid her \$7131.70 in PIP medical payments just as it did here. Assume that the tortfeasor maintained liability limits of only \$25,000, and that Ms. Carbaugh was ultimately awarded \$27,131.70 in total damages against the tortfeasor.

Example Two

Assume that Ms. Carbaugh declined any PIP coverage with Progressive, but that she accepted \$25,000 in UM /UIM coverage. Assume that Ms. Carbaugh’s private health insurer paid her \$7131.70 in medical payments. Assume that Ms. Carbaugh was ultimately awarded \$27,131.70 in total damages against Progressive resulting from the fault of an uninsured tortfeasor.

Under either of these examples, because Ms. Carbaugh would not be able to recover the total amount of her damages from the tortfeasor in example one, or from her UM/UIM insurer in example two, no right of reimbursement arises for either the PIP insurer in example one, or the health insurer in example two. Hamm v. State Farm Mut. Auto. Ins. Co., supra, 151 Wn.2d at 309 (a right to reimbursement arises only after the insured recovers the total amount of her damages from another source.)

Progressive asserts, without citation to any authority, that under the first hypothetical example, it would be entitled to a “partial reimbursement of its PIP expenses.” See Progressive’s Respondent’s Brief at p. 10. Progressive likewise asserts, without authority, that in the second hypothetical example, the private health insurer would be entitled to reimbursement as well. Id. In doing so, Progressive overlooks the fact that a claimant must recover all of her damages *first*, before any right of subrogation, setoff or offset applies.

Washington courts have long applied the “make whole” or “made whole” doctrine that requires an injured party must recover all of her damages before any right of subrogation, or reimbursement offset arises.

Skiles v. Farmers Ins. Co., Inc., 61 Wn. App. 943, 814 P.2d 666 (1991)
("In this state it is well established that public policy requires an injured party to be made whole before requiring reimbursement of an injured party's insurance carrier.") See also Sherry v. Financial Indem. Co., 160 Wn.2d 611, 160 P.3d 31(2007).

Corpus Juris Secundum provides a succinct explanation of the "make-whole" doctrine as follows:

The make whole doctrine prevents subrogation by acting as a rule of priority, such that only where an injured party has received an award which pays all of the elements of damages, including those for which he or she has already been indemnified by an insurer, is there any occasion for subrogation.

46A C.J.S., Insurance, § 2004 (2007).

In both of our Supreme Court decisions in Hamm v. State Farm Mut. Auto. Ins. Co., 151 Wn.2d 303, 309, 88 P.3d 395 (2004), and Winters v. State Farm Mutual Automobile Insurance Co., 144 Wn.2d 869, 31 P.3d 1164, 63 P.3d 764 (2001), the Court held that it is only when an insured recovers the total amount of her damages *from a source other than the PIP carrier* that the PIP carrier may seek reimbursement. Hamm, 151 Wn. 2d at 309. Winters 144 Wn.2d at 881 (the insured recovered from the at-fault driver and then recovered from his own UIM carrier creating a

common fund from which the PIP insurer was able to recoup payments it had made).

Thus, under Washington law, there is no right of “partial offset” as Progressive asserts. Either the injured party is made whole by actually recovering the total amount of her damages, thereby triggering a right of reimbursement offset, or she does not recover all of her damages, thereby barring any right of reimbursement offset.

In the case at bar, because Ms. Carbaugh’s total damages were in excess of her UM/UIM policy limits, she cannot recover all of her damages. Therefore, Progressive had no right to any PIP reimbursement offset in this case. The trial court’s order granting reconsideration should be reversed, and the matter should be remanded for entry of judgment for the balance of Ms. Carbaugh’s \$25,000 UM/UIM policy limits.

5. **Ms. Carbaugh should receive an award of her attorney fees and costs on appeal, and in responding to Progressive’s Motion for Reconsideration, that were necessary for Ms. Carbaugh to obtain the full benefit of her insurance.**

In its Respondent’s Brief, Progressive concedes that Ms. Carbaugh is entitled to an award of her attorney’s fees on appeal under the holding of Olympic Steamship Co. v. Centennial Insurance Co., 117 Wash.2d 37, 54,

811 P.2d 673 (1991), if she is successful. See Respondent's Brief at p. 14.

In the case at bar, at the trial court level, Progressive filed a motion to deny Ms. Carbaugh the full benefits of her UM coverage, despite the fact that her total damages awarded in Mandatory Arbitration exceeded her UM limit with Progressive. Ms. Carbaugh was forced to respond to that motion in an effort to obtain her UM benefits, CP 117 - 121, and requested attorney's fees for doing so. Now, Ms. Carbaugh has been forced to file the present appeal in order to obtain her full UM benefits. In the event Ms. Carbaugh prevails on appeal, the Court should award Ms. Carbaugh her attorneys fees and costs expended at the trial court level and on appeal.

C. CONCLUSION

Based on the foregoing argument, Ms. Carbaugh requests that the court reverse the trial court's order granting reconsideration, order that Progressive pay Ms. Carbaugh the balance of her \$25,000 UM policy, and award Ms. Carbaugh her attorney's fees and costs incurred in opposing Progressive's Motion for Reconsideration at the trial court level, as well as her attorney's fees and costs incurred on appeal.

DATED this 26th day of July, 2012.

**THE LAW OFFICES OF
WATSON & GALLAGHER, P.S.**



Thomas F. Gallagher, #24199
Attorney for Appellant
Karyn Carbaugh

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

KARYN A. CARBAUGH, an individual,

Appellant,

v.

JOHN N. JOSLIN and "JANE DOE" JOSLIN, husband and wife and the marital community comprised thereof; NORMA O. JOSLIN and "JOHN DOE" JOSLIN, wife and husband and the marital community comprised thereof;

Respondents.

and

PROGRESSIVE NORTHWEST INSURANCE COMPANY,

Respondent Intervenor,

NO. 42780-0-II

DECLARATION OF MAILING

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DIVISION II
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STATE OF WASHINGTON
BY _____
DEPUTY

Marie Ekstrand hereby declares and states as follows:

On July 26, 2012, I deposited a copy of the Appellant's Reply Brief, in the United States Mail, postage prepaid, addressed to the following recipients:

Attorney for Respondent Intervenor, Progressive Northwestern Insurance Company:

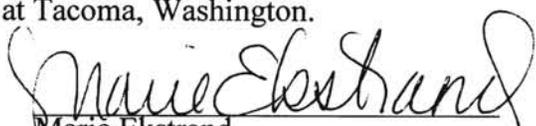
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I declare under the penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 26th day of July, 2012, at Tacoma, Washington.


Marie Ekstrand