

THE COURT OF APPEALS OF THE STATE OF
WASHINGTON
DIVISION II

William D. MORGAN et al.

Defendants/Appellants,

v.

STATE FARM FIRE AND CASUALTY COMPANY,

Plaintiff/Appellee.

On Appeal from Pierce County Superior Court Failure to
Implement Court of Appeals Mandate on Remand in Court of
Appeals Cause No. 47913-3-II (Linked with No. 47196-5-II)
and
from Order Dismissing Counterclaims for Want of Prosecution
under Pierce County Superior Court Cause Number 12-2-07091-7

BRIEF OF APPELLANT

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INTRODUCTION

This is an appeal from the Superior Court’s unjustified failure to obey the mandate of the Court of Appeals and the superior court’s erroneous dismissal of the counterclaims of Appellant Robert Charles Justus (“Justus”) against Appellee State Farm Fire & Casualty Company (“State Farm”). *See Court of Appeals Opinion, State Farm Fire & Casualty Co. v. Justus*, No. 47913-3-II (linked with No. 47196-5-II), 199 Wn.App. 435 (2017) (“*Court’s Opinion*”). In that decision, the Court of Appeals remanded the case to the Superior Court, directing the lower court (1) to hold an in camera hearing to determine whether the State Farm claim file at issue contains material protected by attorney-client privilege, (2) to redact any privileged material and disclose the claim file to Justus, and (3) to determine State Farm’s summary judgment motion on the extra-contractual claims after disclosure. *Id.* at 21.

However, State Farm failed to produce the claim file to the superior court and the superior court took no action on the matter, in defiance of the Court of Appeals order on remand and despite Justus’ August 26, 2019 and December 6, 2019 request to the superior court and State Farm.

Instead, State Farm moved the superior court to dismiss Justus' counterclaims for want of prosecution under CR 41(b)(1). In error, the superior court granted the motion dismissing Justus' counterclaims. *See* Order Granting Motion to Dismiss, filed November 1, 2019, attached hereto as Exhibit C.

In the Order, the Superior Court made the erroneous finding that "Justus has failed to note this action for trial or hearing within one year after issues of law and fact were joined and such failure is not due to . . . State Farm's actions." *Id.*

Justus appeals from the superior court's failure to comply with the Court of Appeals' mandate on remand, appeals the superior court's erroneous finding and the dismissal of his counterclaims, and requests an award of attorney fees, costs, and sanctions.

ASSIGNMENTS OF ERROR

Error No. 1. The lower court failed to comply with the Court of Appeals' mandate by not placing the matter on the next available calendar when State Farm had the claim file in its possession.

Error No. 2. The lower court erred in Finding No. 2 of its Order; for failing to note this action for trial or hearing within one year after December 6, 2017 when the issues of law and fact were joined.

Error No. 3. The lower court erred in Finding No. 2 of its Order; when it found that the failure in not bringing the claims was not due to State Farm's actions.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Issue No. 1. Whether the lower court erred by failing to comply with the Court of Appeals' mandate to place this matter on the next available calendar.

Issue No. 2. Whether the lower court erred when it dismissed Justus' counterclaims for want of prosecution.

Issue No. 3. Whether the lower court erred in finding that the failure to bring the action or hearing was not due to plaintiff State Farm's actions.

STATEMENT OF THE CASE

The Court Of Appeals has already ruled on several issues in this case. The relevant facts as set forth in the *Court's Opinion* are summarized here.

This case arises from Justus' claim for negligent wrongful detention against William and Donna Morgan. At the time of the incident, in which William Morgan ("William") shot at and detained Justus at gunpoint, the Morgans held an umbrella liability insurance

policy with State Farm Fire and Casualty Company. *Court's Opinion* at 1-2. In the linked case, No. 47196-5-II, the Court of Appeals confirmed the lower court's determination that a covenant judgment settlement between Justus and the Morgans was reasonable. *Id.* at 2. In that settlement, the Morgans stipulated to a judgment in favor of Justus, Justus agreed not to execute the judgment against the Morgans, and the Morgans assigned to Justus all Morgans first party claims they may have against State Farm. *Id.*

During the covenant judgment settlement proceedings, State Farm filed a separate declaratory judgment action, arguing (now in the position of plaintiff in the declaratory judgment action) that the insurance policy did not cover William's actions in shooting at and detaining Justus. *Id.* Justus (now acting as defendant in the declaratory judgment action) filed counterclaims, alleging that State Farm acted in bad faith and various extra contractual claims. *Id.*

On November 20, 2014, before the bifurcation of the trial into coverage and extra contractual claims, State Farm moved for summary judgment to dismiss Justus' extra contractual claims. *Id.* at 21-22, n. 13. In opposing State Farm's motion, Justus argued that summary judgment would be premature because discovery had not

yet been completed. *Id.* The lower court then ordered a stay of the discovery that was not lifted until May 20, 2015. *Id.* Just over a week later Justus moved the lower court to compel production of the claim file from State Farm. *Id.* The Court of Appeals noted that, contrary to State Farm's assertion, Justus did not "drop the ball" on requesting discovery. *Id.* State Farm claimed that it refused to disclose the claim file because the Morgans refused to waive any privilege they may have in it. *Id.* at 20. The lower court implied that Justus would need to file a separate action against the Morgans in order to compel production of the claim file. *Id.*

After a bench trial, the superior court ruled that Williams actions against Justus could only constitute intentional acts of false arrest and false imprisonment (as opposed to negligent or reckless acts), which were time barred under the applicable statute of limitations, and therefore not covered by the State Farm policy. *Id.* at 3. The superior court also denied Justus' motion to compel State Farm to produce the Morgans' claim file and granted summary judgment to State Farm on Justus' extra contractual counterclaims. *Id.* Justus appealed the superior court decision to the Court of Appeals.

In its opinion filed on June 27, 2017, the Court of Appeals upheld the superior court determination that Justus's actions were time-barred intentional torts. *Id.* However, Justus prevailed on two issues. The Court of Appeals reversed the superior court's denial of Justus' motion to compel State Farm to produce the claim file and reversed the dismissal of Justus' extra contractual counterclaims. *Id.*

With respect to the motion to compel, the Court of Appeals held that Justus stands in the shoes of the Morgans and has the same rights to the claim file as the Morgans, as a result of the settlement agreement assigning the Morgans' claims against State Farm to Justus. *Id.* at 21. In doing so, the Court of Appeals extended its earlier opinion in *Cedell v. Farmers Ins. Co. of Washington*, regarding an insured's right to obtain the claim file from the insurer, to include requests for production of a claim file by a third party such as Justus who has been assigned a first party insured's claims. *Id.*; *Cedell v. Farmers Ins. Co. of Washington*, 176 Wn.2d 686, 295 P.3d 239 (2013). The Court of Appeals noted that the State Farm claim file "may contain information pertinent to Justus' extra contractual claims." *Court's Opinion* at 21.

The Court of Appeals remanded the case to the superior court

with instructions for the superior court: (1) to hold an in camera hearing to determine whether the claim file contains any material protected under the Morgans' attorney-client privilege, (2) to redact any privileged material and disclose the claim file to Justus, and (3) to determine State Farm's summary judgment motion on Justus' extra contractual counterclaims after the disclosure. *Id.*

The Court of Appeals filed its opinion on June 27, 2017; the opinion became the decision terminating review on December 6, 2017. *See* Court of Appeals Mandate, filed December 12, 2017, attached hereto as Exhibit A. The Court of Appeals remanded the case to the superior court for further proceedings in accordance with the opinion and directed the superior court to place the matter on the next available motion calendar for action consistent with the Court of Appeals' opinion. *Id.*

In directing the Superior Court to review the claim file, the Court of Appeals clearly required State Farm to produce the claim file to the superior court and clearly required the superior court to schedule the matter for hearing. However, neither the superior court nor State Farm took any action in the matter.

On August 26, 2019, counsel for Justus filed a formal request

with the superior court to place the matter on the next available calendar, and served the request on opposing counsel. *See* Notice from Counsel, served August 26, 2019, attached hereto as Exhibit B. Neither the superior court nor State Farm took any action in response to Justus' request.

On July 23, 2020, State Farm brought a motion to dismiss Justus' counterclaims under CR 41(b)(1), alleging want of prosecution. The superior court granted State Farm's motion and dismissed Justus' counterclaims on November 1, 2019. Exhibit C. However, this was error by the Superior Court because the failure to bring the civil action to trial was caused by State Farm.

CR 41(b)(1) provides:

Any civil action shall be dismissed, without prejudice, for want of prosecution whenever the plaintiff, counterclaimant, cross claimant, or third party plaintiff neglects to note the action for trial or hearing within 1 year after any issue of law or fact has been joined, *unless the failure to bring the same on for trial or hearing was caused by the party who makes the motion to dismiss.*

CR 41(b)(1) (emphasis added).

The failure to bring the matter for trial or hearing "was caused by the party who makes the motion to dismiss," because State Farm

declined to comply with the Court of Appeals direction on remand for State Farm to produce the claim file and ignored Justus' August 26, 2020 and December 6, 2020 notifications and requests.

The dismissal without prejudice of Justus' counterclaims under CR 41(b)(1) had the effect of determining the action and preventing final judgment or discontinuing the action RAP 2.2(a)(3). *See Munden v. Hazelrigg*, 105 Wn.2d 39, 40, 42-44, 711 P.2d 295 (1985). *Osborne v. Cty. of Spokane ex rel. Newman Lake Flood Control Zone Dist.*, 103 Wn. App. 1026 (2000). Accordingly, the CR 41(b)(1) dismissal is appealable. *Id.*

ARGUMENT

I. The Court Of Appeals Should Compel The Superior Court To Comply With The Court Of Appeals' Mandate.

The superior court clearly failed to comply with the Court of Appeals' mandate on remand to place the matter on the next available motion calendar, despite August 26, 2020 and December 6, 2020 notices by Justus.

"Superior courts must strictly comply with directives from an appellate court which leave no discretion to the lower court." *State v. Schwab*, 134 Wn.App. 635, 645, 141 P.3d 658 (2006), *aff'd*, 163 Wn.2d 664, 185 P.3d 1151 (2008). Here, the Court of Appeals

directed the superior court to place the matter on the next available motion calendar and to hold a hearing to examine the State Farm claim file, leaving no discretion to the superior court on whether to hold a hearing or not. *Id.* See also *Harp v. Am. Sur. Co. of N. Y.*, 50 Wn.2d 365, 369, 311 P.2d 988, 990 (1957) (“The distinction between what the superior court was obligated to do without the exercise of any discretion and the area within which it could exercise its discretion is clear.”).

Accordingly, the Court of Appeals should compel the superior court to comply with the Court of Appeals’ mandate.

II. The Superior Court Erred In Dismissing Justus’ Counterclaims For Want Of Prosecution.

There are at least two purposes of the rule on dismissal for want of prosecution: “first, to protect litigants from dilatory counsel; and second, to prevent the cluttering of court records with unresolved and inactive litigation.” *Franks v. Douglas*, 57 Wn.2d 583, 585, 358 P.2d 969, 971 (1961). Neither of those purposes is furthered by dismissing Justus’ counterclaims in the present case. Dismissing the counterclaims would only reward State Farm for unjustifiably resisting discovery of the claim file and the superior court for ignoring the Court of Appeals’ mandate.

Additionally, the superior court deprived Justus of the opportunity to reach the merits of the controversy when it dismissed Justus' counterclaims for want of prosecution. *Kirschner v. Worden Orchard Corp.*, 48 Wn. App. 506, 509, 739 P.2d 119, 121 (1987) (“Dismissals for want of prosecution are punitive or administrative in nature and every reasonable opportunity should be afforded the parties to allow them to reach the merits of the controversy.”).

The Court of Appeals has already ruled that in order to reach the merits of the controversy, Justus should have access to the claim file. The superior court's failure to compel production of the claim file, followed by dismissal of Justus' counterclaims wholly deprives Justus of the opportunity to try his case, rewards State Farm's dilatory behavior, and disrupts “the orderly administration of justice” contemplated by the Washington Superior Court Civil Rules. *Gott v. Woody*, 11 Wn. App. 504, 506, 524 P.2d 452, 453 (1974).

The superior court's dismissal of Justus' counterclaims was error because both State Farm and the superior court unreasonably delayed the case by failing to hold a hearing on the claim file and failing to produce the claim file. CR 41(b)(1) provides that dismissal

is not appropriate if, as in this case, “the failure to bring the [case] . . . on for trial or hearing was caused by the party who makes the motion to dismiss.” CR 41(b)(1). See *Hanson v. Lee*, 3 Wn. App. 461, 467, 476 P.2d 550, 555 (1970) (holding that the party who unreasonably delays prosecution of a case is equally at fault for failing to bring the case to trial). Here, the Court of Appeals has already found that the extra contractual claims cannot be tried before examination of the claim file has occurred. In the *Court’s Opinion*, the Court of Appeals held that “the trial court abused its discretion” in denying Justus’ motion to compel State Farm to produce the claim file. *Court’s Opinion* at 21. Stating that “the [State Farm] claim file may contain information pertinent to Justus’ extra contractual claims,” the Court of Appeals also ruled that as a consequence of the trial court’s error on the motion to compel, it was appropriate to reverse the trial court’s summary judgment ruling on Justus’ extra contractual claims. *Id.* (citing *Demelash v. Ross Stores, Inc.*, 105 Wn. App. 508, 514, 20 P.3d 447, 451 (2001)).

Therefore, the Court of Appeals should reverse the superior court’s CR 41(b)(1) Order.

III. Justus Is Entitled To Attorney Fees, Expenses, And Sanctions Under Rap 18.1 and 18.9.

The Court should order State Farm to pay attorney fees, expenses, and sanctions pursuant to RAP 18.1 and 18.9 and applicable law. In this case, “no debatable issue is presented upon which reasonable minds might differ.” *Washington Motorsports Ltd. P’ship v. Spokane Raceway Park, Inc.*, 168 Wn. App. 710, 718, 282 P.3d 1107, 1111–12 (2012). The Court of Appeals’ mandate was unequivocal and clear. Yet, both State Farm and the superior court ignored it, despite Justus’ August 26, 2020 and December 6, 2020.

Furthermore, the Court of Appeals noted that the State Farm claim file goes to the heart of Justus’ counterclaims. Yet, instead of ordering State Farm to produce the claim file, the superior court granted State Farm’s motion to dismiss and blamed Justus for want of prosecution. Obviously, here there is no debatable issue that the misbehavior of State Farm and the superior court forced Justus to undertake the considerable expense of lodging this appeal.

Furthermore, State Farm’s resistance to discovery of the claim file was clearly unjustified from the start. It is well-settled law that, “the nature of the issues in a bad faith insurance action automatically establishes substantial need for discovery of certain materials in the

claims file.” *Barry v. USAA*, 98 Wn. App. 199, 208, 989 P.2d 1172, 1177 (1999).

The insurer owes the insured a quasi-fiduciary duty to its insured, which by its nature is not and should not be adversarial. *Id.* at 205-07. *See also Cedell*, 176 Wn.2d at 696. Under those circumstances, the insured is entitled to discover the entire claim file kept by the insured without exception for any claim of attorney-client privilege. *Barry*, 176 Wn.2d at 694. In *Cedell v. Farmers Ins. Co.*, the Washington Supreme Court affirmed the trial court’s order to compel the insurance company to provide the insured with all documents that it had withheld or redacted based on attorney-client privilege, as well as sanctions payable to the insured of \$15,000 and sanctions payable to the court of \$25,000. *Cedell*, 176 Wn.2d 686.

Here, Justus requests attorney fees and costs for having to make August 26, 2020 and December 6, 2020 to State Farm and the superior court to schedule a hearing for in camera review of the claim file, for having to defend himself from State Farm’s frivolous CR41(b)(1) motion, and for the costs of bringing this appeal. Attorney fees should also be awarded for State Farm’s egregious concealment of the claim file for past 30 months, in direct defiance

of the Court of Appeals mandate to move this case forward.

IV. CR 11 Sanctions Are Appropriate In This Matter.

State Farm and the lower court violated several provisions of CR 11. The lower court and State Farm engaged in egregious litigation tactics by: (1) failing to keep the extra contractual claims open; (2) doing nothing about State Farm's conduct; and (3) for attempting to force Justus to start a separate action against the Morgans in order to obtain the claim file. These postures were already rejected by the Court of Appeals. Yet the lower court and State Farm still proceed contrary to the Court of Appeals mandate. Therefore, Justus requests CR 11 sanctions against State Farm for its ongoing unacceptable litigation practices in failing to produce the claim file, thereby hindering Justus' ability to prosecute his claims on the merits.

CONCLUSION

The Court of Appeals should compel the superior court to comply with the Court of Appeals' mandate on remand. The Court should also reverse the superior court's CR 41(b)(1) order. Finally, the Court should award attorney fees, expenses, and sanctions to Justus under RAP 18.1, 18.9, and CR 11.

Dated this 2 day of August 2020

Respectfully submitted,

/s/ Kevin L. Johnson

Kevin L. Johnson

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August 27, 2019 8:36 AM

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NO. 12-2-07091-7
NO. 12-2-07091-7

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE FARM FIRE & CASUALTY CO., an
Illinois corporation,
Respondent,

v.

ROBERT CHARLES JUSTUS, a single man,
Appellant.

WILLIAM D. MORGAN and DONNA L.
MORGAN, husband and wife; CORINNE M.
TOBECK, as Personal Representative of the
Estate of JOSEPH "JOEY" TOBECK;
VERNON A. TOBECK, natural father of
decedent Joseph "Joey" Tobeck; and APRIL
D. NORMAN, natural mother of decedent
Joseph "Joey" Tobeck,

Defendants.

No. 47913-3-II

MANDATE

Pierce County Cause No.
12-2-07091-7

Court Action Required

The State of Washington to: The Superior Court of the State of Washington
in and for Pierce County

This is to certify that the opinion of the Court of Appeals of the State of Washington, Division II, filed on June 27, 2017 became the decision terminating review of this court of the above entitled case on December 6, 2017. Accordingly, this cause is mandated to the Superior Court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

Court Action Required: The sentencing court or criminal presiding judge is to place this matter on the next available motion calendar for action consistent with the opinion.

Exhibit # A Pg. # 1

Exhibit # _____ Pg. # _____

Page 2
Case #47913-3-II
Mandate



IN TESTIMONY WHEREOF, I have hereunto set
my hand and affixed the seal of said Court at
Tacoma, this 12th day of December 2017.

Derek M. Byrne
Clerk of the Court of Appeals,
State of Washington, Div. II

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

ROBERT CHARLES JUSTUS, CORINNE
M.TOBECK, as Personal Representative of the
Estate of JOESPH "JOEY" EMERY TOBECK,
VERNON A. TOBECK, natural father; and APRIL
D. NORMAN, natural mother,

Case No. 12-2-07091-7

Plaintiffs,

MANDATE

vs.

WILLIAM D. MORGAN, and DONNA L.
MORGAN, husband and wife, and the marital
community comprised thereof,

Defendant(s).

I. INTRODUCTION

COMES NOW, Defendant Justus, by and through his attorney of record, Kevin L.
Johnson, request that the Superior Court note this matter on the next available calendar pursuant
to the Mandate.

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Exhibit # B Pg. # 1

REQUEST THAT THE COURT
PLACE THIS MATTER ON
THE NEXT AVAILABLE CALENDAR--1

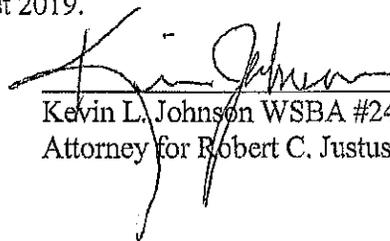
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I. RELIEF REQUESTED

Division II Court of Appeals issued a Mandate to the Superior Court which indicated "Court Action Required" for the purpose to hold an in-camera hearing to determine whether the claim file contains any material protected under the Morgans' attorney client privilege, to redact any attorney client privilege and to disclose the claim file to Justus, and to determine State Farm's summary judgment motion on the extra contractual claims after the disclosure. Justus request that the Superior Court act by placing this matter on the next available calendar consistent with the Division II Court of Appeals Mandate and decision.

DATED this 26th day of August 2019.


Kevin L. Johnson WSBA #24784
Attorney for Robert C. Justus

B Z

REQUEST THAT THE COURT
PLACE THIS MATTER ON
THE NEXT AVAILABLE CALENDAR--2

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CERTIFICATE OF SERVICE

I Kevin L. Johnson, hereby certify that on August 26th, 2019, caused to be electronically filed the foregoing documents with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

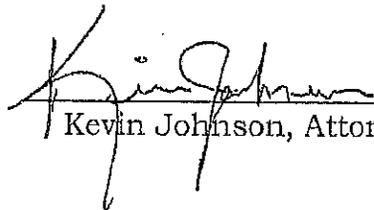
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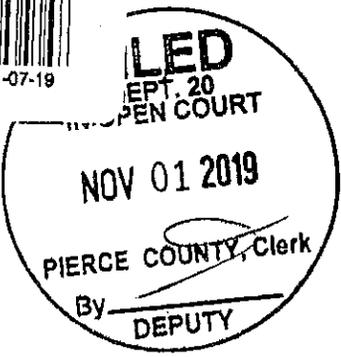
Kevin Johnson, Attorney at Law

Exhibit # B Pg. # 3

REQUEST THAT THE COURT
PLACE THIS MATTER ON
THE NEXT AVAILABLE CALENDAR--3

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0032
174
11/7/2019



The Honorable K.A. van Doorninck
Date of Motion: October 4, 2019
Nature of Motion: Motion to Dismiss
With Oral Argument

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

STATE FARM FIRE & CASUALTY
COMPANY, an Illinois corporation,

Plaintiff,

v.

WILLIAM D. MORGAN and DONNA L.
MORGAN, husband and wife; CORRINE M.
TOBECK, as Personal Representative of the
Estate of JOSEPH "JOEY" TOBECK;
VERNON A. TOBECK, natural father of
decedent Joseph "Joey" Tobeck; APRIL D.
NORMAN, natural mother of decedent
Joseph "Joey" Tobeck; and ROBERT
CHARLES JUSTUS, a single man,

Defendants.

NO. 12-2-07091-7

~~[PROPOSED]~~ ORDER GRANTING
PLAINTIFF STATE FARM FIRE &
CASUALTY COMPANY'S MOTION
TO DISMISS COUNTERCLAIMS FOR
WANT OF PROSECUTION

THIS MATTER has come for hearing before this Court on Plaintiff State Farm Fire and
Casualty Company's Motion to Dismiss for Want of Prosecution pursuant to CR 41(b)(1).
Plaintiff State Farm seeks an order dismissing Defendant Justus's counterclaims for want of
prosecution.

The Court has considered the following submissions in support and opposition thereto,
and the argument of counsel:

~~[PROPOSED]~~ ORDER GRANTING PLAINTIFF
STATE FARM'S MOTION TO DISMISS
COUNTERCLAIMS FOR WANT OF PROSECUTION

- 1 -

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701 Pike Street
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Exhibit # C Pg. # 1

11/7/2019 174 0033

From Moving Plaintiff State Farm:

- (1) Plaintiff State Farm Fire & Casualty Company's Motion to Dismiss Defendant Justus's Counterclaims for Want of Prosecution;
- (2) Declaration of Joseph D. Hampton in Support of Plaintiff State Farm Fire & Casualty Company's Motion to Dismiss Defendant Justus's Counterclaims for Want of Prosecution;
- (3) Reply in Support of Plaintiff State Farm Fire & Casualty Company's Motion to Dismiss Defendant Justus's Counterclaims for Want of Prosecution;
- (4) [Proposed] Order Granting Plaintiff State Farm Fire & Casualty Company's Motion to Dismiss Defendant Justus's Counterclaims for Want of Prosecution

From Defendant Justus:

- (1) Response to Plaintiff's Motion to Dismiss Without Prejudice for Want of Prosecution;

The Court finds:

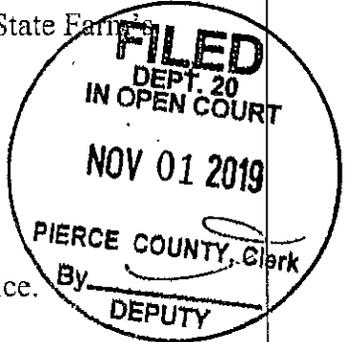
- 1. Issues of law and fact were joined as of December 6, 2017.
- 2. Defendant Justus has failed to note this action for trial or hearing within one year

after issues of law and fact were joined and such failure is not due to plaintiff State Farm's actions.

NOW, THEREFORE, it is hereby ORDERED as follows:

- 1. Plaintiff State Farm's motion is hereby GRANTED.
- 2. Defendant Justus's counterclaims are dismissed without prejudice.

DATED this 1st day of November, 2019.



[Signature]

Judge K.A. van Doorninck

[Signature]
 29284

[PROPOSED] ORDER GRANTING PLAINTIFF STATE FARM'S MOTION TO DISMISS COUNTERCLAIMS FOR WANT OF PROSECUTION

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Presented by:

BETTS, PATTERSON & MINES, P.S.

By /s Joseph D. Hampton
Joseph D. Hampton, WSBA #15297
Vasudev N. Addanki, WSBA #41055
Attorneys for Plaintiff State Farm Mutual
Automobile Insurance Company

[PROPOSED] ORDER GRANTING PLAINTIFF
STATE FARM'S MOTION TO DISMISS
COUNTERCLAIMS FOR WANT OF PROSECUTION

- 3 -

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