

No. 70413-3

DIVISION I, COURT OF APPEALS
OF THE STATE OF WASHINGTON

Snohomish County Case No. 11-2-04773-1

ADAN ROSALES-GUZMAN,

Plaintiff/Respondent,

v.

SPRUCE HILLS, LLC,

Defendant,

And

LLOYD'S SYNDICATE 2112,

Intervenor/Appellant.

APPELLANT'S REPLY BRIEF

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I.

INTRODUCTION

The parties to the action below misled Lloyd's Syndicate 2112 ("Syndicate 2112") about the status of the case in order to obtain a default judgment and by their misrepresentations deprived Syndicate 2112 of its right to have its insured, Spruce Hills LLC ("Spruce Hills") properly defended. They now seek to use the manufactured default judgment to recover \$3 million despite substantial evidence supporting strong *prima facie* defenses to the underlying claim and a near-total lack of evidence to support the excessive judgment amount. The issues raised by Syndicate 2112 on *its* motion to vacate, which the court summarily denied and on which this appeal is based, were not previously presented by either respondent Adan Rosales-Guzman ("Guzman") or Spruce Hills to the trial court when the trial court initially denied Spruce Hills' motion to vacate. Nor could they have been, given that they are based on the demonstrated wrongdoing of Guzman and Spruce Hills themselves. Syndicate 2112 has an absolute right to have its position heard, and the trial court erroneously deprived it of that right by denying the motion to intervene and then using that denial to support a summary denial of its motion to vacate.

Under Washington law, parties are not and should not be permitted to use deception to create liability on the part of insurers for multi-million dollar judgments. CR 60(b) and authoritative case law from the Washington Supreme Court require that the default judgment entered in this case be

vacated and that Syndicate 2112's intervention rights be recognized so that the case can be remanded for a decision on its merits.

II.

ARGUMENT IN REPLY

The Snohomish County Superior Court erred when it denied Syndicate 2112's motion to intervene as a matter of right based on findings that were not accurate, not supported by the record, and legally insufficient to deny Syndicate 2112 its right to intervene in this action. That error was compounded when it was used as the basis to avoid meaningful consideration of the merits of Syndicate 2112's motion to vacate the default judgment. Guzman's repetition of the erroneous and unsupported findings relating to those motions in his brief to this Court does not make those incorrect facts true.¹ As explained in Syndicate 2112's opening brief and below, the record does not support – but rather reveals as untrue – the “facts” argued by Guzman to the Court. Those inaccurate assertions cannot stand as a basis to deprive Syndicate 2112 of its basic right to address its position to the trial court and to this Court. The supported facts in this case establish that Syndicate 2112 has a right to intervene in these proceedings and, under CR 60(b) and Washington case law, the default judgment should be set aside based on the misrepresentations and purposeful concealment of material facts

¹ Syndicate 2112 is contemporaneously filing a motion to strike Guzman's unsupported statements.

conducted by representatives of both Spruce Hills and the respondent, Guzman.²

A. Standard of Review on Appeal.

As a threshold matter, the Superior Court's refusal to allow Syndicate 2112 to intervene in this matter for the purpose of moving to vacate the default judgment must be reviewed *de novo*. *DeLong v. Parmelee*, 157 Wn. App. 119, 163, 236 P.3d 936 (2010) ("We review rulings on intervention as a matter of right *de novo*." (citing *Westerman v. Cary*, 125 Wn.2d 277, 302, 892 P.2d 1067 (1994))). Guzman's arguments that the timeliness of the motion to intervene is subject to an "abuse of discretion" standard and that the *de novo* review of this Court is limited, *Brief of Respondent* at 21, are not supported by the cases cited.³ Guzman also incorrectly states that the Court below denied Syndicate 2112's motion to intervene on timeliness grounds.⁴

Although a motion to vacate is reviewed for abuse of discretion, such abuse is more likely to be found where, as here, the trial court refused to set

² Attached as Appendix A to this brief is a chronology of material events with citations to the record.

³ Guzman cites four cases, none of which are on point or support his arguments: *Ford v. Logan*, 79 Wn.2d 147, 150, 483 P.2d 1247 (1971) (addressing standard of review only for permissive intervention); *Bd. of Regents of Univ. of Wash. v. Seattle*, 108 Wn.2d 545, 557, 741 P.2d 11 (1987) (not even addressing intervention); *In re Jones' Estate*, 116 Wash. 424, 426, 199 P. 734 (1921) (also not addressing intervention); *Westerman*, 125 Wn.2d at 302 (addressing appellant's argument that denial of motion to intervene "constituted an error of law").

⁴ The Court Commissioner struck Guzman's request for a finding that the motion to intervene was not timely. CP 11.

aside the default judgment. *Griggs v. Averbek Realty, Inc.*, 92 Wn.2d 576, 582, 599 P.2d 1289 (1979) (citing *White v. Holm*, 73 Wn.2d 348, 352, 438 P.2d 581 (1968)). Indeed, “for more than a century, it has been the policy of [the Washington Supreme Court] to set aside default judgments *liberally*” in order “to give parties their day in court and have controversies determined on their merits.” *Morin v. Burris*, 160 Wn.2d 745, 754, 161 P.3d 956 (2007) (emphasis added). In deciding whether to grant a motion to vacate a default judgment, the Court must view all evidence in the light most favorable to the *moving* party—here, Syndicate 2112. *Pfaff v. State Farm Mut. Auto. Ins. Co.*, 103 Wn. App. 829, 835, 14 P.3d 837 (2000), *rev. den.* 143 Wn.2d 1021 (2001). These principles are in stark contrast to the standard actually applied by the Superior Court here, which construed all facts in Guzman’s favor even when those facts were directly contradicted by the record.

B. The Superior Court Erred in Failing to Vacate the Default Judgment.

When the ruling denying the motion to vacate is reviewed with all inferences viewed in the light most favorable to Syndicate 2112, *see Pfaff*, 130 Wn. App. at 835, reversal is warranted.

1. The Default Judgment Should Be Vacated Under the Supreme Court’s Holding in *Morin v. Burris*.

On remarkably comparable facts, the Washington Supreme Court held that it is reversible error to fail to vacate a default judgment on an insurer’s motion when the plaintiff’s attorney makes settlement overtures but fails to disclose the true status of litigation to the insurer. *Morin v. Burris*,

160 Wn.2d 745, 759, 161 P.3d 956 (2007). Significantly, despite Syndicate 2112's reliance on *Morin* in its opening brief, Guzman fails to address or even cite the case in his response brief, thus conceding the case's application. The *Morin* case is on point, controlling, and requires reversal of the default judgment under the circumstances in this case.

Here, not only did Spruce Hills' attorney mislead Syndicate 2112 regarding the status of Spruce Hill's defense, CP 1110-11, CP 1929-31, but Guzman's counsel's complicit actions further kept Syndicate 2112 in the dark as to the true status of the underlying litigation. Specifically, Guzman's attorney sent a letter to the New York office of the Corporation of Lloyd's ("Lloyd's America"), which was not the entity designated in Spruce Hills' policy for receipt of claims⁵ and also was not an entity that had the ability to respond to the substance of the letter. The letter, dated October 4, 2011, attached a copy of the complaint that had been filed five months earlier but failed to mention the default order on liability that Guzman had obtained eleven days earlier, on September 23, 2011. CP 1106. Rather than revealing that Guzman already had obtained an order of default and was on his way to obtaining a default judgment because Spruce Hills was not defending itself, the letter instead meekly suggested "we are hopeful that you will consider early mediation of this matter so that this dispute can be resolved without

⁵ The policy specifically identifies the entities authorized to receive notice. CP 399.

additional litigation.”⁶ *Id.* Guzman’s attorney then ignored Lloyds’ response that it was not the correct entity failed to inform the entities identified in the policy for notice as Lloyd’s recommended and failed to respond to Lloyds’ explicit request for information sufficient to enable the company to forward the correspondence to the correct entity for handling. CP 1100-08. Rather than doing anything to ensure that the correct entity received notice, Guzman’s attorneys obtained an unopposed default judgment and then waited until after the time had passed to appeal the default judgment before forwarding it directly to the correct entity – Syndicate 2112 – at its correct address.⁷ CP 391-94.

This is the exact situation described in *Morin*. *Morin* generally stands for the proposition that a plaintiff has no affirmative duty to give notice of a lawsuit to the defendant’s insurer even if the plaintiff knows who the insurer is, but the Supreme Court carved out an important exception for situations such as this one where the plaintiff affirmatively misleads the insurer by making a settlement overture without disclosing the true status of the litigation. Just as in *Morin*, Guzman’s attorney’s “failure to disclose” that a

⁶ Incredibly, Guzman asserts, “there was nothing misleading about the letter.” *Brief of Respondent* at 20. He also argues that Syndicate 2112 cannot complain because the correct entity did not receive the letter; this argument misses the critical point that Guzman’s failure to notify the correct entity contributed to deprive Syndicate 2112 of its ability to make any informed decisions or protect its rights in any manner.

⁷ Guzman has never explained why his October 4, 2011 letter was sent to an incorrect entity that could not respond to its substance, but he sent his April 13, 2012 letter directly to the correct entity.

default order had been entered at the same time as he “was calling and trying to resolve matters” appeared “to be an inequitable attempt to conceal the existence of the litigation” and justifies setting aside the default judgment. 160 Wn.2d at 759.

Ignoring *Morin*, Guzman instead cites to a case decided a week earlier based on distinguishable facts: *Little v. King*, 160 Wn.2d 696, 161 P.3d 345 (2007). In *Little*, neither the defendant nor its insurer contested either the defendant’s liability or damages, and the insurer was fully and accurately informed about the underlying proceeding before making a “decision not to participate.” *Id.* at 706.

When all inferences from these facts are drawn in the light most favorable to Syndicate 2112, Syndicate 2112’s motion to vacate falls squarely within the Washington Supreme Court’s holding in *Morin*. As in *Morin*, the parties’ misrepresentations and Guzman’s counsel’s lack of disclosure in the content and manner of his communications require reversal of the order denying the motion to vacate.

2. Syndicate 2112’s Interests Were Not Addressed in Spruce Hills’ Motion to Vacate.

Guzman’s assertion that Spruce Hills made the same arguments Syndicate 2112 articulates here or somehow acted to protect Syndicate 2112’s interests is not accurate. The bases for this motion and this appeal were not – and **could not** have been – raised in Spruce Hills’ earlier motion to vacate. Spruce Hills had no interest in exposing the misrepresentations of its own counsel, and Syndicate 2112 did not find out about Guzman’s

attorneys' involvement – which provided an additional independent basis for seeking to vacate the default judgment – until months later.

Furthermore, Syndicate 2112 could not have sought to intervene and insert its own interests in Spruce Hills' Motion to Vacate because to do so could have improperly prejudiced Spruce Hills' position. *See, e.g., Mut. of Enumclaw Ins. Co. v. Dan Paulson Constr., Inc.*, 161 Wn.2d 903, 919, 169 P.3d 1 (2007) (finding that insurer's motion to intervene in underlying case interfered with insured's defense and was improper).⁸ Guzman's statement that Spruce Hills had no independent interest in setting aside the judgment, *Brief of Respondent*, p. 10, must be based either on the fact that Spruce Hills colluded with Guzman to allow the judgment to be entered or Guzman's contention that Spruce Hills did not care about the judgment because it was judgment-proof. The former would not support Guzman's contemporaneous argument that Spruce Hills' and Syndicate 2112's respective interests were aligned; and the latter is contradicted by testimony from Guzman's attorney (James Beck) that he believed (even months after the judgment was entered) that Spruce Hills had assets to apply to the judgment. CP 1211.

⁸ Accordingly, as recognized by a California court, "an insurer intervening in an action to pursue its own interests after its insured has defaulted is not required to move to vacate the insured's default as to itself; the insured's default simply has no effect on the insurer." *West Heritage Ins. Co. v. Superior Court*, 199 Cal. App. 4th 1196, 1211, 132 Cal. Rptr. 3d 209 (2011).

Guzman's argument that Syndicate 2112's interests either were or should have been interposed in Spruce Hills' earlier motion to vacate is unsupported by fact or law.

3. Syndicate 2112 Had No Duty to Defend and No Reason to Suspect a Set-Up.

Due to the self-insured retention endorsement, and as ruled by the King County Superior Court as a matter of law, Syndicate 2112 had no duty to defend Spruce Hills in this case. CP 61-62. Syndicate 2112 also had no reason to suspect that Spruce Hills was not complying with its obligation under the policy to properly defend itself⁹ that its attorney who filed a Notice of Appearance would do absolutely nothing to defend the case or that it was lying by representing that an Answer had been filed and the case was "dormant." CP 1110-11. There is no authority in Washington allowing parties to set-up an insurer in the absence of a duty to defend, particularly under circumstances similar to those presented here, in which the insurer was not given the opportunity to participate but was, instead, purposely kept in the dark about the litigation until after the set-up was complete.

C. The Doctrine of Collateral Estoppel Is Not Applicable.

Contrary to Guzman's argument, *Brief of Respondent* at 21-26, the doctrine of collateral estoppel cannot be used to deprive Syndicate 2112 of its

⁹ The self-insured retention provision of the policy "obligate[s the insured] to provide proper defense and investigation of any claim or suit" until "the 'Self Insured Retention' limit shown in the Declarations [\$25,000] has been property exhausted." CP 443.

day in court. Under Washington law, even the *same* party can file more than one motion to vacate;¹⁰ certainly Syndicate 2112 is not precluded from raising its own arguments for the *first* time.

In addition, collateral estoppel is not applicable here where Guzman is trying to enforce a judgment entered in the same proceeding; rather, the doctrine applies only where there were separate “prior” and “subsequent” proceedings. *See generally* Philip A. Trautman, *Claim and Issue Preclusion in Civil Litigation in Washington*, 60 Wash. L. Rev. 805 (1985) (repeatedly referencing prior and subsequent litigations when discussing both collateral estoppel and *res judicata* and distinguishing these theories from those that attempt to limit a party’s ability to litigate issue within a single lawsuit).

Regardless, Guzman fails to meet his burden of establishing the elements essential to the application of collateral estoppel. *See George v. Farmers Ins. Co. of Wash.*, 106 Wn. App. 430, 443, 23 P.3d 552 (2001). Specifically, (1) there is no identity of issues; (2) Syndicate 2112 was neither a party nor in privity with Spruce Hills when the default judgment was entered; and (3) application of collateral estoppel in this context is not only legally nonsensical, it would work a substantial injustice on Syndicate 2112. *Id.* These requirements “center on whether the party that is being estopped

¹⁰ *E.g.*, *Taylor v. Cessna Aircraft Co., Inc.*, 39 Wn. App. 828, 696 P.2d 28 (1985) (addressing the merit of plaintiff’s argument that the trial court erred in denying his *second* motion for a new trial, brought several months after judgment); *see also Sea Hawk Seafoods, Inc. v. Alyeska Pipeline Svc. Co.*, 206 F.3d 900 (9th Cir. 2000) (considering party’s *second* motion for new trial based on newly discovered evidence).

has had a ‘full and fair opportunity’ to present its case.” *Wear v. Farmers Ins. Co. of Wash.*, 49 Wn. App. 655, 659, 745 P.2d 526 (1987).

Here, Syndicate 2112 has had no opportunity whatsoever to present its case. The issues presented by Syndicate 2112’s motion to vacate are not identical to the issues presented by Guzman below. As discussed above, Syndicate 2112’s motion to vacate is based on Spruce Hill’s and Guzman’s attorneys’ misrepresentations and misleading communications to Syndicate 2112. As such, Syndicate 2112’s position and the issues presented by its motion to vacate are distinct – and actually contrary to – the positions held and issues presented by either Guzman or Spruce Hills in the proceedings below. Furthermore, Syndicate 2112 was not a party to the default judgment nor was it in privity with Spruce Hills when the default judgment was entered against it.¹¹ Indeed, Syndicate 2112 did not have any duty to Spruce Hills at the time the default judgment was entered because its duty to defend did not potentially arise until the judgment was tendered to it months later. CP 61-62. Furthermore, application of collateral estoppel principles in this context

¹¹ Guzman’s collateral estoppel argument is particularly disingenuous in light of his simultaneous argument that Syndicate 2112 has no standing and an insufficient interest to seek to vacate the default judgment. Guzman’s argument to apply collateral estoppel to Syndicate 2112 **supports** Syndicate 2112’s position that it was wrongfully denied the right to intervene. See 3A Karl B. Tegland, *Washington Practice, Rules Practice* CR 24 (7th ed. 2013) (noting that “the intervenor’s risk of being bound through res judicata, collateral estoppel, or stare decisis, should constitute sufficient risk of ‘impairment’” to justify intervention).

would compound further the errors of fact and law made below and work a substantial injustice to Syndicate 2112.

The Washington Supreme Court's decision in *Lenzi v. Redland Insurance Co.*, 140 Wn.2d 267, 996 P.2d 603 (2000) – a case on which Guzman relies and represents is “on point”¹² – is instructive. In *Lenzi*, the Court recognized that, despite the unity between the tortfeasor and insurer,¹³ the insurer had a clear right to intervene in the tort action and to have the default judgment entered in that action vacated. The Court denied the insurer's request only because it was made in a *separate* declaratory judgment action. 140 Wn.2d at 273. The Court noted that if the insurer had moved to intervene and set aside the default judgment in the original tort action – as Syndicate 2112 did here – “it seems possible if not likely the trial court might have granted both motions.” *Id.* at 278, n.8 (citing CR 55(b)(1) and CR 60(b)).

Guzman cites no authority to support its argument to apply the doctrine of collateral estoppel to a motion to vacate a default judgment, and the argument must be rejected.

¹² Brief of Respondent at 24.

¹³ *Lenzi* involved underinsured motorist (“UIM”) insurance, in which situation the insurer “stands in the shoes of the tortfeasor.” *Hamm v. State Farm Mut. Auto. Ins. Co.*, 151 Wn.2d 303, 308, 88 P.3d 395 (2004).

D. The Superior Court Erred in Summarily Denying Syndicate 2112's Motion to Intervene.

This Court reviews *de novo* the trial court's ruling on Syndicate 2112's CR 24(a) motion to intervene. *DeLong*, 157 Wn. App. at 163. Because the trial court's decision relies on an erroneous analysis of the legal standards applicable to intervention, factual errors related to service, and a misapplication of CR 24(c), the court's order denying intervention should be reversed.¹⁴

1. Syndicate 2112 Satisfied All Elements Triggering a Right to Intervene.

Syndicate 2112 had an absolute right to intervene in this action. It satisfies each of the four elements required for intervention, and it therefore had the right under CR 24(a)'s mandatory "shall" language to intervene.

First, as found by the Superior Court, Syndicate 2112's application to intervene, made one month after discovering Guzman's complicity in the cover-up and less than one year after entry of judgment,¹⁵ was timely.¹⁶

¹⁴ Although Syndicate 2112 believes it clearly had a right to intervene under CR 24(a), the trial court should, at a minimum, have granted permissive intervention under CR 24(b), which permits intervention by an entity whose interest has facts or law in common with the existing parties to the action. *Keeler v. Port of Peninsula*, 89 Wn.2d 764, 767, 575 P.2d 713 (1978).

¹⁵ Guzman cites to a Fourth Circuit case to argue that intervention cannot be granted post-judgment. *Brief of Respondent* at 26-27. Guzman's argument is contrary to Washington law, which permits intervention even after a case is concluded through judgment. *Olver v. Fowler*, 131 Wn. App. 135, 126 P.3d 69 (2006), *aff'd*, 161 Wn.2d 655 (2007); *Columbia Gorge Audubon Soc'y v. Klickitat County*, 98 Wn. App. 618, 629, 989 P.2d 1260 (1999).

Guzman's reliance on the case of *Martin v. Pickering*, 85 Wn.2d 241, 533 P.2d 380 (1975) is misplaced because, in that case, the insurer knew that the case would not be defended unless it provided counsel, took a "calculated risk" in not defending, and provided no explanation for its failure to defend, leading the Court to conclude that allowing the judgment to be entered before moving to intervene "was directly attributable to the [insurer's] tactics or game plan." *Id.* at 244. Furthermore, although the Court ruled that the motion was untimely, it recognized that "[i]n considering the question of timeliness, all the circumstances should be considered," and nevertheless considered the substantive merit of the motion to vacate. *Id.* at 244-45. The facts of the *Martin* case are diametrically opposed to the facts of the instant case, in which the parties affirmatively (and falsely) represented that the case *was* being defended and in which the record demonstrates that Syndicate 2112 would have voluntarily taken over the defense if it had been told the truth. CP 1112.¹⁷

The remaining three elements of CR 24(a) are satisfied: Syndicate 2112 "claims an interest relating to the property or transaction which is the

(. . . continued)

¹⁶ Guzman's position that "[t]he trial court did not abuse its discretion in concluding that the motion for intervention as a matter of right was not timely made," *Brief of Respondent* at 32, is belied by the record, which indicates that the trial court refused to find that Syndicate 2112's petition was not timely. CP 11.

¹⁷ Contrary to Guzman's argument, Syndicate 2112 did not make a "conscious decision not to provide a defense," *Brief of Respondent* at 34, because its decision (although correct according to the King County Superior Court, CP 61-62) was based on misrepresented and omitted facts. .

subject of the action;”¹⁸ disposition of this action will “as a practical matter impair or impede [Syndicate 2112’s] ability to protect [its] interest;” and it certainly is not and has not been “adequately represented by existing parties” who have colluded to try to create a \$3 million liability against Syndicate 2112. CR 24(a).

As a result of the trial court’s denial of Syndicate 2112’s motion to intervene, Syndicate 2112 has no ability and no forum in which to address the improprieties underlying the default judgment in this case. Although this precise factual scenario has not yet been addressed under Washington law, other jurisdictions recognize the injustice of this situation. *See Reliance Ins. Co. v. Superior Court*, 84 Cal. App. 4th 383, 385, 100 Cal. Rptr. 2d 807 (2000) (“[I]ntervention by an insurer is permitted where the insurer remains liable for any default judgment against the insured, and it has no means other than intervention to litigate liability or damage issues.”); *Kollmeyer v. Willis*, 408 S.W.2d 370, 378-79 (Mo. App. 1966) (holding that trial court properly considered non-party insurer’s motion to set aside default judgment where,

¹⁸ Although Guzman conceded the “interest” element to the trial court (CP 999, admitting Syndicate 2112 has “an interest relating to the property or transaction which is subject to the action”), he argues on appeal that Syndicate 2112 must be *actually* liable for the judgment before it can intervene. *Brief of Respondent* at 35. The rule, however, is that a party must “*claim*” an interest to be entitled to intervene. CR 24(a) (emphasis added). Furthermore, since “interest” must be construed broadly, *Vashon Island Comm. for Self-Gov’t v. Wash. State Boundary Review Bd. for King County*, 127 Wn.2d 759, 765, 903 P.2d 953 (1995), an “insufficient interest should not be used as a factor for denying intervention.” *Columbia Gorge Audubon Soc’y*, 98 Wn. App. at 629.

had it not been set aside, judgment would have bound insurer “as to all issues necessarily determined thereby, including the issues as to defendant’s liability to plaintiff and the amount of damages to be awarded for plaintiff’s injuries.”); *Erickson v. Bennett*, 409 N.W.2d 884, 888 (Minn. Ct. App. 1987) (insurer should have been permitted to intervene “for the purpose of having the issues of liability and damages determined in a full adversary proceeding [and] should have the right to dispute the questions which make it liable on its contract and should not be penalized when it was put on notice of the default hearing in an untimely manner”).

The trial court’s denial of Syndicate 2112’s motion to intervene is contrary to the Washington Supreme Court’s instruction to *liberally* and *broadly* construe CR 24, *Vashon Island Committee for Self-Government*, 127 Wn.2d at 765, and violates the basic principle “to give parties their day in court and have controversies determined on their merits.” *Morin*, 160 Wn.2d at 754. Therefore, the trial court’s ruling – which blocks Syndicate 2112 from any forum to protect its rights – must be reversed.

2. The Motion to Intervene Was Served on Spruce Hills.

The trial court’s stated basis to deny intervention – *i.e.*, that Syndicate 2112 did not serve Spruce Hills with the motion – is simply wrong. The record conclusively establishes that Spruce Hills’ principal was served with both the motion to intervene and the motion to vacate, and not (as Guzman

argues) merely the subsequent motion to revise the commissioner's ruling. CP 86.¹⁹

3. The Motions to Intervene and to Vacate Served as Any "Pleading" Required by CR 24(c).

Despite no legal authority to support its position and no prejudice, Guzman continues to argue that Syndicate 2112's intervention motion was deficient because it did not attach a document titled "Complaint" or "Answer." *Brief of Respondent* at 30-31. It is clear, however, that the motion itself – which set forth all grounds justifying intervention and was accompanied by Syndicate 2112's motion to vacate – complied with any "pleading" requirement in CR 24(c).²⁰ Furthermore, Guzman cannot claim any prejudice, as he fails to state a single fact, argument, or anything else that was not included in Syndicate 2112's motions.

¹⁹ Furthermore, although the allegation of no service is demonstrably false, Guzman lacks standing to even raise it since *he* was undeniably served.

²⁰ Although no Washington state court has addressed Guzman's creative argument, Courts interpreting the parallel federal rule (including in Washington) agree that the "pleading" requirement is met when the grounds for intervention are adequately stated in the motion to intervene itself. *Beckman Indus., Inc. v. Int'l Ins. Co.*, 966 F.2d 470, 474 (9th Cir. 1992); *Shores v. Hendy Realization*, 133 F.2d 738, 742 (9th Cir. 1943); *Raines v. Seattle Sch. Dist. No. 1*, 2009 WL 3444865 (W.D. Wash. Oct. 23, 2009) (citing *Beckman Indus., supra*). Washington courts also reject a hyper-technical interpretation, holding that CR 24(c)'s reference to "a pleading" requires only that the grounds for intervention be adequately stated in a way that avoids prejudice. *Olver*, 131 Wn. App. at 139; *see also* 3A Karl B. Tegland, *Washington Practice, Rules Practice* CR 24 (7th ed. 2013) ("The failure of an applicant to strictly follow the motion and pleading requirements, however, does not justify denial of the motion if the parties were not prejudiced.").

E. Guzman’s Uncited Assertions of “Fact” Must Be Disregarded.

Guzman’s brief is replete with unsupported and untrue statements of “fact” and “evidence.” These assertions, outlined with specificity in Appendix B, may not be considered by this Court as they are not supported and have not been preserved in the record. RAP 10.4(f); *Nelson v. McGoldrick*, 127 Wn.2d 124, 141, 896 P.2d 1258 (1995). Syndicate 2112 is filing a contemporaneous Motion to Strike these improper outside-of-the-record factual claims.

In addition, Guzman’s uncited and improper references to settlement must be disregarded as inaccurate (Syndicate 2112 has made settlement offers) and violations of ER 408. *Brief of Respondent* at 9. Indeed, the lack of any relevance to the issues before this Court and the prominence with which Guzman places his unsupported argument related to settlement, suggests that Guzman included this reference in an improper attempt to prejudice the Court against Syndicate 2112’s position on the merits of the appeal.

F. Guzman Is Not Entitled to Attorneys’ Fees.

Finally, Guzman’s request for an award of attorneys’ fees under RAP 18.1 and *Olympic Steamship Co. v. Centennial Insurance Co.*, 117 Wn.2d 37, 811 P.2d 673 (1991), must be denied for at least three alternate reasons.

First, this case involves only Guzman’s personal injury claims, for which he is not entitled to an attorney fee award. *Bowles v. Wash. Dept. of Ret. Sys.*, 121 Wn.2d 52, 70, 847 P.2d 440 (1993) (noting the “American rule,” under which parties are not entitled to recover fees, applies in

Washington).

Second, as recognized by the Washington Supreme Court, fees are available under *Olympic Steamship* only in insurance coverage actions. *Condon v. Condon*, 177 Wn.2d 150, 166-67, 298 P.3d 86 (2013) (holding that *Olympic Steamship* fees apply only “when an insurer contests the meaning of a contract”). In this case, Guzman purportedly asserts claims only in his own capacity, not as assignee of Spruce Hills, and Guzman himself admits this case does not involve coverage. *Brief of Respondent* at 20 (“[T]he King County action, and not this action, involves coverage issues.”).

Third, even if this case involved coverage and even if Guzman were pursuing his assigned claims from Spruce Hills, he nevertheless is not entitled to a fee award. Because the *Olympic Steamship* rule is based on equity, Washington courts “refuse an award when the insured breaches express coverage terms that may extinguish the insurer’s liability.” *Credit Gen. Ins. Co. v. Zewdu*, 82 Wn. App. 620, 630, 919 P.2d 93 (1996). In *Public Utility District No. 1 of Klickitat County. v. International Insurance Co.*, 124 Wn.2d 789, 881 P.2d 1020 (1994), for example, the insured breached a “no action” clause by settling an underlying lawsuit without the insurer’s permission. The Washington Supreme Court held the insurer liable, but, because of the insured’s breach, declined to award fees. *Id.* at 815. Here, the King County court has ruled that prior to entry of judgment, Syndicate 2112 had no duty to defend, and the policy’s SIR endorsement required the insured during this time to “properly defend.” CP 61-62; CP

443. It is beyond dispute that Spruce Hills breached its obligation to “properly defend” itself by allowing a default judgment to be entered against it and by misrepresenting the status of the case to Syndicate 2112, and Guzman’s argument for fees apparently is made as an assignee of Spruce Hills.

For these multiple alternative reasons, Guzman’s request for a fee award must be denied.

III.

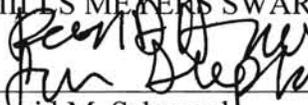
CONCLUSION

The fundamental flaw in and profound element of injustice created by the trial court orders below is that Washington law supports resolution of disputes on the merits and abhors imposition of large undeserved liabilities on entities who have been deprived, through no fault of their own, of an opportunity to protect their interests. These principles are particularly compelling here, where Syndicate 2112 was under no obligation to defend Spruce Hills, yet made repeated efforts to obtain information regarding the underlying case. For their part, both Spruce Hills and Guzman misrepresented the true status of the underlying litigation and misled Syndicate to its detriment. Under these circumstances, the only proper and fair result is to grant Syndicate 2112 its right to intervene and to vacate the \$3 million default judgment so that the case can be litigated on its merits.

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RESPECTFULLY SUBMITTED this 21st day of November, 2013.

MILLS MEYERS SWARTLING

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APPENDIX A

Date	Event	Clerk's Papers
April 27, 2011	Guzman files Summons & Complaint against Spruce Hills	CP 1935-1939,
May 22, 2011	Guzman serves Spruce Hills with Summons & Complaint, Interrogatories and Requests for Production, and Requests for Admission	CP 1934
June 13, 2011	Spruce Hills fails to file Answer to Complaint	N/A
June 13, 2011	Attorney Kevin Hanchett sends notice of claim to Syndicate 2112 on behalf of Spruce Hills	CP 1382-1383
June 16, 2011	File is assigned to Syndicate 2112 claim handler, Michael Sirianni. Sirianni calls Hanchett to advise that Syndicate 2112 policy has \$25,000 SIR that must be exhausted before any duty to defend can arise. Hanchett indicated he understood he would defend Spruce Hills prior to exhaustion of the SIR.	CP 503; CP 1110
June 29, 2011	Hanchett files Notice of Appearance for Spruce Hills	CP 1011-1078
July 1, 2011	Spruce Hills fails to Respond to Requests for Admission	N/A
August 22, 2011	Guzman files Motion for Default against Spruce Hills	CP 1915-1928
September 23, 2011	Order of Default entered in light of Spruce Hills' failure to file written opposition or appear at hearing	CP 1892-1895
September 30, 2011	Sirianni calls Hanchett to inquire about status of case. Hanchett does not respond.	CP 1110
October 4, 2011	Guzman's attorney writes to Lloyd's America, suggesting "early mediation ... so that this dispute can be resolved without additional litigation" without mentioning that default order already was entered; Guzman's attorneys do not send letter to Syndicate 2112 or its claims representative	CP 1106
October 4 and 12, 2011	Lloyd's America responds twice to Guzman's attorney informing him that Lloyd's America does not handle claims and Guzman should contact syndicate that issued policy; Guzman does not do so	CP 1100-1104; CP 1107-1108
December 29, 2011	Sirianni calls Hanchett to inquire about status of case. Hanchett does not respond.	CP 840
January 12, 2012	Hanchett advises Sirianni that he (Hanchett) filed an Answer on behalf of Spruce Hills, and that case is "dormant." Hanchett does not reveal that order of default was entered.	CP 1110-1111; CP 1115
January 13, 2012	Syndicate 2112 sends letter to Spruce Hills again outlining coverage issues and informing of no duty to defend due to unsatisfied SIR	CP 1111; CP 1116-1119

APPENDIX A

January 26, 2012	Guzman files Motion for Judgment against Spruce Hills	CP 1882-1887
February 9, 2012	Default Judgment of \$3,044,014.90 is entered against Spruce Hills in light of failure to file written opposition or appear at hearing	CP 1763-1764; CP 1768
March 20, 2012	Hanchett tells Sirianni during telephone conversation that Guzman "has threatened to take a default" against Spruce Hills; Hanchett does not advise that either default or judgment already were entered	CP 1111; CP 1120
April 13, 2012	Guzman's attorney sends Syndicate 2112 a copy of default judgment; this is Syndicate 2112's first notice that Spruce Hills' failed to defend itself. Guzman's attorney offers to settle for \$1 million in next ten days on condition that Syndicate 2112 warrant Spruce Hills has no other coverage available to it.	CP 391-394; CP 1111-1112
April 21, 2012	Syndicate 2112 retains defense counsel "to represent the interests of their insured, Spruce Hills LLC" (As ruled by the King County Superior Court, Syndicate 2112 had no prior duty to defend)	CP 483; CP 1112-1113
April 23, 2012	Syndicate 2112 responds to policy limits demand asking for information and more time to respond	CP 490-493
May 17, 2012	Through new counsel, Spruce Hills files Motion to Vacate Default and Judgment	CP 1444-1759
June 6, 2012	Spruce Hills' Motion to Vacate is denied	CP 1217-1219
June 21, 2012	Spruce Hills assign its rights against Syndicate 2112 to Guzman	CP 94-97
August 24, 2012	Guzman sues Syndicate 2112 in King County Superior Court as assignee of Spruce Hills	N/A
February 8, 2013	Syndicate 2112 files Motion to Intervene and to Vacate Default and Judgment	CP 1015-1202

APPENDIX B

Portion of Respondent's Brief to be Stricken	Basis for Striking
Page 4: "Syndicate 2112 failed to serve Spruce Hills with its motion to intervene and its motion to vacate."	No citation to the record provided.
Page 4: "Syndicate 2112 raised the same arguments that were raised by Spruce Hills in its prior motion to vacate."	No citation to the record provided.
Page 5: "...the record demonstrated that Spruce Hills had not been served."	No citation to the record provided.
Page 7: "Guzman's injuries were permanent."	Citation provided does not support this assertion. It merely says that he will not be able to work, and is not from a medical expert.
Page 8: "By letter dated April 13, 2012, to Syndicate 2112, Guzman offered to accept the insurance policy limits of \$1,000,000 in full satisfaction of the \$3,000,000 judgment. Instead of accepting Guzman's offer, Syndicate 2112 retained a defense attorney, Steve Todd, to represent Spruce Hills and attempt to vacate the judgment."	Improper discussion of settlement negotiations under ER 408.
Pages 8-9: "Syndicate 2112 directed defense counsel, made strategy decisions, decided to move to vacate the judgment, failed to attempt to settle the claim, and then decided not to appeal the denial of the motion to vacate the judgment."	No citation to the record provided.
Page 9: "Syndicate 2112 disregarded Todd's advice and never reconsidered its long-shot attempt at having the judgment vacated."	No citation to the record provided.
Page 9: "Syndicate 2112 never attempted to settle this dispute."	Improper discussion of settlement negotiations under ER 408.
Page 9: "Both Sirianni and Dave Schoeggl, Syndicate 2112's coverage counsel, were acutely involved with directing Todd and Clement how to proceed – directing them to take actions that could only aid Syndicate 2112 in any coverage dispute."	No citation to the record provided.

Page 15: "Sirianni's declaration was not based upon any new information but instead was based upon information that was available to Syndicate 2112 during the prior motion to vacate."	No citation to the record provided.
Page 15: "...Hanchett never told Sirianni that he, Hanchett, was going to defend Spruce Hills..."	No citation to the record provided.
Page 15: "If Sirianni believed that Hanchett was acting as the defense counsel for Spruce Hills, he would have directed all of his letters to Hanchett."	No citation to the record provided.
Page 17: "Thus, Sirianni knew that Spruce Hills was defunct and would never be able to pay the \$25,000 self-insured retention amount. In other words, Spruce Hills was not defending the lawsuit."	No citation to the record provided.

CERTIFICATE OF FILING AND SERVICE

I, Kendra Brown, hereby certify that I filed with the Court of Appeals, Division 1, and served the foregoing upon the following counsel of record:

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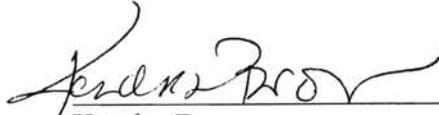
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