NO. 34734-2-II

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

FILED
COURT OF APPEALS
DIVISION II
07 JAN 30 PM 1:11
STATE OF WASHINGTON
BY DEPUTY

HELEN MATHIOUDAKIS, a married woman

Appellant,

vs.

CHRISTINA FLEMING and "JOHN DOE" FLEMING, husband and wife,

Respondents.

APPEAL FROM GRAYS HARBOR COUNTY SUPERIOR COURT
Honorable David Foscue, Judge
Honorable Gordon Godfrey, Judge

BRIEF OF RESPONDENTS

REED McCLURE
By Marilee C. Erickson
Terry J. Price
Attorneys for Respondents

Address:

Two Union Square
601 Union Street, Suite 1500
Seattle, WA 98101-1363
(206) 292-4900

pm 1-29-07

060349.099022\147812

ORIGINAL

TABLE OF CONTENTS

Page

I. NATURE OF THE CASE 1

II. ISSUES PRESENTED 2

III. STATEMENT OF THE CASE 3

A. STATEMENT OF FACTS 3

B. STATEMENT OF PROCEDURE 6

IV. ARGUMENT 8

A. PLAINTIFF'S NEGLIGENCE ARGUMENTS FAIL ON PROCEDURAL AND SUBSTANTIVE GROUNDS 9

1. Denial of Summary Judgment for Factual Issues is Not Subject to Review on Appeal 9

2. Plaintiff Has Ineffectively Challenged the Denial of Judgment as a Matter of Law on Negligence 10

3. The Matter Was Properly Submitted to the Jury and The Verdict Is Supported by Substantial Evidence 12

B. THE SUPERIOR COURT CORRECTLY DENIED PLAINTIFF'S MOTION FOR CLAIM PRECLUSION 15

C. THIS CASE IS NOT A "MIRROR-IMAGE" OF *FISHER-FINNEY* 19

1. The "Persons or Parties" Prong Is Not Met by These Facts 21

2. The "Cause of Action" and "Subject Matter" Prongs Are Also Not Met 22

D. THE SUPERIOR COURT PROPERLY REJECTED *FISHER-FINNEY* BECAUSE TO DO SO WOULD DEPRIVE MS. FLEMING OF HER CONSTITUTIONAL AND STATUTORY RIGHT TO JURY TRIAL 23

V. CONCLUSION 26

APPENDIX A
Ex. 21, Diagram of Accident

TABLE OF AUTHORITIES

Washington Cases

Page

Adcox v. Children's Orthopedic Hospital and Medical Center, 123 Wn.2d 15, 864 P.2d 921 (1993) 10, 11

Bercier v. Kiga, 127 Wn. App. 809, 103 P.3d 232 (2004), *rev. denied,* 155 Wn.2d 1015 (2005) 22, 26

Finney v. Farmers Ins. Co., 21 Wn. App. 601, 586 P.2d 519 (1978), *aff'd*, 92 Wn.2d 748, 600 P.2d 1272 (1979) 8, 15, 16, 18, 19, 23, 25

Fisher v. Allstate Ins. Co., 136 Wn.2d 240, 961 P.2d 350 (1998) 8, 15, 16, 17, 18, 19, 21, 23, 25, 26

Herring v. Dept. of Soc. & Health Servs., 81 Wn. App. 1, 914 P.2d 67 (1996) 12

Johnson v. Rothstein, 52 Wn. App. 303, 759 P.2d 471 (1988) 9, 10

Lenzi v. Redland Ins. Co., 140 Wn.2d 267, 996 P.2d 603 (2000) 15, 17, 18, 26

Loveridge v. Fred Meyer, Inc., 125 Wn.2d 759, 887 P.2d 898 (1995) 21

Peterson v. Littlejohn, 56 Wn. App. 1, 781 P.2d 1329 (1989) 12

Rains v. State, 100 Wn.2d 660, 674 P.2d 165 (1983) 22

Ramey v. Knorr, 130 Wn. App. 672, 124 P.3d 314 (2005), *rev. denied,* 157 Wn.2d 1024 (2006) 11

Rettinger v. Bresnahan, 42 Wn.2d 631, 257 P.2d 633 (1953) 24, 25

Sofie v. Fibreboard Corp., 112 Wn.2d 636, 771 P.2d 711, 780 P.2d 260 (1989) 24

Somsak v. Criton Technologies/Heath Tecna, Inc.,
113 Wn. App. 84, 52 P.3d 43, 63 P.3d 800 (2002).....20

Spokane Research and Defense Fund v. City of Spokane,
155 Wn.2d 89, 117 P.3d 1117 (2005).....20

Other Jurisdictions

Morgan v. American Univ., 534 A.2d 323 (D.C.App. 1987).....10

Constitutions

CONST. art. I, § 21 .....23, 24

Statutes

RCW 4.44.090 25

RCW 4.48.010 25

RCW 48.22.030 18

RCW 48.22.030(2).....18

Rules and Regulations

CR 50(a)(1) 11

060349.099022/147994

I. NATURE OF THE CASE

Respondent Christina Fleming was driving home toward Hoquiam, at 2:00 a.m. on a November night. It was rainy and windy earlier in the evening, but it had subsided by the time she drove home.

Outside of Ocean Shores, Ms. Fleming encountered a fallen tree on the road. She braked as soon as she saw it. She was unable to stop completely, and her car went through the foliage.

George Belesiotis and his wife, plaintiff Helen Mathioudakis, encountered the same fallen tree from the opposite direction. They nearly hit the tree. They called 9-1-1. They waited in place for several minutes. Then, rather than stay in his lane of traffic, plaintiff's husband pulled into the opposite lane to wait for a road crew to clear the tree.

Even if she could have braked in time, Ms. Fleming could not have known that plaintiff's husband parked his truck just beyond the foliage in her lane. Her car collided with plainitff's truck. Both Ms. Fleming and plaintiff were injured.

Plaintiff[1] sued Ms. Fleming for damages. Prior to trial, plaintiff pursued a separate claim for underinsured motorist ("UIM") benefits

---

[1] Only Helen Mathioudakis is a party to the lawsuit. Her husband is not.

against her insurer. The claim was submitted to arbitration. An arbitration award was entered for plaintiff.

Plaintiff then moved the trial court in this case to bind Ms. Fleming to the arbitration. The court denied the motion. Plaintiff also sought a ruling that Christina was negligent as a matter of law. The court denied the motion.

At trial, the jury found Ms. Fleming was not negligent. The jury determined that plaintiff's husband was solely negligent for the accident. Plaintiff appeals. This Court should affirm.

II. ISSUES PRESENTED

1. Should the superior court's submission of the negligence question to the jury be affirmed where denial of summary judgment is not appealable?

2. Should the superior court be affirmed where it correctly denied the motion that Ms. Fleming was negligent as a matter of law and where plaintiff failed to properly preserve the issue when she has not challenged the sufficiency of the evidence supporting the verdict?

3. Should the judgment on the jury verdict be affirmed where the verdict is supported by substantial evidence?

4. Should the superior court be affirmed where it correctly denied plaintiff's motion for claim preclusion when 1) Ms. Fleming was

not a party to the UIM arbitration and 2) where granting the motion would abrogate Ms. Fleming's right to jury trial?

III. STATEMENT OF THE CASE

A. STATEMENT OF FACTS.

In the fall of 2001, Ms. Fleming was working as a bartender at the Aberdeen Eagles. (October 25, 2004 Videotaped Deposition of Christina Fleming, p. 7[2]) She generally worked weekdays from 5:00 p.m. to 10:00 p.m. (*Id.*)

On November 14, 2001, there were few customers so Ms. Fleming closed the bar early. (*Id.* at 7-8.) She finished her closing duties and left at about 9:30 p.m. (*Id.*)

Ms. Fleming did not go straight home. She drove to Captain's Corner, also in Aberdeen. (*Id.* at 8.) She went to see friends and sing karaoke. (*Id.* at 9.) She stayed there until about 1:40 a.m. (*Id.* at 9-10.) She then drove towards her mother's home in Ocean Shores. (*Id.* at 10.) The trip normally took 30 to 45 minutes. (*Id.*)

Although the weather had been rainy earlier in the evening, by the time Ms. Fleming left Captain's Corner, she did not need windshield

---

[2] Ms. Fleming's October 25, 2004, videotaped deposition was included in appellant's designation of clerk's papers. It was transmitted by the trial court as an exhibit rather than as part of the clerk's papers. It is part of the record on appeal. The page numbers will be referenced as "Fleming Dep., p. xx."

wipers. (*Id.* at 13.) She drove on SR 109. (*Id.* at 11.) She knew the road well because she drove that route nearly every day to go to work, school, or shopping. (*Id.* at 11-12.) She drove near the speed limit, about 55 or 60 miles an hour. (*Id.* at 12.)

The road had no artificial lighting. (*Id.* at 11.) Near Ocean Shores, Ms. Fleming saw headlights flash on the left side of the road. (*Id.* at 11, 15.) She thought the lights were a warning that a police officer was in the area. (*Id.* at 16.) She applied her brakes and slowed down. (*Id.* at 17.) About five or ten seconds later, she saw tree branches coming at her face. (*Id.*) She slammed on her brakes. (*Id.*) She did not remember what happened next. (*Id.*) A diagram of the accident, Ex. 21, is attached as Appendix A.

Expert witness Walter Becinski, a former Pierce County sheriff with a specialty in traffic collision reconstruction, testified at trial. (RP 356-60) Mr. Becinski explained that the tree would have been difficult to see. (RP 365) In fact, he thought Ms. Fleming did not see the tree until the last moment. (RP 374) He explained,

> Trees don't reflect light. It has been my experience in all the ones I've done that speeds over 40 miles an hour, the person is going to hit the tree. They just don't have enough time to stop.

(RP 366)

Mr. Becinski elaborated that it takes the average person 1.5 seconds to perceive and react to danger under normal circumstances. (*Id.*) In this case, however, the car facing Ms. Fleming flashed its high beams at her. (RP 367) "So, with that in mind, a tree not reflecting, it's very understandable for her at 55 or 60 miles an hour to strike that tree." (RP 367-68)

Washington State Patrol Trooper Drake, who investigated the scene, also testified at trial. He determined that because Ms. Fleming's car was going at freeway speed, it could have driven through the top of the tree which was in her part of the roadway. (RP 230) There was nothing about the roadway that required greater caution, although Trooper Drake mentioned drivers should have had an increased level of awareness because of the weather conditions that night. (RP 231-32) He did not see any weather conditions that prohibited Christina from driving at the posted speed limit. (RP 232)

Unbeknowst to Ms. Fleming, plaintiff and her husband were parked in her lane of travel on the other side of the tree. The couple had been traveling in the opposite direction. They came upon that same tree that had fallen across the road. (RP 35-36) They hit a branch which cracked one headlamp. (RP 36) Plaintiff called 9-1-1 about the tree. (RP

147-48) They were told to wait where they were and that help was on the way. (RP 110, 148)

After several minutes passed, plaintiff's husband pulled his truck into the oncoming lane to wait for the help.[3] (RP 40-43) He parked the truck at an angle in the lane of traffic. (RP 371-72) When Ms. Fleming came through the tree, her car hit the truck. (RP 45) Both Ms. Fleming and plaintiff were injured. (RP 45-47)

The state trooper agreed that plaintiff's husband's action of pulling into the oncoming lane put them in harm's way. (RP 242-43) "I would stay in my lane of travel regardless of the tree being there," he said. (RP 245) He elaborated later on that he would not go to the oncoming lane of traffic "[b]ecause you don't know what is going to come through the other side." (RP 260) The trooper also saw no other car that had moved into the oncoming lane. (RP 243)

B. STATEMENT OF PROCEDURE.

Plaintiff sued Ms. Fleming in November 2002 alleging negligence. (CP 1-3) In 2003, both parties moved for summary judgment on liability. (CP 8-52, 53-54, 123-36). The court denied the motions, stating, "Due to

---

[3] Although plaintiff's husband claimed that he moved the truck because he heard another tree about to fall (RP 40), and testified that it actually did fall later near the ambulance (RP 44), the state trooper testified that he did not see a tree that had fallen near the ambulance or in the area close to the accident (RP 243).

the convoluted factual positions of both parties, it is the position of this court that trial will need to determine resolution of this case." (CP 177)

In 2005, plaintiff pursued a claim for underinsured motorist (UIM) benefits against her insurer. (CP 183) The arbitration panel awarded plaintiff $250,000. (*Id.*) Plaintiff moved the trial court to bind Ms. Fleming to the results of the arbitration on the theory of claim preclusion. (CP 178-79) The court denied the motion. (CP 203)

A four-day jury trial was held from February 14-17, 2006. (CP 248-51) plaintiff moved the court for a directed verdict as to her and her husband's negligence. (RP 405) The court denied the motion and submitted the case to the jury. (RP 408)

The jury determined that Ms. Fleming was not negligent. (CP 218-20) The jury determined that plaintiff's husband was negligent. (CP 218) The jury answered only the first question on the special verdict form:

> QUESTION 1: Were any of the following negligent?
>
> (Answer "yes" or "no" after the name of the defendant and the name of each entity not a party to this action.)
>
> ANSWER: Yes No
>
> Defendant Christina Fleming:___ X
>
> Non-Party George Belesiotis: X ___
>
> ***(INSTRUCTION: If you answered "no" to Question 1 as to the defendant, Christina Fleming, sign this verdict***

> ***form. If you answered "yes" to Question 1 as to the defendant, Christina Fleming, answer Question 2.)***

(CP 218)The court denied plaintiff's motion for a new trial. (CP 221-23, 242-47) She appeals. (CP 238-41)

IV. ARGUMENT

This Court should not consider plaintiff's challenges to the summary judgment and directed verdict motions because plaintiff has not preserved those issues for appeal. If this Court chooses to consider the issues, this Court should conclude the superior court correctly submitted all issues to the jury. The facts were disputed so the jury weighed the evidence, assessed the credibility of the witnesses, and determined liability. The jury properly performed its duty and determined plaintiff's husband, not Ms. Fleming, was negligent. The jury's verdict for Ms. Fleming is supported by the evidence and should be affirmed.

The superior court also correctly denied plaintiff's motion on claim preclusion because a contractual arbitration award cannot trump Ms. Fleming's constitutional and statutory rights to a jury trial. The *Fisher-Finney* rule does not apply here. *Fisher-Finney* is limited to UIM carriers who are bound by an underlying award or judgment when the UIM carrier had notice. The principle does not apply in the reverse. A stranger to the insurance contract cannot be bound to an award or judgment based on the UIM policy. The *Fisher-Finney* principle cannot operate to deprive that

stranger of her statutory and constitutional right to a jury trial. The superior court's order and judgment should be affirmed.

A. PLAINTIFF'S NEGLIGENCE ARGUMENTS FAIL ON PROCEDURAL AND SUBSTANTIVE GROUNDS.

Plaintiff's arguments that Ms. Fleming was negligent as a matter of law fail on both procedural and substantive grounds. This Court should not consider plaintiff's arguments regarding negligence because they are not properly before this court.

1. Denial of Summary Judgment for Factual Issues is Not Subject to Review on Appeal.

Plaintiff asks this Court to reverse the superior court's denial of summary judgment. The superior court correctly denied summary judgment because issues of fact remained. Denial of summary judgment on factual issues is not subject to review on appeal. *Johnson v. Rothstein*, 52 Wn. App. 303, 304, 759 P.2d 471 (1988).

In *Johnson,* defendant moved for partial summary judgment. 52 Wn. App. 304. The trial court denied the motion because issues of material fact. *Id.* After a jury trial, defendant appealed on the sole issue that the trial court erred by denying summary judgment. *Id.*

The Court of Appeals dismissed the appeal. 52 Wn. App. at 309. The Court held that following a trial, a denial of summary judgment cannot be appealed. 52 Wn. App. at 304. The *Johnson* Court stated,

> "Summary judgment is not a substitute for a trial; it exists as a mechanism to decide whether there exists any truly disputed material facts. Once the determination is made, rightly or wrongly, that there are issues of fact that can be resolved only after [a] full hearing, the summary judgment procedure has no further relevance[.]"

52 Wn. App. at 305 (*quoting Morgan v. American Univ.*, 534 A.2d 323, 327 (D.C. 1987)).

Here the superior court unequivocally determined there were factual issues for the jury. The court stated, "Due to the convoluted factual positions of both parties, it is the position of this court that trial will need to determine resolution of this case." (CP 177) The jury determined the facts at trial and ruled in favor of Ms. Fleming. The summary judgment ruling is not an appealable issue. Plaintiff's challenge to the denial of summary judgment should be rejected.

2. Plaintiff Has Ineffectively Challenged the Denial of Judgment as a Matter of Law on Negligence.

Plaintiff contends it was error to deny the directed verdict and submit the negligence issue to the jury. Plaintiff has not preserved this alleged error for appeal. A party who believes the evidence established judgment for them as a matter of law must appeal from the sufficiency of the evidence. *Adcox v. Children's Orthopedic Hospital and Medical Center*, 123 Wn.2d 15, 35 n.9, 864 P.2d 921 (1993). Plaintiff has failed to do so.

In *Adcox v. Children's Orthopedic Hospital and Medical Center*, the Washington Supreme Court explained that after a summary judgment is denied, the challenging party must appeal the sufficiency of the evidence at trial. The Court explained:

> The Hospital has assigned error not to the jury's verdict, but instead to the trial court's denial of its motion for partial summary judgment on this issue. Accordingly, the Hospital relies on the summary judgment pleadings and the evidence submitted therewith. *These arguments miss the mark.* When a trial court denies summary judgment due to factual disputes, as here, and a trial is subsequently held on the issue, the losing party must appeal from the sufficiency of the evidence presented at trial, not from the denial of summary judgment.

123 Wn.2d at 35 n.9 (emphasis added; citation omitted).

Plaintiff does assign error to the court's denial of the judgment as a matter of law. She fails, however, to demonstrate there was not sufficient evidence to support the verdict. A directed verdict can be granted only if "'there is no legally sufficient evidentiary basis for a reasonable jury to find or have found for that party with respect to that issue.'" *Ramey v. Knorr*, 130 Wn. App. 672, 675, ¶7, 124 P.3d 314 (2005), *rev. denied,* 157 Wn.2d 1024 (2006) (*quoting* CR 50(a)(1)). A motion for a directed verdict admits the truth of the evidence and all reasonable inferences in favor of the non-moving party. 130 Wn. App. at 675-76. A directed verdict can only be granted when it can be held as a matter of law that

there is no evidence to sustain the verdict. *Peterson v. Littlejohn*, 56 Wn. App. 1, 8, 781 P.2d 1329 (1989).

Viewed procedurally, this assignment of error fails because plaintiff did not assign error to the sufficiency of the evidence supporting the verdict. She therefore is left in the contradictory position of arguing that reasonable minds could not have differed on negligence *at the same time* she is left with the fact that the jury's verdict, which is the result of weighing conflicting evidence (*Herring v. Dept. of Soc. & Health Servs.*, 81 Wn. App. 1, 15, 914 P.2d 67 (1996)), was supported by substantial evidence. Because the jury's verdict is supported by substantial evidence, reasonable minds could have differed on negligence, and a directed verdict would have been inappropriate.

3. The Matter Was Properly Submitted to the Jury and The Verdict Is Supported by Substantial Evidence.

The superior court properly denied plaintiff's motion for judgment as a matter of law. The court considered all evidence and reasonable inferences in favor of Ms. Fleming. The evidence and all reasonable inferences established that Ms. Fleming acted with appropriate care under the circumstances.

The evidence established that Ms. Fleming was presented with an emergency: a tree lying across the road. The evidence established that

Ms. Fleming responded promptly to this emergency situation. She slowed first in response to someone's flashing headlights. (Fleming Dep., p. 15-16) As soon as she saw the tree, she slammed on her brakes. (Fleming Dep., p. 17)

The expert testimony of Walter Becinski provided evidence that Ms. Fleming acted with due care in the circumstances. Mr. Becinski established that the tree would have been difficult to see. Ms. Fleming would not have been able to see the tree because it does not reflect light. (RP 366) Mr. Becinksi opined that any driver traveling at speeds even lower than the posted limit, would have been unable to stop in time to avoid hitting the tree. He testified that a driver going above 40 miles an hour are unable to stop in that situation. (RP 366)

The testimony from Washington State Trooper Drake established that drivers were not required to be traveling at any speed less than the posted limit. (RP 232) Trooper Drake's testimony established that Ms. Fleming was acting with appropriate care by driving at freeway speed.

Plaintiff implies that there is evidence of negligence because Ms. Fleming had consumed beer that evening. (Appellant's Brief at 22) This Court should reject plaintiff's attempt to interject alcohol into this case. The evidence establishes that alcohol was not an issue nor was it a factor in the accident. Washington State Trooper Drake succinctly stated:

"Alcohol was not a factor, in my opinion, no," he said. (RP 240) Trooper Drake testified that he interviewed the drivers face-to-face. There was no evidence of alcohol from what he observed. (RP 239) There no evidence to support any suggestion that alcohol played a role.

Moreover, there was no charge to the jury that alcohol was involved. Alcohol was not listed as part of plaintiff's claims in the instructions (CP 255) Nor was alcohol mentioned on the special verdict form (CP 218-20). Plaintiff's attempt to interject it into the case should be completely disregarded.

Taking the evidence and all reasonable inferences from the evidence, the superior court would have been unable to say as a matter of law that Ms. Fleming was negligent. Therefore, a directed verdict on negligence would have been an error, both procedurally and substantively.

The same evidence that demonstrates that Ms. Fleming was not negligent provides substantial evidence supporting the jury's verdict. Plaintiff does not challenge any of the evidence that was admitted. Plaintiff does not complain that any evidence was excluded. The jury heard the evidence and made its determination. The jury's verdict finding that Ms. Fleming was not negligent and that the plaintiff's husband was negligent is supported by substantial evidence. This Court should affirm.

B. THE SUPERIOR COURT CORRECTLY DENIED PLAINTIFF'S MOTION FOR CLAIM PRECLUSION.

This Court should affirm the superior court's denial of plaintiff's motion of claim preclusion under *Fisher-Finney*. The superior court correctly denied the motion because *Lenzi, Fisher, and Finney* define a narrow rule which applies only to UIM carriers, not to persons like Ms. Fleming, who are strangers to the insurance contract. The rationale behind the *Fisher-Finney* doctrine is derived from the UIM statute and public policy considerations relating to UIM benefits. It is an exception to the basic rule of collateral estoppel and does not apply here.

The *Fisher-Finney* rule defines a narrow exception to the fundamental principles of collateral estoppel. The *Fisher-Finney* rule is limited to the area of underinsured motorist coverage. The cases of *Lenzi v. Redland Ins. Co.*, 140 Wn.2d 267, 996 P.2d 603 (2000), *Fisher v. Allstate Ins. Co.*, 136 Wn.2d 240, 961 P.2d 350 (1998), and *Finney v. Farmers Ins. Co.*, 21 Wn. App. 601, 586 P.2d 519 (1978), *aff'd*, 92 Wn.2d 748, 600 P.2d 1272 (1979), involve UIM carriers who wanted to litigate issues with their UIM insured after the insured had resolved the issues in a proceeding against the at-fault driver. The Supreme Court held the UIM carrier was bound by the result of the proceeding with the at-fault driver. The holdings announced in those cases are limited to the specific

situations and apply only to UIM carriers. The holdings do not apply in reverse to bind the allegedly at-fault driver to determinations made in a UIM proceeding.

In *Finney*, the plaintiff was killed in a head-on collision. 21 Wn. App. at 604. Her estate presented a demand to her UIM insurer, Farmers. *Id.* Farmers refused the claim. *Id.* Her estate then sued the two owners of the car. 21 Wn. App. at 604-05. The estate settled with one and was awarded damages at trial against the other. 21 Wn. App. at 605. The estate sued Farmers for UIM benefits. Farmers argued it was not bound by the liability finding in the earlier trial. The superior court ruled Farmers was bound by the liability finding. *Id.* The Court of Appeals affirmed, holding:

> Here, Farmers was fully apprised of plaintiffs' efforts to obtain recompense for Robin's tragic death after Farmers had denied uninsured motorist coverage. Farmers knew that plaintiffs were seeking to establish that Wood was the owner of the 1963 Nova and that he was liable for damages resulting from the collision. Farmers had to know that this determination might be crucial to their liability under the uninsured motorist provisions of their policies. In these circumstances . . . we hold that Farmers is bound by the findings, conclusions and judgment entered in the judgment against the Wood estate.

21 Wn. App. at 617-18.

Likewise, Kelly Fisher sued the driver of the car who struck her motorcycle. *Fisher*, 136 Wn.2d at 242-43. Fisher submitted a UIM claim

to her insurer, Allstate. 136 Wn.2d at 243. When Allstate did not respond, she sued the UIM insurer. *Id.*

Fisher and the at-fault driver resolved their case in arbitration. *Id.* Allstate was notified of the arbitration but chose not participate. *Id.* After receiving an award above the liability limits, Fisher demanded UIM limits from Allstate. *Id.* Allstate denied the claim. Fisher sued Allstate. The superior court determined Allstate was bound by the arbitration because it had notice and opportunity to participate. *Id.* The Supreme Court affirmed.

Lastly, in *Lenzi*, Thomas Lenzi was injured in an accident with an uninsured motorist. 140 Wn.2d at 270. The Lenzis claimed UIM benefits from Redland, their UIM carrier. Redland denied the claim. 140 Wn.2d at 270-71. The Lenzis sued the uninsured motorist, and sent copies to Redland. 140 Wn.2d at 271. Redland did not formally appear or request additional information. *Id.*

After the Lenzis obtained a default judgment against the uninsured motorist, they demanded that Redland pay the judgment. 140 Wn.2d at 272. Redland refused. *Id.* The Lenzis filed a declaratory action against Redland seeking payment of the UIM benefits. Redland argued it was not bound by the default judgment. The superior court granted summary

judgment for Lenzis and ruled Redland was bound by the judgment. 140 Wn.2d at 273. Redland appealed directly to the Supreme Court. *Id.*

The *Lenzi* Court reaffirmed *Finney*, stating,

> [W]e held a UIM carrier can protect its rights by intervening in an arbitration between its insured and a tortfeasor. Thus, so long as the carrier 'has notice and an opportunity to intervene in the underlying action against the tortfeasor,' it will be bound by the findings, conclusions, and judgment of the arbitral proceeding.

140 Wn.2d at 274. The Court further stated the contours of the rule. "*The Fisher-Finney rule requires only timely notice by the insured to an insurer of the insured's action against an uninsured tortfeasor and an opportunity for the insurer to intervene . . . .*" 140 Wn.2d at 278 (emphasis added).

These three cases are distinguishable from the instant case because they all involved suits by the insured against his/her insurer on a pre-existing contract for underinsured motorist (UIM) benefits. Those parties were seeking a contract benefit. In the same way, plaintiff sought a contract benefit from her insurer. But Ms. Fleming had no contract with either plaintiff or plaintiff's insurer.

UIM coverage derives from both contract and statute. RCW 48.22.030 mandates UIM coverage be offered to drivers. *See* RCW 48.22.030(2) (any new policy or renewal of automobile insurance must

provide for insurance against underinsured motorists). The *Fisher* court explained the importance of these dual origins. It stated,

> RCW 48.22.030(2) requires all new and renewed policies to provide UIM coverage to those "who are *legally entitled* to recover damages from owners or operators of underinsured motor vehicles. . . ." RCW 48.22.030(2) (emphasis added). The typical underinsured insurance contract parallels the statutory language, providing: "'We will pay damages which an insured is *legally entitled* to recover from the owner or operator of an [underinsured motor vehicle].'" *Employer's Mut. Cos. v. Nordstrom*, 495 N.W.2d 855, 858 (Minn. 1993) (alterations in original). As the Minnesota Supreme Court noted, *a tort judgment against the tortfeasor establishes conclusively the damages to which the insured is "legally entitled."* Not only must the UIM insurer ordinarily pay because of its contractual obligations, but such a duty arises from statutory law as well.

136 Wn.2d at 247-248 (emphasis added).

The statutory and contractual basis for UIM benefits were key factors for the *Fisher-Finney* holding. Neither of those bases exist here. Because Ms. Fleming is a stranger to the insurance contract and a person outside the purviews of the UIM statutory scheme, the *Fisher-Finney* rule does not apply to her situation. The superior court correctly denied plaintiff's motion for claim preclusion.

C. THIS CASE IS NOT A "MIRROR-IMAGE" OF *FISHER-FINNEY*.

Plaintiff blithely claims that the "mirror-image" facts do not change the *Fisher-Finney* reasoning and therefore that test dictates the outcome. Not only is plaintiff's "mirror-image" characterization

unsupported, it does not work in reverse. Her arguments regarding claim preclusion fail.

The purpose of the claim preclusion doctrine is to prevent litigation of claims that could have been litigated in a prior action. *Somsak v. Criton Technologies/Heath Tecna, Inc.*, 113 Wn. App. 84, 92, 52 P.3d 43, 63 P.3d 800 (2002). In order for plaintiff's claim preclusion formulation to work, all three actors (plaintiff, plaintiff's UIM insurer, defendant) would have to be in equivalent relationships, where all claims are the same or similar. *See Spokane Research and Defense Fund v. City of Spokane*, 155 Wn.2d 89, 99, ¶20, 117 P.3d 1117 (2005) (subsequent action should be dismissed for claim preclusion if it is identical with the first action in the following respects: (1) persons or parties; (2) cause of action; (3) subject matter; *and* (4) quality of the persons for or against whom the claim is made). Even assuming, *arguendo*, that plaintiff can overcome two significant hurdles to advance her argument (Ms. Fleming's fundamental right to litigate the issue of liability in the courts and that liability would have to have been established prior to the arbitration), the claim preclusion elements are not met here.

1. The "Persons or Parties" Prong Is Not Met by These Facts.

There is no privity connecting Ms. Fleming to plaintiff's UIM insurer.[4] "Privity" in the context of claim preclusion "is established in cases where a person is in actual control of the litigation, or substantially participates in it even though not in actual control. *Mere awareness of proceedings is not sufficient to place a person in privity with a party to the prior proceeding.*" *Loveridge v. Fred Meyer, Inc.*, 125 Wn.2d 759, 764, 887 P.2d 898 (1995) (emphasis added, footnotes omitted). The *Loveridge* court also noted:

> "Privity does not arise from the mere fact that persons as litigants are interested in the same question or in proving or disproving the same state of facts. Privity within the context of the doctrine of res judicata . . . is construed strictly to mean parties claiming under the same title. It denotes mutual or successive relationship to the same right or property."

Id. The Supreme Court's ruling directly contradicts plaintiff's claim that Ms. Fleming should be bound by the arbitration just because she *knew* about it.

---

[4] The Supreme Court expressly acknowledged that its ruling in *Fisher* was a "modification of the technical requirements for privity." 136 Wn.2d at 250. The Court's holding was based on the UIM insurance contract and the statutory scheme. Additionally, the Court concluded that a UIM carrier was protected by the underlying litigation. Moreover, it was not fair to require the insured to pursue redundant litigation against its UIM carrier.

The fact that Ms. Fleming was aware of plaintiff's UIM arbitration does not alter the result here. Plaintiff contends that Ms. Fleming could have participated in the UIM proceeding and argues she should have done so. (Appellant's Brief, p. 18) Yet plaintiff cites no authority which requires Ms. Fleming to intervene in a proceeding that pertained to plaintiff's contract with her own insurer. This Court should not consider arguments for which a party has not cited authority. *Bercier*, 127 Wn. App. 809, 824, 103 P.3d 232 (2004), *rev. denied,* 155 Wn.2d 1015 (2005). Moreover, the argument has no merit.

2. The "Cause of Action" and "Subject Matter" Prongs Are Also Not Met.

The second prong of the claim preclusion test is not met because the trial did not involve the same cause of action that plaintiff had against her UIM carrier. *See Rains v. State*, 100 Wn.2d 660, 664, 674 P.2d 165 (1983) (test of whether cause of action is identical depends on whether rights from prior litigation would be destroyed by second action, whether substantially same evidence would be introduced, whether the two suits involve infringement of the same right, whether the two suits stem from same nucleus of facts). Nor is the third prong met, because the UIM arbitration and a trial to establish liability do not share common subject matter.

Although the evidence and the facts of the accident would be similar in both the jury trial and the UIM proceeding, the issues to be resolved were different. In her proceeding against her UIM carrier, plaintiff was required to establish that an underinsured driver was at fault and she was legally entitled to recover damages from that underinsured driver. Plaintiff's theory at the UIM proceeding was presumably that Ms. Fleming was the underinsured driver. There was apparently no one to present a case that plaintiff's husband was actually at fault for plaintiff's injuries and damages.

At the jury trial, the jury had evidence to decide that plaintiff's husband was the at-fault driver. The cause of action and the subject matter at trial differed from the UIM proceeding. For these additional reasons, the superior court properly denied plaintiff's motion for claim preclusion.

D. THE SUPERIOR COURT PROPERLY REJECTED *FISHER-FINNEY* BECAUSE TO DO SO WOULD DEPRIVE MS. FLEMING OF HER CONSTITUTIONAL AND STATUTORY RIGHT TO JURY TRIAL.

Ms. Fleming is guaranteed a right to jury trial under the Washington constitution, common law, and statutes. Plaintiff's contention that Ms. Fleming was bound by the results of the UIM arbitration fails because it conflicts with Ms. Fleming's guaranteed right to a jury trial.

The Washington constitution is unequivocal. "The right of trial by jury *shall remain inviolate* . . . ." Washington Constitution, Article I,

Section 21 (emphasis added). *See also Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 645, 771 P.2d 711, 780 P.2d 260 (1989) (the state constitution protects the right to jury trial in civil proceedings).

The Supreme Court has examined this right to a civil jury trial in depth. In *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 771 P.2d (1989), the Court looked at the right as it existed at the time of the adoption of the Constitution, stating:

> At issue in the present case is whether the measure of damages is a question of fact within the jury's province. Our past decisions show that it is indeed. The constitutional nature of the jury's damage-finding function is underscored by *Baker v. Prewitt,* 3 Wash.Terr. 595, 19 P. 149 (1888) [where the court determined that the territorial code required a jury to be convened where an assessment of damages was required] . . . . *If our state constitution is to protect as inviolate the right to a jury trial at least to the extent as it existed in 1889, then Baker's holding provides clear evidence that the jury's fact-finding function included the determination of damages.*

112 Wn.2d at 645-46 (emphasis added).

The Supreme Court has also been clear about the jury's function to determine liability. Over 50 years ago, the Supreme Court held:

> It is the province of the jury to weigh the evidence, under proper instructions, and determine the facts. It is the province of the jury to believe, or disbelieve, any witness whose testimony it is called upon to consider. If there is substantial evidence (as distinguished from a scintilla) on both sides of an issue, what the trial court believes after hearing the testimony, and what this court believes after reading the record, is immaterial. The finding of the jury,

> upon substantial, conflicting evidence properly submitted to it, is final.

Rettinger v. Bresnahan, 42 Wn.2d 631, 633-34, 257 P.2d 633 (1953).

Not only have Washington's citizens been guaranteed a civil jury trial by constitution and common law, they are also guaranteed a civil jury trial by statute. For instance, RCW 4.44.090 reserves for the jury all questions of fact. RCW 4.48.010, which otherwise permits the appointment of a referee to resolve a civil issue, states, "Any party shall have the right in an action at law, upon an issue of fact, to demand a trial by jury."

The Washington Constitution, common law, and statute all guaranteed Ms. Fleming a civil jury trial in this matter. Plaintiff's argument, that Ms. Fleming is bound by an alternative dispute resolution proceeding regarding the contract between plaintiff and her insurer, does not *and cannot* dispense with that right. Her statement, "Logically, we submit that this mirror-image situation (putting the UIM arbitration before the trial) *should have no impact* on the efficacy of the *Fisher-Finney* Rule" (Appellant's brief, p. 16, emphasis added) fails to account for Ms. Fleming's rights. Instead it is purely speculative and gives no legal basis

for her conclusion that Ms. Fleming's civil jury trial right can be abrogated.[5]

The superior court correctly denied plaintiff's motion for claim preclusion. Any other result would have deprived Ms. Fleming of her statutory and constitutional right to have the factual issues of liability and damages determined by a jury. This Court should affirm.

V. CONCLUSION

A tree fell on a dark roadway. Drivers from opposite directions had difficulty stopping before hitting the tree. One managed to stop. The other did not. That second driver could not have known that the first driver parked in her lane of travel, just beyond the foliage.

These facts were properly presented to a jury to determine the negligence of the parties involved. Ms. Fleming was entitled to a civil jury trial under the Washington constitution, common law, and statute to determine liability and damages. Plaintiff's prior UIM arbitration with her insurer could not have been binding on Ms. Fleming because the doctrine of claim preclusion cannot abrogate the jury trial right.

---

[5] Plaintiff supports her statement with policy considerations from *Fisher* and *Lenzi* why the UIM insurer should be bound by the litigation result. (Appellant's Brief, pp. 16-17) She provides no legal argument supporting extending the doctrine to the "mirror-image" situation in this case. An argument unsupported by legal authority is not considered by the appellate court. *Bercier v. Kiga*, 127 Wn. App. 809, 824, 103 P.3d 232 (2004), *rev. denied,* 155 Wn.2d 1015 (2005).

Respondent, Ms. Fleming, respectfully requests that this Court affirm the superior court's orders and judgment on the jury verdict.

DATED this 29th day of January, 2007.

REED McCLURE

By

Marilee C. Erickson WSBA #16144
Terry J. Price WSBA #31523
Attorneys for Respondents

060349.099022/139382

ILLUSTRATION ONE

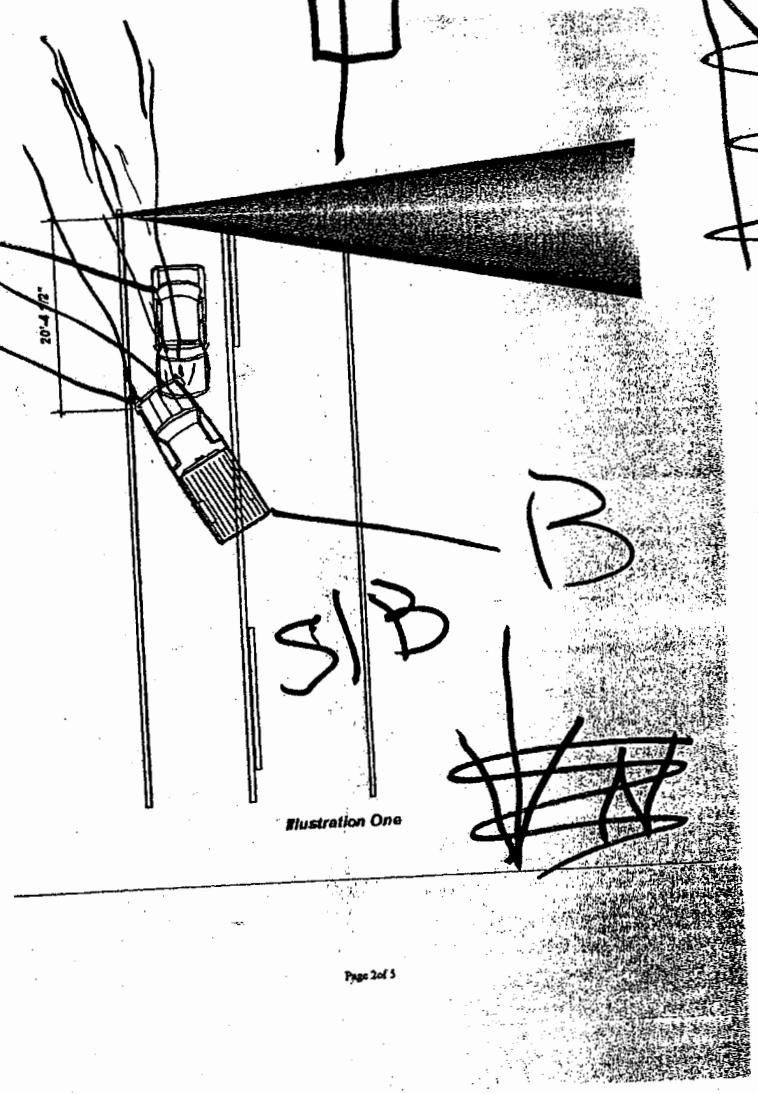

Illustration One

Page 2of 5

APPENDIX A

Grays Harbor County
Cause No. 02-2-1594-4
Plaintiff
Defendant's Ident 21
Petitioner's Ident
Respondent's Ident
EXHIBIT I.D. 21
ADMITTED 2-17-06
Offered & Refused

FILED
COURT OF APPEALS
DIVISION II
07 JAN 30 PM 1:12
STATE OF WASHINGTON
BY_____
DEPUTY

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

HELEN MATHIOUDAKIS, a married woman, Appellant, vs. CHRISTINA FLEMING and "JOHN DOE" FLEMING, husband and wife, Respondents.	No. 34734-2-II AFFIDAVIT OF SERVICE BY MAIL

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

The undersigned, being first duly sworn upon oath, deposes and says:

That she is a citizen of the United States of America; that she is over the age of 18 years, not a party to the above-entitled action, and competent to be a witness therein; that on January 29, 2007, affiant served via United States mail, postage prepaid, copies of the following documents:

1. Brief of Respondents; and
2. Affidavit of Service By Mail

ORIGINAL

addressed to the following party:

Thomas A. Brown
Brown, Lewis, Janhunen & Spencer
P.O. Box 1806
Aberdeen, WA 98520-0907

DATED this 29th day of January, 2007.

Sara Leming

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

SIGNED AND SWORN to (or affirmed) before me on January 29, 2007 by Sara Leming.

Patricia Clayton
Print Name: PATRICIA CLAYTON
Notary Public Residing at Kent Stevens
My appointment expires 10/29/10

PATRICIA A. CLAYTON
NOTARY PUBLIC
STATE OF WASHINGTON
COMMISSION EXPIRES
10-29-10